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Suit for Partition of Real Estate

Wallace R. Heatwole

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FOREWORD

With grateful appreciation for the invaluable aid and guidance given during the preparation of this paper, due and respectful acknowledgment is hereby given Hon. Frank Armstead, Judge, Circuit Court of the City of Williamsburg and James City County; Hon. C. G. Quesenbery, Judge, Corporation Court of the City of Waynesboro, Virginia and to Mrs. Virginia Blanchard and Mr. James Bush, Clerks, of the above mentioned Courts.
INTRODUCTION

Purpose and Facts

The purpose of this paper is to offer as a guide, the pertinent points and routine required in the institution of a suit in Chancery for the partition of land which is not subject to division in kind; i.e., such real estate is jointly owned and it is not practical to divide the land according to the various interests of the coowners. The great majority of times, such a suit will be "friendly" - not being contested by any of the parties to the cause.

However in the present instance, this hypothetical case presented is contested and is unfriendly in order to attempt to provide for the most common problems arising from such a suit. Also, all respondents are said to reside without the Commonwealth in order to show and provide the steps and forms necessary in process by publication. In no way is this paper held forth to be perfect or offer a complete coverage of all situations as each case must be governed by its own facts and acted thereupon.

The facts of the present case, purely hypothetical, are as follows: one Wesley T. Brown died intestate, seized and in possession of a tract of real estate of 97 acres, more or less. At his demise he was survived by his spouse and nine children. At the present time those surviving are three sons and four daughters, two children having died without heirs. All children, other than the Complainant, Lois J. White, are non-residents. She has tried unsuccessfully to purchase the remaining six-sevenths of the property and has refused to sell her interest to the Respondents. After the demise of her mother she paid the taxes on the property. At this time she is asking that the divided interests in the property be united as each one-seventh interest is practically worthless. Hence this suit for partition by one of the method provided by law, Va. Code, Section 5291, is commenced.

The following therefore is a complete, chronological presentation of the papers needed to follow such a suit to its completion. Brief headnotes, giving the essential data of each instrument precede the actual document, which are written to conform with the facts of the present case. It is interesting to note that all the instruments and decrees in the case, while couched in the language of the court, and expressing its mandate, are always drawn by counsel - usually by him in whose favor, or on whose application, the order or decree is granted.

In practice, at his leisure, and usually in his own office, counsel draws the form of the decree, conforming as nearly as possible to the chancellor's directions. It is then submitted to adversary counsel for approval. In case of dispute as to whether the decree correctly expresses the court's views, counsel applies to the chancellor to settle it.
Upon the ascertaining of the facts of the case and the law in question, the first step taken in such a suit is the filing of the memorandum of suit with the Clerk of the Court.

For his own protection, the clerk requires that counsel who apply for the issuance of process shall enter a written order for the desired process, in a book kept for that purpose. It is not a part of the record and is only for the guidance of the clerk.

It should contain all the data necessary: names of all parties; the rule day to which process is made returnable; the place of residence of the defendants so that the clerk may direct proper process; and the names of those under disability so that a guardian ad litem may be appointed. The memorandum should contain such other details and directions as the particular case may demand, and should be signed by counsel. The memorandum in the present case is as follows:

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOIS I. WHITE
Complainant

vs

JAMES B. BROWN
GARNETT Y. BROWN
MILDRED C. JARECKE
WILLIAM F. BROWN
JEAN I. IRVIN
JODY G. CARPENTER,
Respondents

TO JAMES CABLE, CLERK:

Please issue process in Chancery returnable to First September Rules, 1948, against the above named respondents and file same in the papers in this cause. All of the respondents being non-residents and it being necessary to publish process.

The object of this suit is to partition a tract of land in Augusta County containing 97 acres, more or less, of which Wesley T. Brown died seized and possessed, by one of the methods for partition provided by law.

I herewith enclose my check for $7.50 on account of court costs and clerk's fees.

Respectfully

Attorney for Complainant
PART II
AFFIDAVIT AND PROCESS

It is the usual practice to list in the memorandum the addresses of all respondents, but this is sometimes impossible due to their not being able to be found at once or the desire to institute suit as soon as possible. If either of these cases arise, it then becomes necessary, by Va. Code, Sec. 6069, to submit prior to or with the bill of complaint, an affidavit containing the last known addresses of the respondents and a request that process be served.

In the present case, as all respondents are non-residents process by publication must be used. Such an affidavit is as follows:

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY.

LOIS I. WHITE
Complainant

vs

AFFIDAVIT

JAMES B. BROWN
CARNETT Y. BROWN
MILDRED C. JARECKE
WILLIAM F. BROWN
JEAN I. IRVIN
JODY G. CARPENTER
Respondents

Commonwealth of Virginia
City of Waynesboro, ss:

Wallace Heatwole being duly sworn on his oath deposes and says that he is agent and attorney for Lois I. White, the Complainant above named, that due diligence has been exercised to determine the whereabouts of all the respondents above named with the result that it has been ascertained that none of said respondents are resident in Virginia, that the last known Post Office addresses are as follows:

James B. Brown, 1226 Walnut Avenue, Knoxville, Tennessee
Carnett Y. Brown, 518 Cherry Avenue, Knoxville, Tennessee
Mildred C. Jarecke, Northport, Long Island
William F. Brown, 219 Arch Street, Asheville, North Carolina
Jean I. Irvin, 1809 Henry Street, Dallas, Texas
Jody G. Carpenter, 904 Windsor Avenue, Cleveland Ohio

and that this affidavit is made for the purpose of procuring process by publication against the above named respondents.

Attorney For Complainant
Subscribed and sworn to before me on this ____ day of ____, 19__.  
In witness whereof I have hereunto set my hand and seal, the day, month and year last above written.

Notary Public

* * * * * * * * * * * *

After receiving the above affidavit, the Clerk of Court will issue process by publication, the only method available since all respondents are non-residents. Such service is statutory, Va. Code, Sec. 6070, and "shall give the abbreviated style of the suit, state briefly its object, and require the defendants against whom it is entered, or the known parties, to appear within ten days after due publication thereof and do what is necessary to protect their interests. It shall be published once a week for four successive weeks in such newspaper as the court may prescribe, and shall be posted by the clerk, at the front door of the courthouse wherein the court is held, on or before the next succeeding rule day after it is entered, and shall also mail a copy thereof to each of the defendants to the post office address given in the above required affidavit. Such process is as follows:

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOIS I. WHITE
Complainant

vs

JAMES B. BROWN
GARNETT Y. BROWN
MILDRED C. JARECKE
WILLIAM F. BROWN
JEAN I. IRVIN
JODY G. CARPENTER,
Respondents

TO James B. Brown, Garnett Y. Brown, Mildred C. Jarecke, William F. Brown, Jean I. Irvin, Jody G. Carpenter:

You and each of you are hereby notified that the object of the foregoing suit is to procure partition by one of the methods provided by law of 97 acres of land in Augusta County, Virginia, of which Wesley T. Brown died intestate, seized and possessed.

An affidavit having been made and filed that you are non-residents of the State of Virginia, it is therefore, ordered that each of you appear before the Clerk of this Court within ten days after due publication of this order and protect your interest herein. It is further ordered that a copy of this notice be printed in the WAYNESBORO NEWS-VIRGINIAN, the newspaper here designated, a copy of same be mailed to each of the above named respondents, at the addresses given in the said affidavit, and that a copy thereof be posted at the front door of the Court House, before next succeeding rule day.
Given under my hand this ____ day of ____, 19___.

JAMES CABLE
Clerk of the Circuit Court of Augusta County
After filing the aforementioned affidavit or at the same time, the counsel for the complainant files with the Clerk of the Court the instrument upon which his entire case must lie - the Bill of Complaint.

The purpose of the bill is twofold: (1) to state the plaintiff's case for the information of the defendant in the preparation of his defense; and (2) for the information of the court in the trial of the cause, and to fix the issues.

The defendant can be required to answer only from the precise case stated in the bill, evidence must be confined to the case thus stated; and no relief will be granted that does not substantially accord with the case as made in the bill. Hence the importance of the accurate knowledge, by counsel, of the facts of his case, and of the law applicable thereto, before he undertakes to present his case in the form of the bill.

The bill usually resolves itself into several parts. It is not necessary to consciously have these parts in mind when drawing the bill, but in an orderly setting out of an equitable claim, it will usually fall into this pattern. The first of these several parts is, "the address". Bills are addressed to the Chancellor by his official designation, it being optional whether to use his name or not.

The next logical step in the construction of a bill, is to name the plaintiff or plaintiffs. In the bill they designate themselves as "your orator" or "your complainant". In all legal procedure, at law and in equity, the parties always speak in the third person, and never in the first.

The most important and essential part of the bill is the "stating part". It is here that the plaintiff sets out, in detail, the ultimate facts constituting his case against the defendant. Such facts should be stated with certainty, directness and clearness, and not by way of inference.

There are other parts which arise only rarely, such as "the confederacy clause" used in case of a conspiracy of the powerful over the weak; and the more often used "anticipated defense" clause which is followed by an allegation showing the futility of such defense. These clauses play no part in our present case.

The one unneeded clause, but one which is always followed as a matter of custom is the "jurisdiction clause". This part consists of a general averment of jurisdiction in equity - the usual form being that the plaintiff is "without remedy save in a court of equity".

In closing the bill, the "interrogating clause" is found. It is here that the plaintiff calls on the defendants to make answer under oath to all matters and things alleged against him in the bill. By Va. Code, Sec. 6126, the answer under oath may be waived by the plaintiff.

At the conclusion of the bill comes the all important "prayer for
relief". It may be special or general and in cases of special relief of the thing complained, it is customary to ask for general relief in the form "and for such other relief as to equity may seem meet and the nature of the case may require."

All bills must be signed by the counsel.

The bill in the present instance is as follows:

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOIS I. WHITE
Complainant

vs

BILL OF COMPLAINT

JAMES B. BROWN
GARNETT Y. BROWN
MILDRED C. JARECKE
WILLIAM F. BROWN
JEAN I. IRVIN
JODY G. CARPENTER,
Respondents

TO THE HONORABLE WALTER SOMERS, JUDGE

Your complainant, Lois I. White, respectfully shows unto the Court the following case:

(1) That Wesley T. Brown died intestate, on the ___ day of__, 19__, a resident of Augusta County, Virginia, seized and possessed of a parcel of real estate situated in North River District, Augusta County, Virginia, containing 97 acres. And being the same real estate which was conveyed to the said Wesley T. Brown by J. Thomas Newcomb, et ux, et als., by deed dated October 27, 1923 and recorded in Deed Book 12 at page 486, described as follows: (Here should follow a full and complete description of said real estate.)

(2) That the said Wesley T. Brown has no widow surviving him, but left seven children as his sole heirs at law, which seven children are your complainant and the six defendants as follows: James B. Brown, Garnett Y. Brown, Mildred C. Jarecke, William F. Brown, Jean I. Irvin, Jody G. Carpenter.

(3) That all of the said parties to this suit are adults and that each is seized of an undivided one-seventh in said real estate.

(4) That said real estate is unencumbered property.

(5) That it is not susceptible of partition in kind between the parties entitled thereto, and that your complainant has made an effort to purchase the undivided interest of the other coowners without success; that she is willing to take the whole of said real estate and to pay value thereof into court for distribution between the parties entitled to receive same, but that from her investigation no party in interest appears willing to sell, but that all parties in interest apparently
prefer to buy; that therefore the object of this suit is to procure a partition of the above mentioned real estate in some method prescribed by law; that it is to the advantage and interest of all parties concerned that the property be sold as a whole to effect a partition, and that the proceeds of such sale be divided by the Court according to the interests of the respective parties; that a more advantageous market is available at the present time than in all probability will occur again within any reasonable future period.

For as much as your complainant is without remedy in the premises, save in a court of equity, she prays that the said defendants, James B. Brown, Garnett Y. Brown, Mildred C. Jarecke, William F. Brown, Jean I. Irvin and Jody G. Carpenter, be made parties defendant to this bill and be requested to answer the same, answer under oath, however, being expressly waived; that the prayer process may issue, accounts taken, that partition of said real estate may be made and decrees in some manner prescribed by the Statute 5881, preferably by a sale of the whole thereof and division of the proceeds; that all proper accounts and inquiries may be directed and taken; that your complainant's counsel may be allowed a reasonable fee for instituting and conducting this suit, and that your complainant may receive all such other, further, both general and special, relief as to equity may seem meet and the nature of her cause may require.

LOIS I. WHITE

Wallace R. Heatwole, p.c.

NOTE: It is to be noted that the defendant has signed this instrument herself and it is countersigned by the attorney in the case. This step is taken on the advise of Judge Frank Armstead from his personal experiences. It is wise in all cases involving family disputes and those in which women are plaintiffs to have the parties sign all instruments themselves to forestall the possibility of the said parties changing their minds and dropping the suit, denying any knowledge whatsoever of the proceeding. To say the least, this leaves the attorney in a very embarrassing position in court and this simple step may avoid such embarrassment and possible ridicule.
PART IV

THE ANSWER

After the filing of the Bill of Complaint, the defendants must respond by an answer or suffer judgment by default. The answer is the pleading by which the defendant sits up his defense, or defenses, and in great detail. It is the most common method of making defense in chancery suits. It may be used for any defense available to the defendant.

Formerly the answer was unique in being the only pleading, at law or in equity, possessing evidentiary value in favor of the pleader. By being under oath it was treated highly but now by Va. Code, Sec. 6128, the plaintiff is now permitted to waive the oath in his bill, and thus deprive the answer of its ancient force - of all force as self-serving evidence.

It is interesting to note that the rules of equity provide that allegations of the bill not denied nor noticed in the answer, are not to be taken as admitted by the defendant, but if material to the plaintiff's case, must be proved by independent testimony. If the plaintiff objects to the answer or insists upon a response to such allegations, he is no longer allowed to except for insufficiency but must, by Va. Code, Sec. 6123 make a motion to strike out.

If the answer sets up a cross claim, it is then treated as a cross-bill and is used to obtain affirmative relief on behalf of the defendant.

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOIS I. WHITE

Complainant

vs

JAMES B. BROWN
GARNETT Y. BROWN
MILDRED C. JARECKE
WILLIAM F. BROWN
JEAN I. IRVIN
JODY G. CARPENTER,

Respondents

TO the Honorable Judge of said Court:

This is the joint and several answer of James B. Brown, Garnett Y. Brown, Mildred C. Jarecke, William F. Brown, Jean I. Irvin, and Jody G. Carpenter, by their counsel, for Answer to so much and such parts of the Bill of Complaint heretofore filed against them in the above entitled cause as they are advised it is either material or necessary for them to answer, respectfully show unto the Court, as follows:

(1) That the Defendants admit as true the allegations contained in Paragraphs "1", "2", "3", and "4" of said Bill of Complaint;
(2) Answering the allegation contained in Paragraph "5" of the Bill of Complaint, these Defendants say that said real estate is susceptible of partition in kind between the parties entitled thereto; that they admit that the Complainant has offered to purchase from these Defendants their undivided interests; that they admit as true the allegation that they have offered to purchase from the Complainant her undivided interest and that she is unwilling to sell to them; that these Defendants deny the allegation that it is to the advantage of all parties concerned that the property be sold as a whole.

(3) For further answer to said Bill of Complaint, these Defendants say that they wish to keep said property intact and they pray, therefore, that, pursuant to Section 5281 of the Code of Virginia, the fair market value of the Complaint's undivided interest in the said real estate be determined by the Court and that these Defendants be permitted to purchase the interest of the said Complainant for the amount determined by the Court;

(4) That the Complaint, Lois I. White, has had exclusive use of said real estate for many years past; that she has used said real estate to the exclusion of the rights of the Defendants herein; that she has sold a large amount of timber from said real estate and has not accounted to these Defendants for any part of the proceeds received by her from said sales;

(5) That these Defendants jointly and severally object to the partition of said real estate mentioned and described in said Bill of Complaint and they pray: That the prayer of the Complainant for partition be denied and that, in lieu thereof the interests of the Complainant herein be determined by the Court and be conveyed to these Defendants upon payment to the Complainant of the amount determined by the Court as the fair market value of the Complainant's undivided one-seventh interest.

These Defendants jointly and severally further pray: That the Complainant be required to render an accounting for the profits derived by her, the said Complainant, from the sale of timber from the said real estate;

These Defendants jointly and severally pray for such further and general relief as the exigencies of the case may require and to the Court may seem meet, and that this Answer be considered in the nature of a crossbill.

Counsel for all Defendants
PART V

DECREES OF REFERENCE

When a case of action involves matters of account or other intricate details which require minute examination, and for that reason are not fit to be brought before a jury, it is usual to refer the entire case or some part of it, to the decision of a Commissioner in Chancery, and the case is then said to be referred and such an order is a decree of reference.

It is distinguished from "arbitration" in that arbitration imports submission of a controversy without any lawsuit having been brought, while reference imports a law suit pending, and an issue framed or question raised which is sent out to be settled. Reference is one mode of decision employed in the course of a judicial proceeding.

"Reference" is distinguished from "hearing and trial", in that these are the ordinary modes of deciding issues and questions in and by the courts with the aid of juries when proper; while reference is an employment of non-judicial persons - individuals not integral parts of the court - for the decision of particular matters inconvenient to be heard in actual court.

Due to the complexity of the present case, the involving of accounts and as a means of expediting litigation, the Judge of aforesaid Court issues the following Decree of Reference:

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOIS I. WHITE, Complainant

vs

DECREE OF REFERENCE

JAMES B. BROWN
GARNETT Y. BROWN
MILDRED C. JARECKE
WILLIAM F. BROWN
JEAN I. IRVIN
JODY G. CARPENTER
LOIS I. WHITE

This cause coming in this day to be heard upon the Complainant's bill, duly filed at rules, upon process by publication against the Respondents, all of whom are non-residents, and upon the written appearance on behalf of each of the respondents by Marion L. Martin, their attorney, and which appearance is here filed; and said cause having been regularly matured at rules, was argued by counsel.

On consideration whereof, and it appearing that this is a suit for partition of real estate, it is ordered, adjudged and decreed that the papers in the cause be referred to C. E. Stonbock, one of the Commissioners of this Court, who is directed to take, state, and report to the Court the following inquiries:
(1) Of what real estate Wesley T. Brown died seized and possessed; its fee simple and annual value, and whether improved or unimproved.

(2) Who are the heirs at law of said Wesley T. Brown, and what are their respective interests in the real estate of which he died seized and possessed.

(3) Whether or not the said real estate can be partitioned in kind between the parties in interest, and if not susceptible of partition in kind, how best can the same be effected.

(4) Are all the necessary parties before the court in this proceeding.

(5) What, if any, liens are on said real estate, their amounts and respective priorities.

(6) Together with any other matter deemed pertinent by the Commissioner, or requested to be stated by any party in interest.

But before proceeding to execute this reference, the Commissioner shall give notice in writing to counsel for the respective parties, of the time and place of executing the same.

This cause is continued.
The Commissioner's report is the formal statement in writing made to a court by a master in chancery, a clerk or referee, as the result of his inquiries into some matter referred to him by the court.

The parties interested in the execution of an order referring the cause to the Commissioner are entitled to notice of the time and place fixed upon for the hearing, and a reasonable opportunity to present evidence of their claims or in their defense. In Virginia this notice may be given by publication in a newspaper when so directed by the court according to the Va. Code, Sec. 6180. The evidence introduced before the Commissioner is by depositions, which he must return with his report by Section 6185 of the Virginia Code.

By Section 6186 of the Virginia Code, the report of the Commissioner, after completion, is filed in the clerk's office, where it lies for 10 days for such exceptions to confirmation as any party may desire to file. Failure to file exceptions will ordinarily operate as a waiver of objections but is not confirmed until an order of the court is entered expressing such confirmation.

While the finding of a Commissioner, on a question of fact, is prima facie correct, such report is not entitled to the weight of the verdict of a jury. If upon reading the testimony, as the Court must do in case of an exception, the Court is satisfied that the ruling should have been otherwise, it must, by Va. Code, Sec. 6179, overrule the finding of the Commissioner.

In the present case, depositions have been taken from all parties in interest and the following Commissioner's Report is filed with the Clerk of the Court.

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOIS I. WHITE,
Complainant

vs

COMMISSIONER'S REPORT

JAMES B. BROWN, ET ALS.,
Respondents

TO THE HONORABLE WALTER SOMERS, JUDGE OF SAID COURT:

The undersigned, G. B. Stombock, Commissioner in Chancery for the Circuit Court of the County of Augusta, to whom this cause was referred, under a Decree of Reference entered on __ day of __, 19 __, begs leave to report that on the __ day of __, 19 __, at his office in the city of Waynesboro, Virginia, he proceeded to execute the said decree, at which time all of the parties to this cause were present in person or by counsel; that he took the depositions of the witnesses adduced by
the parties, which depositions are herewith returned and made a part, of the report.

In answer to the several inquiries contained to the said decree, you Commissioner reports as follows:

(1) Of what real estate Wesley T. Brown died seized and possessed, its fee simple and annual value and whether improved or unimproved. The said Wesley T. Brown died seized and possessed, intestate, of a fee simple in the following real estate: The Commissioner then proceeds to describe the property in minute detail, using to a large extent the description from the Deed Book. The Commissioner would then continue:

This land is unimproved and, on account of the condition of the roadway leading into it, it is practically inaccessible. It has some scattered timber on it, of very little value, and your Commissioner is of the opinion that its fee simple value is $1455.00 and that it has no annual value.

(2) Who are the heirs at law of said Wesley T. Brown, and what are their respective interests in the real estate of which he died possessed.

The heirs at law of Wesley T. Brown, deceased are: James B. Brown, Garnett Y. Brown, Mildred C. Jarecke, William F. Brown, Jean I. Irvin, and Jody G. Carpenter.

Each heir owns an undivided one-seventh interest in the said real estate.

(3) Whether or not the said estate can be partitioned in kind between the parties in interest, and if not susceptible of partition in kind, how best can the same be effected.

Your Commissioner is of the opinion that a partition in kind is not practical nor advisable since it would materially reduce the value of the land as a whole and, therefore, recommends that the said real estate be sold and the proceeds divided among the parties in interest.

Your Commissioner further reports that the Complainant is desirous of purchasing the said real estate and likewise the Respondents are desirous of purchasing it, and, under these circumstances, he recommends that it be sold at public auction, as per Section 5281 of the Virginia Code.

(4) Are all the necessary parties before the Court in the proceeding.

All the necessary and proper parties are before the Court in this cause.

(5) What if any liens are on said real estate, their amounts and respective priorities.

There are no liens on said real estate, except taxes for the year 1947 amounting to $22.01, including 5% penalty.
(6) Together with any other matter deemed pertinent by the
Commissioner or requested to be stated by any part in
interest.

The evidence shows that since the death of the mother of the
Complainant that taxes have been paid by the Complainant up to and
including the year 1946; also that some of the timber was sold off the
property and was used to pay delinquent taxes and current taxes as they
became due and payable. Your Commissioner is unable to ascertain the
amount paid for the timber and the only evidence we have is the statement
of the Complainant to the effect that the purchase money was used for
the payment of the taxes as far as it would go and that she paid the
other taxes out of her own funds, but she makes no claim for reimbursement.

All of which is respectfully submitted this ___ day of ___, 19__.

________________________________________
Commissioner in Chancery

I hereby certify that due and proper notice of the filing of this
report has been given to all parties who appear in this case or their
counsel of record as required by Section 6135 of the Virginia Code.

________________________________________
Commissioner in Chancery
PART VII

DECREES OF LEASE

After the filing of the Commissioner's Report in the Clerk of Court's office, it stays there for ten days in which time exceptions must be noted, after that time they having been deemed waived.

While such a report is deemed prima facie correct due to the Commissioner's opportunity to see, examine and adjudge witnesses, and even though no exceptions are filed, it is not deemed per se to be correct. According to the Virginia practice, the report never stands confirmed because of failure to file exceptions within the ten day period during which the report must lie for exceptions, nor at any other time until an order of the court is entered expressing confirmation.

It is under this Decree of Sale that such confirmation of the Court is entered. Sales under decrees of a chancery court are usually made by commissioners, either regularly or especially appointed by the court for the purpose. In Virginia it is customary to name one or more of the counsel in the cause as special commissioners of sale. Under Section 6266 of the Va. Code, such commissioners, if they receive money, are expressly required to give bond, but this is circumvented by paying the proceeds of the sale into the Court, the highest bidder producing a certificate of deposit and filing same with the Clerk of the Court as evidence of such proceeds being deposited in the name of the Court in the stated bank. It remains as such until confirmation of sale and distribution is adjudged by the court.

Under the last mentioned statute, the terms of the judicial sale are largely left to the discretion of the court, to be fixed as seems best in the interests of all parties - or as declared by the statute "for cash, or on such credit and terms as it may deem best".

The Decree of Sale should prescribe with preciseness the terms and place of sale, and should give directions as to advertising the sale. Such sales are usually made at public auction.

The Decree of Sale issued by the Court in the present instance:

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOIS I. WHITE,
Complainant

vs

JAMES B. BROWN, ET ALS.,
Respondents

DECREES OF LEASE

This cause came on this day to be again heard upon the papers formerly read and upon the report of G. B. Stombock, Commissioner in Chancery, filed in the Clerk's Office of this Court on the day of , 19, reporting in answer to the decree of reference entered
in this cause on [__] day of [__], 19[___], together with the depositions; to which report no exceptions are filed; and this cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed that the said report of G. E. Stombock, Commissioner in Chancery, filed as aforesaid be, and the same hereby is, approved and confirmed.

It appearing to the Court that all necessary parties are before the Court, that the land in the bill and proceedings mentioned is not conveniently susceptible of partition in kind among the parties entitled thereto, that several of the parties are willing to take the whole and pay to the other parties in interest their respective share or shares, as the same may be fixed by the court, that the real estate should, therefore, be sold at public auction to afford all parties in interest an equal opportunity to purchase the same, on consideration whereof the Court doth:

Adjudge, order and decree that Wallace R. Heatwole and Marion L. Martin, who are hereby appointed special commissioners for that purpose, shall offer the said real estate for sale at public auction at the front door of the Courthouse of this Court, after first advertising the time, place, and terms of the sale for at least two other places in the City of Waynesboro or County of Augusta, and after such other advertisement, if any, as the said special commissioners shall deem wise. Such sale shall be free and clear of all liens and indebtedness, including the taxes for the year 1947 and shall be for cash.

In lieu of requiring bond of the Special Commissioners, it is further ordered that the successful bidder shall, at the conclusion of the bidding, deposit in the Citizens-Waynesboro Bank and Trust Company, Waynesboro, Virginia, to the credit of the Court in this cause, the amount of his bid, and file with the Clerk of this Court a receipt showing such deposit.

And the Commissioners hereunder shall report their action to the Court.
After the sale has been made, the Special Commissioners make a report thereof, in writing, to the Court, and if under bond, returning with his report a certificate of deposit for the cash payment, with an itemized statement of the expenses incurred. It is also customary to file with this report a copy of the notice of sale with the auctioneer’s endorsement thereon.

The report usually contains a recommendation from the Commissioner that the sale be, or not be, confirmed, with reasons.

The Report in the present case is as follows:

VIRGINIA

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOIS I. WHITE,
Complainant

vs

JAMES B. BROWN, ET ALS.,
Respondents

TO THE HONORABLE WALTER SOMERS, JUDGE

Comes now your Commissioners, Marion L. Martin and Wallace R. Heatwole and reported to the Court as follows:

That acting pursuant to the decree entered in the above cause on the day of , 19 , the real estate in the bill and proceedings mentioned and described, at public auction for cash pursuant to directions of said decree.

That at said sale the bid was competitive and spirited and that Lois I. White became the highest bidder and the property was knocked down to her subject to confirmation by the Court at the sum of $2500.00

That your Commissioners believe that the sale was an advantageous one and that they therefore recommend its confirmation.

That your Commissioners incurred the following expense items:

Waynesboro News-Virginian, printing notice of sale $ 9.00
I. M. Strong, Sheriff, auctioning sale 25.00

That your Commissioners file herewith a copy of the notice of sale with endorsement thereon as well as a receipt of the Citizens-Waynesboro Bank and Trust Company, Waynesboro, Virginia, showing that Lois I. White had deposited in said bank to the credit of the Court in the cause the sum of $2500.00 in compliance with her bid.

Respectfully submitted,

Commissioners
PART IX

DECREES CONFIRMING SALE AND DISTRIBUTION

Equity has established its own rule as to judicial sales - namely, that the bidder is bound from the moment to the conditional acceptance of his bid, while the court, as vendor, may - not arbitrarily, but in the exercise of a proper discretion - either accept or reject the bid. As the bid is not made in the presence of the court, the Commissioner is without authority to do more than to accept the bid subject to the court's approval.

The Commissioner's Report, after lying for ten (10) days in the Clerk's Office for exception - this period may be shortened by consent of the parties - may be brought to the attention of the Court for confirmation or rejection. On confirmation, the transaction for the first time assumes the nature of a completed contract, binding the Court as well as the purchasers.

This confirmation of sale is expressed by the Court in the final instrument of the case - the Decree Confirming Sale and Distribution. It is in the decree that the Special Commissioners are ordered to execute and deliver to the purchaser a Special Warranty Deed for the property in question. As a final step, all costs are itemized, fees paid and the remaining distribution of the proceeds made to the parties, to wit:

VIRGINIA

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOIS I. WHITE,
Complainant

vs

JAMES B. BROWN, ET AL.

Respondents

This cause came on this day to be heard again upon the report of the Special Commissioners, Marion L. Martin and Wallace R. Heatwole, filed herein on day of 19, and to which report no exceptions have been taken and the time for filing exceptions having expired, was argued by counsel.

On consideration whereof, the Court doth approve and confirm the sale of the real estate in the bill and proceedings mentioned and described to Lois I. White for the sum of $2500.00 cash.

And it further appearing to the Court from the deposit slip of the Citizens-Waynesboro Bank and Trust Company filed with the papers in this cause, that the full sum of $2500.00 has been deposited in the Citizens-Waynesboro Bank and Trust Company to the credit of the Court in this cause.

It is further ordered, adjudged and decreed that Marion L. Martin and Wallace R. Heatwole, Special Commissioners, be, and they hereby are, authorized and directed to prepare, execute and deliver to the
purchaser, Lois I. White, a good and sufficient deed of Special Warranty of the real estate in the bill and proceedings described, and purchased by her at the public auction as aforesaid, she having bid the sum of $2500.00, and has deposited the full purchase price to the credit of this Court, as aforesaid, and being entitled to receive deed for the said premises.

It is further ordered, adjudged, and decreed that James Cable, Clerk of this Court, draw his several checks on the fund so deposited to the credit of this Court in this cause, as aforesaid, in payment of the following items, to wit:

(Note - these are actual costs taken from a case on record in which by judicial sale land sold for $2500.00)

<table>
<thead>
<tr>
<th>Item</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>James Cable, Clerk, court costs and clerk's fee</td>
<td>$39.00</td>
</tr>
<tr>
<td>G. B. Stombock, Master Commissioner, report and stenographer's fees</td>
<td>$50.00</td>
</tr>
<tr>
<td>I. M. Strong, Sheriff, services conducting sale</td>
<td>$25.00</td>
</tr>
<tr>
<td>Wallace R. Heatwole, for documentary stamps on deed to purchaser</td>
<td>$2.75</td>
</tr>
<tr>
<td>Marion L. Martin and Wallace R. Heatwole, Special Commissioners, commission on sale</td>
<td>$125.00</td>
</tr>
<tr>
<td>Marion L. Martin and Wallace R. Heatwole, Attorneys fee for services in this suit</td>
<td>$250.00</td>
</tr>
<tr>
<td>Marion L. Martin and Wallace R. Heatwole, Attorneys, preparing Special Commissioner's deed</td>
<td>$10.00</td>
</tr>
<tr>
<td>R. H. Mexico, Treasurer, taxes on real estate for year 1947</td>
<td>$22.03</td>
</tr>
</tbody>
</table>

And it appearing to the Court that after payment of the several items hereinbefore directed to be paid, from the funds on deposit as aforesaid, that there will remain in the Citizens-Waynesboro Bank and Trust Company to the credit of the Court in the cause the sum of $1954.47; and that said sum is distributable among the seven children of Wesley T. Brown, deceased, all of whom are represented by counsel in this cause, and who are entitled to receive the distribution of said fund, as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>James B. Brown</td>
<td>$279.21</td>
</tr>
<tr>
<td>Garnett Y. Brown</td>
<td>279.21</td>
</tr>
<tr>
<td>Mildred C. Jarecke</td>
<td>279.21</td>
</tr>
<tr>
<td>William F. Brown</td>
<td>279.21</td>
</tr>
<tr>
<td>Jean I. Irvin</td>
<td>279.21</td>
</tr>
<tr>
<td>Jody G. Carpenter</td>
<td>279.21</td>
</tr>
<tr>
<td>Lois I. White</td>
<td>279.21</td>
</tr>
</tbody>
</table>

It is therefore, ordered, adjudged and decreed that James Cable, Clerk, draw his check on the funds on deposit as aforesaid, to the said Lois I. White and Wallace R. Heatwole, her Attorney, for the sum of $279.21; and to the remaining six children of Wesley T. Brown, above named, and Marion L. Martin, their Attorney, for the distributive share of each of the said as above set forth.

It is further ordered that a certified copy of this decree shall be the authority to the Citizens-Waynesboro Bank and Trust Company for
honing the check so drawn as aforesaid, when properly presented for payment.

And it appearing that nothing further remains to be done in this cause, it is directed that the papers be filed among the decided causes of this Court.
PART X
DEED OF SPECIAL WARRANTY

Even though it has been directed "that the papers in this cause be filed among the decided causes of this Court", there remains one thing to be done – the executing of the Deed of Special Warranty by the Special Commissioners.

As already indicated, the Commissioners who conducted the sale have no implied authority to make conveyance of title, but must await the express direction of the Court. The deed thus issued should give the title of the cause, the court, and the date of the decree under which authority is derived.

The Commissioner may be named in his official capacity as the sole grantor, and the words of the conveyance may be his own; and he may sign, seal and acknowledge the instrument in his official capacity. The deed should set out as specifically as practicable the names of those parties on whose behalf the deed is described as simply heirs of such decedant. The deed must be acknowledged and certified as in the case of other deeds.

There seems to be no necessity for a report from the Commissioner that he has executed the deed, though in some circuits of Virginia such a report is customary.

The Deed of Special Warranty in the present instance is as follows:

THIS DEED, made this ___ day of ___, 19___, by and between Marion L. Martin and Wallace R. Heatwole, Special Commissioners, parties of the first part; and Lois I. White, party of the second part;

WHEREAS, by decree entered therein on ___ day of ___, 19___, it was ordered and decreed in the Circuit Court of Augusta County, Virginia, in a certain cause then depending on the Chancery side of said Court, under short style of Lois I. White, Complainant, VS James B. Brown, ET ALS., Respondents, that the real estate hereinafter described, and in the bill and proceedings mentioned, be sold at public auction to the highest and best bidder, for cash, subject to the confirmation of the Court, and that at said sale held pursuant to said decree, Lois I. White became the highest and the best bidder, bidding therefor the sum of Twenty-five Hundred ($2500.00) Dollars, and, in accordance with direction with said decree, she has deposited said sum to the credit of the Court in this cause in the Citizens-Waynesboro Bank and Trust Company, Waynesboro, Virginia, and,

WHEREAS, by decree entered herein on ___ day of ___, 19___, the said sale was confirmed and the said Marion L. Martin and Wallace R. Heatwole, Special Commissioners, were directed to execute and deliver to the said Lois I. White a good and sufficient deed of Special Warranty of the said premises;

NOW, THEREFORE, THIS DEED WITNESSETH: That for in consideration of the premises, and of the said sum of Twenty-five Hundred ($2500.00) Dollars, deposited to the credit of the Court in the aforesaid Chancery
cause, in the manner aforesaid, and agreeable to the terms of said decretal order, at and before the sealing and delivery of this deed, the compliance with which is hereby acknowledged, and said Marion L. Martin and Wallace R. Heatwole, Special Commissioners, aforesaid, in order to carry into effect the said sale, made as aforesaid, in pursuance of said decretal order, do give, grant, bargain, sell and convey with SPECIAL WARRANTY, unto LOIS I. WHITE, or her assigns, forever, the following described real estate, to wit: -- (Here said real estate must be described in minute detail, ascertaining the boundary lines, the descent of title, and may refer to the Deed Books for a more full and complete description of said property.)

This deed is made on behalf of the heirs at law of Wesley T. Brown, deceased.

WITNESS the following signatures and seals:

Marion L. Martin (seal)

Wallace R. Heatwole (seal)

STATE OF VIRGINIA
COUNTY OF AUGUSTA, to wit:

I, a Notary Public in and for the County of Augusta in the State of Virginia, do certify that Marion L. Martin and Wallace R. Heatwole, Special Commissioners, whose names as such are signed, to the aforesaid writing, bearing date on the ___ day of ___, 19___, have this day acknowledged the same before me in my County and State aforesaid. My commission expires on the ___ day of ___, 19____.

Given under my hand and seal this ___ day of ___, 19____.

Notary Public
BIBLIOGRAPHY

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