Bexley, 20 Bea. 127; *Morris* v. *Ellis*, 7 Jur. 418; Sugden's Ven. & Pur. 13th edit. 403.

The Chancellor before whom the petition was argued, delivered the following judgment.

With regard to the petition in this case I think the petitioners cannot by means of it intercept the payment to the plaintiffs of the money to which they are entitled under this decree. If the petitioners have any right at all I think they should have proceeded by bill according to the decision in *Slater* v. *Young*, 11 Grant 268.

It is important that there should be uniformity in the practice, and though authority may be found in some of the English cases for such a course of procedure as that adopted here, in certain cases, yet I prefer in such matters to stand by a clear decision of our own courts.

I doubt, however, if on bill filed the petitioners could now have any relief. The plaintiffs have succeeded by the decree in subjecting this piece of land to the extent of the vendor's lien thereon to their judgments, and they are in the position of a party who by a superior diligence has fastened the first charge upon the property, as when a first execution in the sheriffs hands takes effect. The petitioners here had executions in the sheriff's hands, but they had no operation upon the property here unless indeed the petitioners could treat the conveyance to McConkey as fraudulent and void. The writs could only give the petitioners a right, or put them in a position to come to this court and seek for equitable execution. This they have not done, *non constat*, till the filing of this petition. that they even intended to do so; they might have intended, and from their delay in coming here it is the more reasonable to suppose that they intended proceeding at law to sell, treating the conveyance to McConkey as a nullity.

I must refuse the petition with costs.

(*Reported by* S. G. Wood, Esq., *Barrister-at-Law.*)

In re Dillon's Trusts.

New Trustees—Two appointed in place of one—Vesting order—Imp. Stat. 13, 14 *Vic. cap.* 60—*C. S. U. C. cap.* 12, *s.* 26—*Practice.*

Where it becomes necessary to apply to the Court for the appointment of a new trustee, it is only under very special circumstances that the Court will be satisfied with *one*; therefore

Where the trustee appointed by a will had died, and he who was named by the testator to succeed him was out of the jurisdiction, and shewn to be an unsuitable person to act in the trust, the Court appointed, in substitution for him, a *cestui que trust* under the will, whom the testator had named as a trustee thereof under certain contingencies which had not occurred; but under the circumstances, directed another to be associated with him, although the will provided for one trustee only acting in the trust at one time.

[Chancery, Feb. 18, 25, April 8, 1867.]

This was a petition presented *ex parte* on behalf of the *cestuis que trustent* under the will of the late G. G. Dillon, setting out the will of the deceased, whereby, after devising his real and personal estates to J. G. Bowes, in fee, to be held by him in trust for the *cestuis que trustent* therein named (being the petitioners and J. Dillon, jun.) the testator directed as follows: "Provided also that in case my said trustee shall die, or become unable from any cause to act, then I will and direct and hereby appoint John Hall to be the trustee of this my will, in the place of the said J. G. Bowes; and in case the said John Hall shall die, or refuse to accept the said appointment, in such case I nominate and appoint my father to act in this behalf; and failing either, then I request the said J. G. Bowes, John Hall, my father, or either of them, to name some trustee to act in the matter of this my will; and failing this, I desire my brother John to act as my trustee in this behalf; hereby vesting in such one trustee as shall consent to act all the trust estates, moneys and premises, which shall be then vested in the trustee so dying or refusing or becoming incapable to act as aforesaid."

The petition further alleged the death of Mr. Bowes, the departure from Canada of Mr. Hall, his residence out of the jurisdiction, and other circumstances which rendered it desirable that a new trustee should be appointed, and prayed that John Dillon, jun., the testator's brother, named in the will, should be appointed trustee thereof, and that the trust property might vest in him for the estate devised by the will to the trustee thereof, to be held by him upon the trusts of the will or such of them as were subsisting and capable of taking effect.

S. G. Wood for the petitioners.

As to the jurisdiction of the Court. Under C.S.U.C. cap. 12, sec. 26, the Court of Chancery for U. C. has the power conferred upon the Court in England by Imp. Stat. 13, 14 Vic. cap 60 (Trustee Act 1850), secs. 32-40.

Application should be by petition, not by bill. —Tripp's Forms, 212; Morgan's Acts and Orders, 91; *Thomas* v. *Walker*, 18 Beav. 521; and should be made in Court, not in Chambers.—*In re Lash*, Chy. Cham. Rep. 226. (As to cases where application in Chambers is proper, see Tripp, 212; 2 Set. 812; Morgan, 526.)

Service on former trustee not necessary when he is out of the jurisdiction.—Tripp, 95, 96, note *f*; Lewis on Trusts, 4th Edit. 687, note *c*. *In re Sloper*, 18 Beav. 596, the old trustees appear to have been within the jurisdiction.

A trustee going out of the jurisdiction is not thereby incapable, unwilling, or unable to act, within the terms of a power to appoint new trustees, and an application to the Court is proper. —*Re Harrison's Trusts*, 22 L. J. N. S. Chy. 69; following *In re Watt's Settlement*, 20 L. J. N. S Chy. 337; S. C. 15 Jur. 459.*

As to misconduct of trustee affording ground for the application.—Lewin, 547, 548. As to bankruptcy.—*Re Bridgman*, 1 Drew. & Sm. 164. see 170; *Harris* v *Harris*, 29 Beav. 107.

As to the appointment of a *cestui que trust*— As a general rule, such an appointment is considered objectionable —*Wilding* v. *Bolder*, 21 Beav. 222. Yet in this case, the *cestui que trust* is the nominee of the testator (although the precise circumstances under which the trust was to devolve upon him have not occurred); and *cestuis que trustent* were appointed in *Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W R 458; *Re Clissold's Settlement*, 10 L. T. N S. 642

As to the appointment of one trustee. The testator, by his will, manifested an intention that only one trustee should act at one time, and

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* But see contra, *Mesnard* v. *Welford*, 1 [Sm. & Gif. 426; S. C. 22 L. J., N. S. Chy. 1053; Morgan, 89.—Rep.