

Chan. Div.]

NOTES OF CANADIAN CASES.

[Com. Pleas.]

1877, and claimed a discharge thereof from J. U. and L. R.

Held, that the power given by the will to M. M. to appoint a trustee in her place did not authorize her to appoint in her life time, and only authorized her to appoint "by will or otherwise" a trustee to be such after her death, and neither the appointment of Nov. 5th, 1873, nor that of Oct. 6th, 1877, was authorized by the will.

Held, also, that R. S. O. c. 107, s. 30 could not be invoked to authorize either appointment, for this enactment did not come into force till Dec. 31st, 1877, subsequently to the transactions in question.

Held, however, that under the provisions of 40 Vict. c. 8, s. 30, assented to on March 2nd, 1877, the appointment of Oct. 6th, 1877 was a good and valid appointment.

It is not correct to say that 40 Vict. c. 8, s. 30 has no application in the case of a trustee appointed before the passing of the Act who desires to be discharged from his trust. It has such application.

Moreover, the fact that the new trustees so appointed as aforesaid were the husbands of the *cestui que trustent*, whereas the testator obviously intended that the legacies given to his daughters should be free from the control of any present or future husband, did not make the appointment bad, although it might be that if the court were appointing trustees of the fund, the husbands of the *cestui que trustent* would not be appointed.

The statute is very broad in its language, and a trustee who has from the beginning been a sole trustee has under the Act the same position and power as a last retiring trustee, or a sole surviving trustee.

Semble, that 40 Vict. c. 8, s. 30 is prospective and not retrospective in this sense, that it would not make valid the appointment of trustees made prior to its passing without authority.

J. Bethune, Q.C., W. Cassels, Q.C., and Walker, for the plaintiffs.

Gormully, for the defendants.

COMMON PLEAS DIVISION.

SUTHERLAND V. PATTERSON.

Guarantee—Promissory Note.

The defendant wrote to the plaintiff, and, after referring to J. S., the person whom he desired to assist, said: "he informs me how that I could help him by pledging myself to you that you might give him a letter of credit on Montreal; and I now say if you will assist him in that way to \$7,000 or \$8,000, that I will become responsible to you for the like amount in any manner you may wish, as I am fully satisfied that John will protect and take care of any one who would be generous enough to assist him."

Held, not a continuing guarantee.

An instrument in the following form was signed by the defendant:—

"Three years after date I promise to pay to the order of J. S., \$5,000 at the office of Mr. A. S., Canifton, value received. This note is given as collateral security for a guarantee of \$5,000 given to J. S. by A. S."

Held, not a negotiable promissory note.

Bethune, Q.C., for the plaintiff.

Northrup (of Belleville), for the defendant.

BROOKE V. McLEAN.

Wall—Erection on plaintiff's land—Damages—Trustee.

The plaintiff was the surviving trustee under the will of one J. B., of certain land, on which was erected a two-storey brick house, the westerly wall of which formed the boundary of defendant's land. L., who owned the land immediately adjoining plaintiff's land on the west, leased the same to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall; inserting joists therein, and building on the said wall so as to raise it two stories higher, thereby weakening plaintiff's wall. F. mortgaged to a building society, who, in default, sold to the defendant.

Held, that the plaintiff under O. J. Act, Rule 95, was entitled to maintain an action as representing the estate without making the *cestui qui trust* parties; and that he was entitled under the circumstances to a decree that the defen-