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 where one trustee only was originally appointed the Court will appoint one.—*Re Roberts*, 9 W.R. 758; *Re Reyneault*, 16 Jur. 233; and in *Re Tempest*, 1 L.R. Chy. Appeals, 485; S.C. 35 L.J. N.S. Chy. 682, it is said that "the Court will regard the wishes of a testator expressed or demonstrated" in regard to the appointment of trustees.

By consent of parties concerned, a trustee will be appointed without a reference—*In re Battersby's Trusts*, 16 Jur. 900; *Robinson's Trusts*, 15 Jur. 187; *In re Tunstall*, 15 Jur. 645, 981; S.C. 4 De G. & Sm. 421.

The proposed trustee being a nominee of the testator, the Court in appointing him will be merely giving effect to the testator's wishes and intentions, and therefore he will take all the powers conferred by the will on the trustee thereof for the time being; the decisions in *Lyon* v. *Radenhurst*, 5 Gr. 544, and *Tripp* v. *Martin*, 9 Gr. 20, not being applicable to the present case.

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

MOWAT, V. C.—I think the petition and affidavits make out a case for the appointment of new trustees, but not of one trustee. The testator had a right to appoint one if he chose; but when it becomes necessary to apply to this Court for an appointment in a case not provided for by the testator, it is only under very special circumstances that the Court of Chancery will be satisfied with one trustee. The circumstances here are not sufficient for this purpose. The petitioners must therefore procure another to be associated with Mr. Dillon, and, on proper affidavits of the fitness of the trustee so proposed, the two will be appointed.*

Upon a consent by another proposed trustee, and affidavits of fitness being filed, his Lordship afterwards granted a fiat for the order as prayed, appointing the two trustees proposed and vesting the trust estates in them.

ENGLISH REPORTS.

ROOTH *v.* THE NORTH EASTERN RAILWAY COMPANY.

Railway Company—Carrier—Special Condition—Reasonableness—Delivery.

A railway company carried cattle upon special conditions The first condition stipulated that "the owner undertakes all risk of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or from imperfection in the station, platform, or place of loading or unloading, or of the carriage in which they may be loaded or conveyed, or from any other cause whatsoever." A subsequent condition stipulated that "the company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them."

Held, that the first taken by itself was unreasonable and void.

Held, secondly, that, even assuming the first condition to be severable, the subsequent condition could not have the effect of making it reasonable, so far as it related to risks over which the persons sent under the subsequent condition had no control, such as defects of stations.

Semble, (per Channel, B.)—Such conditions relating to a single subject-matter are not severable, and cannot be good in part and bad in part.

[Ex., Jan. 25, 1867.]

This was an action for not duly delivering cattle carried for the plaintiff by the defendants from Boroughbridge to Chesterfield.

The first count alleged a bailment upon the terms that the defendants should safely and securely carry the cattle from Boroughbridge to Chesterfield, and there deliver them to the plaintiff. It alleged a breach of this duty whereby some of the cattle escaped on to the railway and were destroyed.

The second count alleged a bailment on the terms that the defendants should safely and securely carry the cattle from the one place to the other and there deliver them to the plaintiffs at a safe and proper place. It alleged for breach that they delivered them at an unsafe and improper place, whereby they escaped as in the first count.

The defendants traversed the bailments and the breaches.

The case was tried before Mr. Justice Smith at the last Summer Assizes at Derby, when the facts proved were as follows:—

* See 2 Set. 824; *Re Tunstall*, 4 De G. & Sm. 421; S. C. 15 Jur. 645; *Re Dickinson's Trusts*, 1 Jur. N. S. 724.