of the notes given into the plaintiffs' hands as security for their debt these plaintiffs can have any claim.

And as to those notes, the plaintiffs' right to recover seems to me to be clear, for they cannot be held to have passed under the assignment to defendant, except as to the surplus af.. the plaintiffs' claim. It was evidently the intent, taking the assignment and the schedule together, to provide that the plaintiffs' advances should first be paid out of them, and to give the assignee to understand that there was that prior claim on the proceeds in the plaintiffs' favor, to secure which the plaintiffs held the notes.

I think Feehan's evidence fully supports the plaintiffs' right to the $2,550, so far as it can be shewn to have been collected out of or upon these securities.

If what was collected from Thompson & Co. was collected merely as so much by way of a dividend on their whole debt due, and without any reference to any particular securities (as I suppose it was), then of course a calculation must be made founded on the proportion of the securities held by the plaintiffs to the whole of *Feehan's claim against Thompson & Co.*

McLEAN, J., having been absent during the argument, gave no judgment.

IRWIN v. SAGER ET AL.

Ejectment—Right to try question of boundar —Conflict of opinion

It was held by this court that at a former trial the question of boundary should have been tried in this action of ejectment. The Court of Common Pleas held differently upon the same point in other cases, and the Chief Justice of that court having at a second trial ruled in accordance with their judgment, a new trial was granted without costs.

Ejectment of the west half of lot number 29 in the 3rd concession of Ancaster.

This case came on for trial at the last spring assizes at Hamilton, before Draper, C. J., and the title of the plaintiff to the west half of lot 29, in the third concession of Ancaster being admitted, the defendant offered evidence to prove that the land actually in dispute between him and the plaintiff, though claimed as part of that lot, was not in fact part of it, but part of lot No 28, to which the defendant claimed title. The learned Chief Justice rejected that evidence, holding that under the statute he must treat the appearance as general, for the statute, though providing for a notice limiting the defence, the defence does not provide for a limited appearance; and consequently, as the general defence could not under the admission be sustained, the plaintiff was entitled to a verdict for the whole of the lot sued for; and that he must take possession at his peril of any land not belonging to that lot.

Sadlier obtained a rule *nisi* to set aside the verdict, relying upon the judgment given in this caseafter a former trial, 21 U C Q B. 373, at variance with the decision of Common Pleas in *Lund* v. *Savage*, 12 U. C. C P. 143, in accordance with which the learned Chief Justice ruled at the last trial.

Barton shewed cause.

McLEAN, C. J.—The able judgment of the learned Chief Justice of this court delivered during the last term in this particular case seems to me conclusive as to the question whether or not a disputed boundary can be decided in an action of ejectment, or whether an action of trespass is the only form of action in which such a question can be raised. Before the passing of the Ejectment Act, Consol. Stats. U. C , cap 27, the constant practice was to bring ejectment in any case of disputed boundary, and the premises were so defined that there could be with due care no difficulty in seeing on the face of the proceedings the premises sought to be recovered. It is true the verdict in any such action might be disputed at the instance of either party, and another action might be brought, but the facts disclosed in evidence were generally sufficient to satisfy the parties on which side the right lay; and though in some instances other actions might be brought on the same or different testimony, the disputed boundary might be called in question and disposed of, for the time at all events, in an action of ejectment as satisfactorily as in an action of trespass. I cannot, I confess, see that in changing the mode of proceeding in an action of ejectment, and causing the parties actually contesting to appear as plaintiff and defendant instead of John Doe and Richard Roe, the legislature intended to drive a party, in order to assert a right to a piece of land in dispute, to an action of trespass in the first instance, in which damages only can be recovered, and then to an action of ejectment to recover the land after a recovery in trespass.

The 20th section of the Ejectment Act provides that upon a finding for the claimant judgment may be signed and execution issued for the recovery of possession of the property, or *of such part thereof* as the jury have found the claimant entitled to; and the 12th section provides that any person appearing to a writ may limit his defence to a part only of the property mentioned therein, describing *that part* with reasonable certainty in a notice entitled in the court and cause and signed by him or his attorney; and an appearance without such notice confining the defence to a part shall be deemed an appearance to defend for the whole. I think that these clauses, and the 49th section, as to the effect of a judgment in ejectment, and indeed all the provisions of the act, shew that, though the form of proceeding was changed, the action of ejectment was intended to be the same as it had always been In the case of *Peters* v *Nixon*, 6 U C C. P 451, the learned Chief Justice says that the practice of trying boundaries in actions of ejectment had prevailed too long perhaps to enable the courts by their own authority to put an end to it; but in that case the decision was to discourage (except when bound by well-established rule) the practice of trying questions of boundary by actions of ejectment, the legitimate object of which it declares is to try titles.

The decisions of this court as to the right to try questions of boundary in actions of ejectment, and those of the Common Pleas on the subject, are so much at variance as to leave suitors in doubt as to the law, and in some cases create so much inconvenience and expense to parties that it is extremely desirable that a decision of our highest court should be obtained, but till then I do not feel at liberty to decide that a course of proceeding which I believe has always prevailed in this province shall be no longer continued.

BURNS, J., concurred.

HAGARTY, J., dissented, retaining the opinion expressed by the Court of Common Pleas, of which he was then a member, in *Lund* v. *Savage*, and *Lund* v *Nesbitt*, 12 U. C. C. P., 143.

New trial without costs.

CHANCERY.

(*Reported by* ALEX GRANT, Esq, *Barrister-at-Law Reporter to the Court*)

MASSINGBERD v. MONTAGUE.

Sale for taxes—Sheriff's officer—Duty imposed on sheriff and his officers at sales for taxes—Costs.

At a sale of lands for wild land taxes, one of the sheriff's officers conducted the sale, at which he knocked down without any competition to another officer of the sheriff, a lot of land worth about £350, for rather less than £7 10s., which it was subsequently, with the assent of the sheriff, entered in the sales book in the name of the party who had conducted the sale, for the purpose of enabling the person to whom it had been knocked down to cheat his creditors Upon a bill filed to set aside the deed executed by the sheriff, it was shewn that by arrangement amongst the persons attending the sale, it was understood a lot should be knocked down to each person in turn, in pursuance of which the sale in question was effected. Under these circumstances the court set aside the sale with costs as against the person to whom the conveyance was made.

The duty imposed upon sheriffs at sales of lands for taxes is to sell such portions of the lands offered as the sheriff may consider it most for the advantage of the owners thereof, where therefore a sheriff so neglected his duty in this respect that at a sale for taxes very valuable lots of land were knocked down for trifling amounts of taxes, in pursuance of an agreement to that effect entered into amongst the bidders, some of which lands were purchased by bailiffs in his employ, and with his knowledge, the court in dismissing the bill filed to set aside one of the sales to his bailiff as against the sheriff, refused him his costs It is not sufficient that the sheriff does not participate in such arrangements for his own benefit.

The bill in this cause was filed by the Reverend Hompesh Massingberd, against Charles Montague, William Glass, sheriff of the county of Middlesex, and John Godbold, praying, under the circumstances appearing in the head-note and judgment, to have a sale effected by the defendant Glass, as sheriff, set aside, and plaintiff let in to redeem the lands so sold to the defendant Godbold, on the payment to him of what he had advanced.

The cause came on to be heard before his Lordship the Chancellor.