

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.

former mortgaging the above lands, and the latter the south half of Lot 16, Con. 8, and it was agreed in the mortgage that the mortgagors should have the right to have the south half of Lot 16 released when \$500 were paid, the village lots when \$600 were paid, or both the said properties when \$1,100 were paid. The mortgage was to secure \$4,000, and the evidence showed, though not so expressed in the mortgage, that W. W., jun., was only surety for his father, and received no part of the mortgage money. By deed of June 13th, 1882, W. W., jun., in consideration of \$500, sold the south half of Lot 16 to J. W., subject to \$500 to the Loan Company. By deed of February 14th, 1883, W. W., sen., having borrowed from him \$1,000 upon the security of the north half of Lot 14, granted the same to the plaintiff in fee, "Subject, however, to a mortgage of \$4,000 to the Loan Company, to be divided between the following lands, as follows: \$2,900 on the north half of Lot 14, \$500 on the south half of lot 16, and \$600 on the two village lots." This deed was registered before the deed to J. W., of which the plaintiff had no notice. Default being made under the mortgage of August 16th, 1880, the company, on April 4th, 1881, sold the lands, when the village lots fetched \$300, and the north half of Lot 14 \$4,450, which was more than enough to pay the company, but the surplus was not enough to pay the plaintiff.

The plaintiff now brought this action, claiming a lien on the south half of Lot 16 to the amount of \$500 at least, and a proportionate part of the arrears of interest due to the company on their mortgage towards satisfaction of the balance due to him after the application of the surplus proceeds of the sales already paid, and, if necessary, to stand in the place of the Loan Company, with all their rights and powers under their mortgage to the extent of \$500 and interest, maintaining that the company, having had security on several parcels of land, should not be allowed to realize their debt out of the one parcel on which he had alone security, and that the equitable right or interest of J. W., being unregistered, could not prevail against his subsequent registered equity without notice.

Held, that the plaintiff was not entitled to the lien claimed. If the Registry Act could in any case apply with regard to the equities now in

question it certainly could not apply here, for the plaintiff was not a grantee of the south half of lot 16 at all, and J. W.'s equity was to have that land relieved from the mortgage, the debt having been paid by the sale of the land of the principal debtor. It is essential to the doctrine of marshalling, not only that there should be two creditors of the same person, but that one of them should have two funds belonging to the same person to which he can resort; and marshalling is not enforced to the prejudice of third parties. The case shortly resolved itself into the case of two equities of which the plaintiff's was the later. He was entitled to the surplus in the hands of the Loan Company, and J. W. was entitled to have the mortgage to the company released as to the south half of Lot 16.

The American cases are equally clear that a court of equity will not compel a creditor to proceed against the estate of a surety, in order to leave the principal's estate free for the discharge of his debt.

Quaig v. Sculthorpe, 16 Gr. 449, cited as decisive of the present case.

PRACTICE.

Ferguson, J.]

[June 16.

MCMILLAN V. WAUSBURGH.

Examination of witnesses pending motion—Chy. G. O. 266.

On an appeal from a taxing officer.

Held, overruling *Monaghan v. Dobbin*, 18 C. L. J. 180 that Chy. G. O. 266 has not been superseded by rule 285, O. J. A., and is still in force.

Masten, for the appeal.

Hoyles, contra.

Mr. Dalton, Q.C.]
Osler, J. A.]

[September 13, 19.

CLARK V. RAMA TIMBER TRANSPORT CO.

Security for costs—Class suit.

*An application by the defendants for security for costs from the plaintiff on the ground that the latter was without means and merely a nominal plaintiff suing for the benefit of others.