ROSANNA GRAY..... APPELLANT; 1890

AND *Mar. 17, 18.

CORNELIUS COUGHLIN.....RESPONDENT. 1891

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *Jan. 19.

Mortgage—Non-Registration—Priority of subsequent mortgage—Sale under —Bar of dower.

Certain land was devised to the testator's sons charged with an annuity to his widow who also had her dower therein. The devisees mortgaged the land to C. in March, 1879, and the mortgage was not registered until January, 1880. In November, 1879, a second mortgage was given to M. and registered the same month. In this mortgage the widow joined barring her dower and releasing her annuity for the benefit of M. She had had knowledge of the prior mortgage when it was made and had refused to join in it. The second mortgagee, not being aware, when his mortgage was executed, of the prior incumbrance, gained priority, and the land was sold to satisfy his mortgage: the proceeds of the sale being more than sufficient for that purpose the surplus was claimed by both the widow and by C.

Held, reversing the judgment of the Court of Appeal for Ontario, Gwynne and Patterson JJ. dissenting, that the security for which the dower had been barred and the annuity released having been satisfied, the widow was entitled to the fund in the court as representing her interest in the land in priority to C.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancellor (2) in favor of the appellant.

The appellant is the widow of one Charles Gray who, by his will, left his real estate to two sons subject to an annuity to the widow, but such annuity not to be in lieu of dower. The sons mortgaged the real estate to the

*PRESENT.—Sir W. J. Ritchie C. J., Strong, Fournier, Gwynne and Patterson JJ.

(1) 16 Ont. App. R. 224; *sub-nomine McLellan* v. *Gray.*

(2) 16 O. R. 321.

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respondent, the widow not being a party to such mortgage; subsequently, a second mortgage was given to one Maclennan in which the widow joined, releasing for the purposes of the mortgage her interest in the land both as annuitant and doweress. The respondent neglected to register his mortgage until the second mortgage had been registered and the latter thus obtained priority under the Registry Act. Default having been made in paying the second mortgage the land was sold under it and such sale realised some $1600 over the mortgage. The contest in this case is over this surplus the widow claiming it as annuitant and doweress, the respondent claiming it under his mortgage.

The right to this money was tried out in the master's office who decided that the appellant was entitled to it. On appeal to the Chancellor this decision was affirmed (1). On further appeal to the Court of Appeal the Chancellor's judgment was reversed and the court held that the widow was not entitled to priority over the respondent. She then appealed to the Supreme Court of Canada.

Moss Q. C. and *Bolton* for the appellant. The second mortgage was paid by appellants' interest in the land and she is, therefore, a surety and entitled to an assignment of MacLennan's securities. See *Merchants Bank of Canada* v. *McKay* (2).

On the question of subrogation the following authorities were cited: *Hodgson* v. *Shaw* (3); *Craythorne* v. *Swinburne* (4); *Re Robertson* (5); *McNeale* v. *Reed* (6); Sheldon on Subrogation (7); *Mutual Life Assurance Society* v. *Langley* (8).

(1) 16 O. R.321.
(2) 15 Can. S. C. R. 672.
(3) 3 Mylne & K. 183.
(4) 14 Ves. 160.
(5) 24 Gr. 442.
(6) 7 Ir. Ch. 251.
(7) Sec. 104.
(8) 32 Ch. D. 460.

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Scott Q.C. for the respondent cited DeColyar on Guarantees (1); Brand on Suretyship and Guarantee (2); *Patterson* v. *Hope* (3); *Newton* v. *Charlton* (4); *Farebrother* v. *Wodehouse* (5) *Duncan & Co.* v. *North and South Wales Bank* (6); *Forbes* v. *Jackson* (7).

Sir W. J. RITCHIE C. J.—It appears that from the first of March, 1879, when Richard and John Gray mortgaged their interest to the respondent, Rosanna Gray was entitled to dower in the mortgaged premises and the property was also subject to an annuity to her of $150 a year. The chancellor has fixed the value of the dower and annuity at $1525. Had there been no second mortgage and had the property been sold under this first mortgage it is fair to assume that it would have sold for what it did sell for under the second mortgage, namely, $7500, less the value of the dower and annuity $1525. This firstmortgage was not registered until the 2nd January, 1880; Rosanna Gray no doubt had notice of its existence as she refused to join in it. On the first of March, 1879, Richard and John Gray mortgaged the same lands to MacLennan for $4,000, the appellant Rosanna Gray joining in the mortgage, releasing for the purposes of that mortgage all her rights and interest in the land as doweress and annuitant for the benefit of the mortgagee and for the better securing the repayment of the advance to Richard and John Gray whereby her property thus became security to answer the plaintiff's testator's claim in case his mortgage was not paid by the mortgagors. But she received no portion of, or benefit from, the money so advanced. This mortgage was duly registered on the 27th November, 1879, thereby gaining priority over the mortgage to Coughlin.

(1) P. 290.
(2) P. 357 sec. 255.
(3) 5 Dana 241.
(4) 10 Hare 646.
(5) 23 Beav. 18.
(6) 11 Ch. D. 88; 6 App. Cas. 1.
(7) 19 Ch. D. 615.

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Thus matters stood until default was made in the payment of MacLennan's mortgage when under proceedings on that mortgage the land was sold and after payment of MacLennan's claim a surplus of $1612 was left in court, $1525 of which surplus is the subject of this litigation. The mortgagee, Coughlin, claims to have his mortgage paid out of this surplus.

The first question that naturally suggests itself is: Did the land mortgaged to Coughlin produce this surplus? To my mind it clearly did not. It was produced by the property sold under the second mortgage, namely, the land mortgaged to Coughlin, plus the dower and annuity of Rosanna Gray. I think no question of registration or non-registration arises in this case between Coughlin and Rosanna Gray. It is clear that when Coughlin advanced the money on his mortgage he had express notice of the appellant's outstanding dower and annuity and he did so after an express refusal on her part to join therein. The effect of the decision appealed from appears to me to place the appellant, Rosanna Gray, notwithstanding such refusal, in precisely the same position as if she had actually joined in the respondent's mortgage, which I respectfully think we have no right to do. Had the respondent registered his mortgage he would have had a prior claim on the land but not on the land relieved from Rosanna Gray's dower and annuity. This priority he lost by reason of the non-registration of his mortgage, but how does this give him a claim on the fund produced by the value of Rosanna Gray's dower and annuity which was never pledged to him? Her portion of the fund only escapes liability by reason of the share of her sons in the land being sufficient to pay the first charge on the property, namely, the MacLennan mortgage, and for the security of which or for which purpose alone she included her dower and an

nuity in the mortgage. I am at a loss to see how Coughlin can claim more than the surplus after deducting the value of the dower and annuity fixed as we have seen by the Chancellor at $1,525; otherwise, Coughlin would be getting payment of his mortgage, not out of the lands mortgaged to him, but out of the value of the dower and annuity which were not released for the benefit and security of his mortgage, but alone for the benefit and security of the second mortgage. He lost his priority by his own negligence or default. Had the mortgagor of the second mortgage paid it off at maturity can it be doubted that Rosanna Gray would have been entitled to insist on being restored to her original position with reference to her dower and annuity leaving the Coughlin mortgage to stand against the interest of Richard and John Gray in the land, as it was conveyed by them in that mortgage? Or had Rosanna Gray, instead of her dower and annuity, included in the mortgage a piece of her own land and the mortgaged premises had been sold *en bloc* could Coughlin have claimed the surplus without accounting for the value of the land belonging to her? Or supposing the land had not been sold *en bloc*, but had been sold in parcels and the first parcel sold was the land mentioned in both mortgages and that brought sufficient to pay the mortgage having priority, could Coughlin have insisted that the parcel of land belonging to Rosanna Gray should be sold for the purpose of being applied in payment of his mortgage? I should certainly think not. Surely the property primarily liable to pay the mortgage money is the property of the borrower, not the property of the surety, when the mortgage on the property, having legal priority over all other securities, has paid the debt secured by it. I am at a loss to understand on what principle of law or equity the property of the surety can be sold to pay a mortgage second in pri-

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ority never pledged for its payment. When Coughlin advanced money on the mortgage from Richard and John Gray, he so advanced it on the land and on the land alone subject to the rights of dower and annuity of Rosanna Gray. Had he registered his mortgage and so obtained priority he could only have recovered his advance subject to such rights, but he lost that priority by neglecting to register his mortgage whereby the mortgage to MacLennan's testator gained the priority. Rosanna Gray having joined in the mortgage to MacLennan's testator with a view of adding her dower and annuity to the security of that mortgage and of that alone, why should the proceeds of her dower and annuity be taken to discharge the respondent's mortgage for payment of which such dower and annuity never were made responsible, and as against which the respondent would have had no claim if he had retained his priority, inasmuch as the mortgage was from Richard and John Gray on their interest only in the land subject to those charges. I cannot see how having lost his priority he is in any better position to claim against the fund on which he could not have claimed if he had not so lost his priority. His mortgage interest has not produced the fund in court. I think it will be anything but equitable to allow this surplus to be applied in payment of the mortgage which never covered either Rosanna Gray's dower or her annuity. The prior existing mortgage to Coughlin is postponed to MacLennan's and is not defeated by allowing Mrs. Gray's claim but by reason of the lost priority and because Coughlin, under his mortgage, never had any claim in the dower and annuity, and because Rosanna Gray only released her interest in the land for the purpose of the mortgage to MacLennan, not for the purpose of Coughlin's mortgage. Had the mortgagors paid off the

MacLennan mortgage there can, in my opinion, as I have said before, be no doubt that Mrs. Gray's interest would have reverted to her, and if the mortgage is paid off by means of the sale under the decree of the court, I cannot see why she is not equally entitled to say that the amount having been obtained by the sale of her interest she is equally entitled to the benefit of the amount which her interest realised. Inasmuch as her dower and annuity were solely given as security for the MacLennan mortgage why should they be made security for the Coughlin mortgage likewise?

As I have said I cannot see what the registry acts have to do with this case beyond giving the second mortgage priority over the first, nor can I see why Rosanna Gray's knowledge that the first was in existence before the second was given can be in any way used to increase the security of the first mortgage, nor in any way make her charges on the property given as security for the second available to make good the deficiency on the first. Richard and John Gray never having had any right to or claim on such charges, and the same having been given simply as security for the second mortgage alone, to take Rosanna Gray's dower and annuity or the proceeds thereof to satisfy the first mortgage to which she was no party and in which she was in no way interested and in which she absolutely refused to join, would be, in my opinion, most unjust and inequitable. I therefore cannot see that as surety Rosanna Gray was not entitled after payment of the second mortgage to any surplus that might arise from the sale of the land free from her dower and annuity, that is to say, the value thereof established by the Chancellor, namely $1,525, nor can I discover that Rosanna Gray claims in any way under the registry acts but simply under the general principle of equity that her property shall not be applied to the payment of

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an indebtedness and liability she never incurred and which she expressly refused to incur, simply because the first mortgagee had lost his priority either willingly or by negligence. The registry laws placed the Maclennan mortgage in a better position than the Coughlin mortgage, but why should that operate to give Coughlin a right to take the proceeds of Mrs. Gray's property to pay his mortgage? Under such priority thus obtained over the Coughlin mortgage MacLennan was entitled to be paid out of the fund in court representing the mortgagor's property in priority to Coughlin, leaving the part which represents the property of Rosanna Gray to be appropriated to her and not to Coughlin. It is said, in that case, that Coughlin would be entirely cut out; be it so, but by whose fault but his own. In other words, I do not think that Coughlin having lost his priority in the mortgaged premises secured to him there is any equity in allowing him now to recoup himself out of the fund produced by the property of the surety to another mortgage in which property he, Coughlin, has no interest, and on which he had no claim. The practical operation of the judgment of the appellate court is to remove the Coughlin mortgage from the property of his mortgagors and place it on the property of Rosanna Gray which was never mortgaged to him.

Under these circumstances I think the appeal should be allowed and the judgment of the Chancellor restored.

STRONG J.—The facts which have given rise to this litigation are few and simple and are not disputed. Charles Gray died in 1874, leaving his widow Rosanna Gray, the present appellant, and his two sons, Richard and Charles Gray. By his will he devised the lands which are the subjects of the mortgages to be hereinafter mentioned to his sons Richard and Charles sub-

ject to an annuity of $150 to his wife charged on the same lands. This annuity was not in lieu of dower. On the first of March, 1879, Richard and Charles Gray mortgaged the lands devised to them by their father to the respondent Cornelius Coughlin to secure $700 and interest. The appellant was not a party to this mortgage, having refused to join in it. The mortgage was not registered until the 2nd of January, 1880. On the 1st of November, 1879, Richard and Charles Gray made a second mortgage of the same lands to Donald MacLennan, who was the original plaintiff in this action, the present plaintiffs being his executors by whom the action was revived This second mortgage was to secure $4,000 and interest. To this latter mortgage the appellant was a party, and she thereby released all her right, title and interest as doweress and as annuitant for the purpose of the mortgage; in other words, she mortgaged her dower and her annuity as a surety for the benefit of her sons, the mortgagors. The mortgage deed contained a clause expressly making these interests of the appellant thus mortgaged by her as a surety for her sons subject to the proviso for redemption. This mortgage to MacLennan was registered on the 27th of November, 1879, and it is not disputed that MacLennan the mortgagee had no notice of the prior mortgage to Coughlin which, as before stated, remained unregistered until the 2nd January, 1880. Mrs. Gray had notice of Coughlin's mortgage when she executed the mortgage to MacLennan.

The money not having been paid according to the tenor of the mortgage MacLennan brought this action for a foreclosure or sale of the mortgaged property. The sale realised sufficient to pay off MacLennan's mortgage, and after doing so there remained a residue of the purchase money produced by the sale amounting to $1,612. In the master's office a

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contention arose between the appellant, the respondent and one Allan, an incumbrancer subsequent to Coughlin, who is not a party to this appeal, regarding the application of this money. The appellant insisted that she was entitled first to be paid out of the fund (so far as it was adequate for that purpose) the equivalent in value of her annuity and dower, whilst the respondent on the other hand insisted that he was entitled to be paid the amount secured by his mortgage in priority to the appellant. The master by his report found that Mrs. Gray was entitled to priority and to be paid $388 as the value of her dower and $1,650 as the value of the annuity.

It was further contended that there was a merger to the extent of a moiety of the annuity by reason of Richard Gray having, on the 4th of August, 1881, conveyed his undivided one half in the equity of redemption in the mortgaged lands to his mother the appellant. The master finding that there was no merger rejected this last mentioned claim. This report of the master was, on appeal, confirmed by the learned Chancellor of Ontario, with the exception that there was a variation of the report by a deduction from the arrears of the annuity, which resulted in the reduction of the aggregate amount due in respect of both the annuity and the dower to the sum of $1,525.

From this judgment of the Chancellor there was an appeal to the Court of Appeal, by which court the judgment of the Chancellor was reversed, and it was adjudged that the respondent Coughlin was, in respect of his mortgage, entitled to priority over the appellant and had therefore a right to be first paid out of the balance of purchase money remaining in court. From this latter judgment the present appeal has been brought.

It is to be remarked that the effect of the judgment

of the Court of Appeal is to make the property of the appellant Mrs. Gray, who mortgaged her dower and her annuity together with the charge by which it was secured as surety for her sons to secure the payment of $4,000 to MacLennan, liable not merely for the debt which she contracted to secure but also for a debt due to the respondent Coughlin for which she had expressly refused to charge these same interests.

The question which we have to decide is, then, whether she is, upon MacLennan being paid off, entitled to her dower and annuity, or, which is the same thing, to the money which represents them; or are these interests to be sequestrated for the benefit of Coughlin to whom she never in any manner agreed that they should be liable.

The first thing which strikes one is the result of the judgment appealed against, which has the effect of charging the appellant's property with a debt which she never contracted or even contemplated it should be charged with, and that too in the absence of any positive act apart from contract or any omission or failure of duty on her part creating any obligation binding her towards the respondent. The only possible way in which in any event it could even have been plausibly argued that Coughlin's debt could be made a lien on Mrs. Gray's interest as doweress and annuitant would have been that it might have been pretended that if the decree had been for a strict foreclosure instead of a sale Coughlin might have entitled himself to some equity through the dry technical rules which, in the interest of a paramount mortgagee, have sometimes to be applied in working out a decree for redemption by successive incumbrancers, which occasionally operates prejudicially to those interested in a portion only of the equity of redemption. As I shall endeavor to show,

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however, no argument of this kind can prevail; first, because here there are no successive redemptions but the property having been realised and turned into money by a sale no provisions for successive redemptions have been requisite; and secondly because, even if instead of a sale there had been a judgment for foreclosure, thus obliging each successive incumbrancer to redeem or be foreclosed, Mrs. Gray could not have been prejudiced by the adoption of that mode of proceeding. It is true, as I have said, that where in foreclosure actions there were successive incumbrances the rules of courts of equity relating to tacking and consolidation sometimes operated oppressively, and that one of the reasons for substituting the remedy of sale for foreclosure was that some harsh consequences might be avoided, but I do not think that any such rules would have entitled the respondent to the relief he has obtained by the judgment under appeal. It is quite sufficient, however, for the disposition of the appeal to consider the rights of the parties in the event which has happened of the mortgaged property and interests having been converted into money by a sale, thus dispensing with any process of redemption, and only requiring the adjustment according to equitable principles of their rights to payment out of the fund thus produced remaining in the hands of the court.

I will then put a case which is distinguishable as regards its influence on the rights of Mrs. Gray from that which we have actually to deal with. Supposing instead of this property having been all sold, including that belonging to the appellant as well as the lands which the mortgagors had mortgaged, the mortgagors had out of their own moneys paid off MacLennan, the mortgagee, and he had sought the direction of the court as to how he was to dispose of the dower and annuity mortgaged by the appellant as a surety for

her sons, could it for a moment have been pretended that he would have been directed to convey and assign these interests to Coughlin? On what ground could any claim by Coughlin to make these interests a security for the money advanced by him have been based? Not, certainly, on any engagement by way of contract or agreement for the appellant had expressly refused to charge her property for his benefit; and if not in that way, upon what other principle could such a liability have been imposed? There can be no doubt but that in such a case Mrs. Gray would have been held entitled to a re-conveyance of her dower and to a re-assignment of her annuity. Then let us go a step further and suppose that MacLennan, in exercise of a power of sale which might have been contained in his mortgage, had sold the land subject to Mrs. Gray's interests, thus leaving her dower and annuity intact, and out of the proceeds of such a sale had paid himself off, what reason would there be in such a case for any difference between this case and that first put? None that I can discern, and none I am sure which any amount of fertile ingenuity could suggest. The like consequences must have followed and Mrs. Gray would have been entitled to be reinstated in her property and rights. Then take another hypothetical case; if MacLennan had sold all which had been mortgaged to him, viz. the lands free from the incumbrances of the dower and the annuity, so that these latter subjects of the mortgage would have been included in the sale, and had then paid himself out of the proceeds, why should the result as regards Mrs Gray differ in this case from those before put? The mere accident of the sale could not alter her rights and the residue of the purchase money remaining, so far as it might be adequate and to the extent of a full indemnity to her, would in that case also and on the same principle as

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in the cases first and secondly supposed have belonged to her absolutely. Then what difference as regards the rights and equities of the appellant can there possibly be between the last case and that which has in fact happened, of a sale by the court instead of by the mortgagee under a power? I venture to think that the most acute lawyer could not suggest a difference in principle between this series of cases beginning with the supposed case of a payment by the mortgagors and ending with the case actually before us. For the reasons thus made apparent, viz., that Coughlin, never having had or contracted for any charge or lien upon the appellant's property, is not entitled now, since they have been converted into money, to derive an advantage for which he could have shown no title while they existed in specie, I am of opinion that the Chancellor's judgment was entirely right and must be restored.

I am also of opinion, although it is not necessary to decide the point, that the rights of the appellant would have been precisely the same under a decree for foreclosure providing for successive redemptions. In considering this it is important to bear in mind that the question is not whether the respondent is to suffer any prejudice or loss through the appellant, but whether or not he is to obtain any adventitious addition to his security by extending, to the prejudice of the appellant, the lien of his mortgage to the appellant's property; if he fails in this he will lose nothing which he ever stipulated for; if he succeeds he will gain that which he never contracted for, or even contemplated the acquisition of. Any accidental advantage which might have been derived by the respondent in the way of getting the appellant's property as an additional security for his debt could only, therefore, have arisen, not from any rights or equities which the respondent

originally had against the appellant, but solely as a consequence of the paramount equitable right of the first mortgagee, MacLennan, to be redeemed entirely and not piece-meal. For this reason Mrs. Gray could not have had the security apportioned and have redeemed her dower and annuity by paying a proportionate part of the mortgage money. If the decree had been for foreclosure the first question in framing it would have been that as to who had the prior right to redeem, Mrs. Gray or Coughlin. Now, upon the 27th November, 1879, when the plaintiff, MacLennan, registered his mortgage the effect of that registration was to postpone Coughlin's mortgage, made on the 1st March, 1879, but not registered until the 2nd January, 1880, to MacLennan's mortgage ; the parties were, therefore, just in the same position from that date as if MacLennan's mortgage had been made first and Coughlin's mortgage had been made subsequently to it. They were to all intents and purposes first and second mortgagees from the date of registration on the 27th November, 1879. Then nothing can be clearer than that Mrs. Gray was a surety for her sons, and that MacLennan, from the very form of his security, knew this. It follows that Mrs. Gray was entitled from the first to be subrogated to all securities held by the creditor, the first mortgagee, on payment by her of the latter. Then according to the latest authorities this right of subrogation entitled her, not only to the securities held by the creditor when she originally became surety, but also to all securities and incidental advantages obtained by him after the appellant's liability as a surety arose. This was at one time supposed to be otherwise and the case of *Newton* v. *Chorlton* (1), was thought to have settled the law the other way. That case has, however, been overruled, the learned judge who decided it, V. C.

(1) 10 Hare 646.

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Wood, having subsequently considered that his decision was erroneous. *Pledge* v. *Buss* (1); *Pearl* v. *Deacon* (2); *Forbes* v. *Jackson* (3). To apply the rule to the facts of the present case it would therefore have been originally the right of Mrs. Gray to have had, upon payment to MacLennan of the amount of his mortgage debt, a transfer of his mortgage; and when MacLennan has gained by prior registration priority for his security over Coughlin that advantage would also have enured to the benefit of Mrs. Gray as a surety on her redeeming MacLennan. In that case she would have been entitled, as the law has now been settled by statute, not merely to be subrogated by decree to MacLennan's right and thus to stand in his shoes, but to have an actual transfer of his securities with the benefit of all priorities attached thereto, unless, for some good reason founded on equitable principles, she had disentitled herself to this *primâ facie* equity of a surety. No such reason for depriving the appellant of her ordinary equitable right as a surety could be suggested, except that which has been referred to in the court below that she had notice of the respondent's mortgage. That she had such notice is no doubt an established fact, but it is one totally irrelevant to the question of the right of priority of redemption between Mrs. Gray and the respondent. If anything can be well settled it is, that one who for valuable consideration acquires title from a purchaser or mortgagee, who has himself gained priority under the registry laws over a former unregistered deed or mortgage, is entitled to the benefit of the priority so acquired, even though such sub-purchaser or mortgagee may himself have had notice; in such case he is entitled to shelter himself under the valid preferable title of his own immediate grantor.

(1) Johns 663.
(2) 24 Beav. 186.
(3) 19 Ch. D. 615.

So that if A. takes a mortgage and does not register and then B. takes a mortgage of the same lands and acquires priority over A. by registering without notice, C., obtaining for valuable consideration an assignment of B's mortgage, though with notice of A's prior mortgage, is nevertheless entitled to the benefit of the priority acquired by his assignor B. Nothing can be better established than this, the principle being the same as that which always applied in equity to the case of a purchaser with notice from a *bonâ fide* purchaser for value without notice. Therefore Mrs. Gray would not in any manner be deprived of her right of subrogation by the fact that she had notice of the respondent's mortgage. Then in the case of Mrs. Gray paying off MacLennan, her own property, the dower and annuity, would have been revested in her and she would have been entitled to call on Coughlin to redeem the lands subject to the dower and annuity on payment of the full amount of the mortgage money, or stand foreclosed. In the event of the appellant not voluntarily paying off MacLennan, and a decree for foreclosure being drawn up by way of carrying out the same principle as that just referred to, the prior right of redeeming MacLennan would have been given to Mrs. Gray and the respondent in turn would have been directed to redeem her as to the lands only subject to the dower and annuity upon payment of the whole principal and interest paid to MacLennan; for she, being a surety, would retain in her own hands her own property mortgaged as such, and Coughlin would not have been entitled to redeem anything more than the lands belonging to the principal mortgagors; in other words, in the technical language of conveyancers, the suretyship securities, namely, the dower and annuity, would be "at home" in Mrs.

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Gray's hands, and the decree would have directed that in the event of Coughlin not redeeming the lands by paying off the full amount of the mortgage debt and interest he should stand foreclosed.

The foregoing conclusion results from the cases of *Forbes* v. *Jackson* (1) and *re Kirkwood* (2), which, following *Bowker* v. *Bull* (3), have overruled the earlier cases of *Williams* v. *Owen* (4) and *Farebrother* v. *Wodehouse* (5). To put it shortly, the equity of a surety to be subrogated to the rights of a mortgagee is a better equity and takes precedence of the right of a subsequent mortgagee to redeem. Here, by the effect of the prior registration by MacLennan of his mortgage, Coughlin became, in respect of his unregistered mortgage, a subsequent incumbrancer, just as he would have been had his mortgage not been executed until after the 27th of November, 1879, the day on which MacLennan's mortgage was registered. It is no answer to this to say that the registry laws gave Coughlin any advantage over Mrs. Gray by cutting out her equity to subrogation, when on the 2nd of March, 1880, he registered his mortgage; and this, for more than one reason; in the first place, Mrs. Gray acquired the right to subrogation under the mortgage to MacLennan, which, on its face, showed she was a surety, and which was registered previously to Coughlin's; then Coughlin had notice, by reason of the prior registration of this mortgage to MacLennan, when he himself registered, of all rights accruing under that instrument, for I hold that under the registry law of Ontario (now R.S.O., cap. 114, sec. 80), registration is conclusive and not merely presumptive notice to all subsequent purchasers and incumbrancers, and by a provision embodied in sec. 82 of

(1) Ubi sup.
(2) L.R. Ir. 1 Eq. 108.
(3) 1 Sim. N. S. 29.
(4) 13 Sim. 597.
(5) 23 Beav. 28.

the same act, not to be found in either the Middlesex or Yorkshire or Irish registry laws, (1), but peculiar to the Ontario Act, notice of a prior unregistered deed or equity, after the execution of a conveyance or mortgage, but before registration, is sufficient to postpone the party claiming under it. But the conclusive answer to any contention that the Registry laws operated in favor of Coughlin to counteract Mrs. Gray's right of priority, is that Coughlin had nothing to do with the dower and the charge for the annuity and never registered anything against those interests which were not comprised in his mortgage, and as they were, of course, distinct properties from the lands out of which they were derived, just as if they had been other lands owned by Mrs. Gray in fee, it is plain that on this ground alone, no advantage under the registry laws could have accrued to Coughlin as a subsequent registered mortgagee even if it should be considered that he had no notice of Mrs. Gray's equity, for he was not in fact a subsequent registered mortgagee at all in respect of the dower and the annuity. The right to subrogation as regards the lands mortgaged by Richard and Charles Gray is clear and in respect of them Mrs. Gray was entitled to be substituted for MacLennan together with all his right of priority as regards them, and for the reasons before given, notice to her of the respondent's mortgage could make no difference.

I have thus discussed the questions which would have arisen had the judgment directed a foreclosure and successive redemptions according to the old practice in chancery instead of a sale, not because the rights of the parties can depend upon such considerations, but rather by way of testing the correctness of the conclusion to which I have come upon the case as it is actually presented. For these reasons, I am of opinion

(1) *Elsey* v. *Lutyens*, 8 Hare 159.

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that even in the case of a strict foreclosure Mrs. Gray would have been entitled to priority in the case before us in which there are no complications or difficulties arising out of directions for successive redemptions but where the property as well that of the mortgagors as that of the surety, mortgaged on their behalf, has been all converted into money, and the mortgage debt having been paid out of the proceeds the only question which remains is as to the right of the surety to take the money representing in value her own property (or as much of it as remains for her to take) a right which I fail to see any one is entitled to interfere with.

Certainly, it would have been a strange result if by obtaining priority over the appellant the respondent could have indemnified himself from the result of his own negligence in not registering his mortgage, out of the property of the appellant, who neither by contract nor by any wrongful act or omission had in any way subjected it to the charge of the respondent's debt.

As regards the question of merger, the law now depends on the statute of Ontario which provides that there shall be no merger in such a case as the present, thus settling the law in the way the learned chancellor has indicated, and this is sufficient for the present purpose, without entering upon any consideration of the old authorities prior to the statute.

The appeal should be allowed and the chancellor's judgment restored with costs to the appellant both here and in the Court of Appeal.

FOURNIER, J.—I concur in the reasons given by the Chief Justice for allowing the appeal and restoring the chancellor's judgment.

GWYNNE J.—Charles Gray died in 1874, seised in

fee of certain lands which by his will he devised to his two sons Richard and John as tenants in common in fee, subject to the payment of his debts and legacies among which latter was a bequest of $150 to be paid yearly to his wife Rosanna during her life, and this bequest was not stated in the will to be in bar of her dower. In March, 1879, Richard and John Gray mortgaged the said land with the knowledge of Rosanna to the respondent Coughlin, to secure the repayment of $700 advanced by Coughlin to them, of which sum $150 at least was applied in payment of certain debts of the testator Charles. Rosanna did not bar her dower on this mortgage nor did she release her claim to the legacy of $150 per annum. In October, 1879, a quit claim deed was executed to Richard and John by the other legatees except Rosanna. In November, 1879, Richard and John Gray being desirous of borrowing a further sum of $4,000 upon a mortgage of the lands procured their mother Rosanna, in order to enable them so to do, to agree to release both her claim for dower and for the legacy. This was effected by a mortgage executed by Richard and John to one MacLennan to which Rosanna was made a party of the second part. She thereby released, demised and for ever quitted claim unto the said MacLennan his heirs and assigns, all her interest, &c., both at law and in equity so that MacLennan his heirs and assigns should hold the land for ever exonerated and discharged from all claims and demands whatsoever of the said Rosanna thereupon.

At the time of the execution of this mortgage Coughlin's mortgage had not been registered he having, at the request of the mortgagors Richard and John, abstained from registering it, but the legal estate in the land was nevertheless vested in him and upon the execution of the mortgage to MacLennan Coughlin's

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estate had precedence and was in fact then the first charge on the land; this precedence, however, he lost, but in the interest of MacLennan alone, by reason of MacLennan having placed his mortgage first on the registry whereby MacLennan acquired a statutory precedence over Coughlin. On the 4th August 1888 Richard Gray executed a deed of bargain and sale whereby he conveyed his undivided share in the said land to Rosanna in fee; this deed was put upon the registry on the same 4th of August. Rosanna now says that she was not a party to this conveyance; it appears, however, that subsequently to the execution of that deed she and John leased the premises to a tenant who occupied the land thereunder paying rent for some years and she must therefore be regarded as having been, since the execution of the deed by Richard to her, seized of the land as tenant in common with John of the equity of redemption in fee in the mortgaged lands. That is the position which she held when MacLennan instituted the suit for foreclosure or sale of the mortgaged lands to which suit, as such tenant in common in fee of the equity of redemption, she was made a necessary party. Upon a sale of the lands under a decree in that suit a sum has been realised which leaves a surplus above what is required to pay MacLennan's mortgage debt, and Rosanna's claim now is that although the lands were released, exonerated and discharged from her claims for dower and the annuity, yet that the money realised from the sale of the lands so released, exonerated and discharged remaining after payment of MacLennan's mortgage is not to be applied in discharge of the mortgage debt of Coughlin which was a charge upon the land and the estate in the equity of redemption therein of which Rosanna was herself seised as tenant in common with John, but is to be applied first in satisfaction of her original claim for both dower and annuity

as if she had never executed a release of the land from these claims, and thus that Coughlin's mortgage, the loan raised upon which was in part at least applied in payment of the testator's debts which had precedence of Rosanna's annuity, shall be postponed to her right of dower and annuity and so rendered worthless. This demand, in my opinion, has been rested wholly upon a fallacy, namely, that when Rosanna executed the release contained in the mortgage to MacLennan the effect was that she mortgaged what is called an estate which she had in the land as doweress and annuitant to MacLennan as collateral security and as surety merely for Richard and John. It is unnecessary, in my opinion, to inquire what her rights might have been upon the surplus if such had been the nature and effect of the transaction but there is no foundation, in my opinion, in law or equity for the contention that it was.

She had no estate in the land as doweress for dower had not been assigned to her. She had no estate either as annuitant. All that she had was a claim to have an estate in dower assigned to her and her annuity secured. These were claims from which she could have released the lands and in the interest of her sons Richard and John she released both her claims and the lands from liability therefor to MacLennan, his heirs and assigns, and such release operated, in my opinion, under the circumstances in which it was executed, by her, with full knowledge of the mortgage to MacLennan being a second mortgage, just as if she had released to Richard and John to enable them to execute and that thereupon they had executed the mortgage to MacLennan. The effect in reality was to release, exonerate and discharge the land both at law and in equity from these claims of Rosanna so that Richard and John might mortgage the lands freed therefrom as their own absolute estate and as MacLennan's mort-

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gage obtained only a statutory precedence over Coughlin's, upon MacLennan being satisfied out of the proceeds of the sale, Coughlin is entitled to come upon the surplus in preference to Rosanna who had no claim upon the land mortgaged, but as tenant in common with John of the equity of redemption therein and as such only after satisfaction of Coughlin's mortgage. The appeal therefore, in my opinion, should be dismissed with costs.

PATTERSON J.—Under the judgment appealed from the appellant is exactly in the position which she knowingly and intentionally assumed. She was aware that her sons had made a mortgage to Coughlin. She had refused to be a party to it for the purpose of releasing her dower or postponing the charge for her annuity. Then when the sons borrowed money from MacLellan on a second mortgage she joined in that deed and released her charges for the dower and the annuity. The land has now been sold under the mortgages for $7,500. The money is not enough to pay both mortgages in full and also to pay the full value of the annuity and the dower. It will pay her a part but not the whole. She must lose a part, but that is the risk she voluntarily undertook when she joined in the second mortgage. It would be a matter of some surprise to find that anything has happened to improve her position at the expense of either of the mortgagees. What has happened is that the first mortgage was left unregistered and the second was registered, whereby the first mortgage, of which the second mortgagee had not been informed but which the appellant knew all about, became liable to be adjudged fraudulent and void against the second mortgagee, and he became entitled to rank as first incumbrancer on the fund produced by the sale. The appellant insists that the

neglect to register the first mortgage enures to her benefit, and gives her an equity to take all the money that remains after satisfying the second mortgage and to let the first mortgage go wholly unpaid. No rule of equity could make her claim a just one, and I do not take it to be supported by any rule that has been appealed to.

There was plausibility in the contention that the appellant's relation to the second mortgage was that of surety, and that she was entitled to benefit by the advantage which accrued to the second mortgagee from the non-registration of the first mortgage.

That contention has been, in my opinion, effectually answered in the Court of Appeal. I shall add only a few observations which may, perhaps, be little more than a repetition in another way of the same ideas.

I do not say that the appellant may not properly be regarded as a surety, and I do not affirm that under the circumstances that was her true position. I assume, for the sake of argument, that she was a surety.

The first mortgage was not void as against her, and I know of no principle of equity on which she could insist on the second mortgagee asserting against the first the priority which his want of notice of the first mortgage entitled him to assert. The rules which in some cases enable one who has notice of an incumbrance or defect of title to acquire a good title by purchasing from one who took without such notice have no application to a case of this kind. Nor is it the case of a person who joins in a mortgage as surety under the belief that it is a first mortgage. The agreement, as far as the appellant was concerned, was that a second mortgage should be given embracing the land freed from the charges in her favor. That was the instrument to which she became a party. MacLennan,

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whose right under the Registry Act was to have Coughlin's mortgage adjudged fraudulent and void, was at liberty to waive such adjudication and let it retain its priority. He would have disobeyed no law, and would have done nothing of which the appellant could properly complain, by redeeming it as the first incumbrance ; and seeing that he would have had no choice in the matter but would have been obliged to redeem it if he had taken his mortgage with the knowledge which the appellant had when she joined in making it, her claim is, to my apprehension, a perversion of equity.

I am of opinion that the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

Appeal allowed with costs.

Solicitors for appellants : *Kingsford & Evans.*

Solicitor for respondent : *Henry J. Scott.*