

ceived a mortgage of only his mortgagors' interest is, by virtue of the Registry Act, enabled to plant his mortgage also on Coughlin's interest; but Coughlin's mortgage, though postponed by force of the Registry Act to that of Macleannan, is nevertheless perfectly valid and binding as against the mortgagors. Can the fund in court then be said to represent Macleannan's mortgagors' interest? And if the fund in court did not really represent the interest of Macleannan's mortgagors, but that interest plus the interest previously mortgaged to Coughlin, then may it not be argued that an equity arises in Coughlin's favor to the extent to which his fund has been applied to pay off Macleannan's debt to rank on the surplus, as will more fully appear as we proceed?

With the learned and elaborate judgment of Mr. Justice Strong, in which the principles of equity applicable to the case are so clearly and fully stated, it is almost impossible to find fault. There is one aspect of the case, however, which neither he nor the Chief Justice appear to us to have noticed; possibly there is nothing in it, and yet it is one that seems to us to afford some ground for the contention of Coughlin.

One of the crucial tests which the learned judge applies to the case is this: Supposing Rosanna had redeemed Macleannan, on what terms would Coughlin be permitted to redeem her? and he says that he would only have the right to redeem the mortgaged property belonging to the principal mortgagors; in other words, in the technical language of conveyancers, the suretyship securities—namely, the dower—would be “at home” in the hands of Rosanna and would therefore be irredeemable by Coughlin, and unless he redeemed by paying off the full amount of Macleannan's debt and interest he would be liable to be foreclosed.

The point, however, which we should like to present in Coughlin's favor is this: This is a case of conflicting equities; on the one hand, Coughlin as a subsequent incumbrancer is entitled, as against Macleannan, to have the securities held by him marshalled; on the other hand, are the equitable rights of the surety. Macleannan is entitled to two funds: the fund mortgaged by the mortgagors and that mortgaged by the surety, Rosanna. He ought not to be allowed to throw the whole of his debt on the former fund to the prejudice of Coughlin. It is, however, conceded that the right of marshalling cannot be allowed to the prejudice of third parties, and it cannot be allowed, therefore, to the prejudice of a surety. But what are the equitable rights of a surety in such a case? Do they extend beyond the right of having the property of his principal applied first towards the payment of the debt for which he is surety? Has he any equity to have any third person's property applied? May not Coughlin be heard to say: “At the time you entered into the contract of suretyship, you knew that all the beneficial interest your principal had in the property mortgaged was subject to my mortgage. By the operation of the Registry Act, Macleannan, it is true, has acquired priority over me, and by that means has been enabled to apply not only the property of his mortgagors, but my property, in payment of his debt. You have an equity, it is true, to have your principal's property applied in discharge of his debt, but as between you and me you have no equity to