

## CONSOLIDATION OF MORTGAGES.

given as security, but also other moneys due the mortgagee in respect of costs, charges or expenses incurred by him respecting the security, or in making necessary permanent improvements on the mortgaged property, or in protecting his security by the redemption of prior charges, or otherwise. As against the heir or beneficial devisee of a deceased mortgagor, the mortgagee would seem also to be entitled to tack to his mortgage debt, any judgment, specialty or even simple contract debt, due to him from the deceased mortgagor: (*McLaren v. Fraser*, 17 Gr. 533; *Re Haselfoot's Estate*, 13 Eq. 327, Cote 810.) But this right cannot be insisted on to the prejudice of other creditors; and this right to tack debts which are not a lien on the land can only be enforced as against the representatives of a deceased mortgagor who died entitled to the equity of redemption; as between mortgagee and mortgagor themselves there is no such right: (*Ferguson v. Frontenac*, 21 Gr. 188.)

Formerly, a subsequent encumbrancer, without notice of a prior encumbrance at the time of making his advance, might have cut out such prior encumbrance by acquiring the legal estate, or the best right to call for it. To this legal title he might tack his subsequent encumbrance, and resting on the principle that where the equities are equal the law must prevail, might therefore gain priority over the *mesne* encumbrance. This latter right, however, is now, as regards registered encumbrances, virtually abolished in Ontario by the Registry Act, R. S. O. c. 111, s. 81; but except in so far as the right of tacking conflicts with the provisions of the Registry Act it may still be enforced as formerly.

The right of consolidation, on the other hand, is an equity which a mortgagee, holding two or more mortgages made by the same mortgagor on different estates, has to insist that any party coming to redeem, shall not be permitted to redeem any of the mortgaged estates without redeeming all. This right of consolidation, notwithstanding what is said

in *The Dominion S. & I. Society v. Kittridge*, 23 Gr. 631, to the contrary, is one that is within the provisions of the Registry Act, s. 81, and cannot, therefore, be insisted on as against an assignee of the equity of redemption claiming under a registered deed without actual notice: (*Brower v. Canada Perm. L. & S. Co.*, 24 Gr. 509; *Johnston v. Reid*, 29 Gr. 293; *Miller v. Brown*, 19 C. L. J. 54.) In *Miller v. Brown*, also, Proudfoot, J., held R. S. O. c. 111, s. 81, to be retrospective in its operation.

It is a right, also, which is subject to certain other limitations and exceptions. Thus where one of the mortgaged estates (*e.g.*, a leasehold, or estate for life), has ceased to exist, there is no longer any right to consolidate a debt thereby secured, with any other mortgage debt: (*Re Raggett*, 44 L. T. N. S. 4; 50 L. J. Chy. 187). Neither can a mortgage of realty be consolidated with a mortgage of chattels, so as to throw the debt secured by the former on the latter, as that would be an invasion of the Bills of Sale Act, R. S. O. c. 119: (*Chesworth v. Hunt*, 5 C. P. D. 266; 42 L. T. N. S. 774; 49 L. J. C. P. 507). Neither is consolidation allowed where prior to the creation of the second mortgage, or prior to the two mortgages coalescing in one hand, the mortgagor had assigned his equity of redemption in one of the properties: (*Mills v. Jennings*, 13 Ch. D. 639, which afterwards came before the House of Lords under the title of *Jennings v. Jordan*, L. R. 6 App. C. 698; 45 L. T. N. S. 593; *Harter v. Coleman*, 19 Ch. D. 630; 46 L. T. N. S. 154; 51 L. J. Ch. 481).

At one time it was held that an assignee of an equity of redemption took, subject not only to the equities of the mortgagee then subsisting, but also to the potential right of the mortgagee to consolidate the mortgage, of which the equity of redemption was assigned, with any other mortgages made by the same mortgagor, which might at any time afterwards come into his hands; but this view of the law which was laid down in