

**THE HIGH COURT****2003 No. 131SP****BETWEEN****HIS HONOUR JUDGE ALAN P. MAHON, HER HONOUR JUDGE MARY FAHERTY AND HIS HONOUR JUDGE GERALD B. KEYS – MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS****PLAINTIFFS****AND****NOEL LAWLOR, ADMINISTRATOR AD LITEM OF THE ESTATE OF LIAM LAWLOR, DECEASED, AND HAZEL LAWLOR****DEFENDANTS****Judgment of Ms. Justice Laffoy delivered on the 30th day of July, 2008.****History of the proceedings**

1. These proceedings and five other similar proceedings (Record No. 2003 Nos. 132SP, 133SP, 134SP, 135SP and 136SP), which I will refer to as the related proceedings, were initiated by special summonses which issued on 24th March, 2003, which named the then Chairman of the Tribunal, the Honourable Mr. Justice Feargus M. Flood, for whom the current plaintiffs were substituted by order of this Court (Kearns J.) made on 12th January, 2004, as plaintiff and Liam Lawlor (Mr. Lawlor) as defendant. In each case the relief sought is a declaration that the monies secured by a judgment mortgage registered against Mr. Lawlor's interest in the lands registered on Folio 47924F and Folio 573 of the Register of Freeholders, County Dublin stand well charged on Mr. Lawlor's interest in the said lands. In each there follows a claim that payment of the monies be enforced "by sale of the lands and/or by the appointment of a Receiver and/or both by such sale and such appointment". The monies in question, which represent the costs awarded against Mr. Lawlor in litigation, aggregate €430,510.66 together with interest and comprise:-

(1) the sum of €47,454.00 together with interest from 26th October, 2000, secured by a judgment mortgage registered in the Land Registry on 29th July, 2002 (Record No. 2003/131SP);

(2) the sum of €78,846.23 together with interest thereon from 1st February, 2002, secured by a judgment mortgage registered in the Land Registry on 13th March, 2003 (Record No. 2003/132SP);

(3) the sum of €40,066.91 together with interest thereon from 24th November, 2002, secured by a judgment mortgage registered in the Land Registry on 29th July, 2002 (Record No. 2003/133SP);

(4) the sum of €54,522.69 together with interest thereon from 19th December, 2001, secured by a judgment mortgage registered in the Land Registry on 29th July, 2002 (Record No. 2003/134SP);

(5) the sum of €75,139.59 together with interest thereon from 31st July, 2001, secured by a judgment mortgage registered in the Land Registry on 29th July, 2002 (Record No. 2003/135SP); and;

(6) the sum of €134,481.24 together with interest thereon from 25th January, 2001, secured by a judgment mortgage registered in the Land Registry on 29th July, 2002 (Record No. 2003/136SP).

2. The proceedings were moribund for a number of years because another judgment creditor, Dermot Coyne, who had registered a judgment mortgage for €265,384.62 against the interest of Mr. Lawlor in the lands registered on both folios on 5th March, 2003, initiated proceedings by way of special summons against Mr. Lawlor in 2003 (Record No. 2003/259SP) (the Coyne proceedings). By order of this Court (Kearns J.) made on 24th November, 2003, as amended by order made by Kearns J. on 19th October, 2004, the sums secured by that judgment mortgage were declared well charged on the lands registered on both folios and the usual order for sale was made in the event of default by Mr. Lawlor in disputing the sum found due on the judgment mortgage and in paying the said sum within the time periods specified. Subsequently, on 29th March, 2004, these proceedings and the related proceedings were adjourned generally, because the primary order in the Coyne proceedings enured for the benefit of all encumbrancers of the lands.

3. Mr. Lawlor died on 22nd October, 2005. Representation has not been raised to his estate. The Court has been informed that the second defendant (Mrs. Lawlor) has always been a notice party to these proceedings and the five related proceedings, presumably in the sense that she was served with notice of the proceedings although not named as a notice party.

4. These proceedings and the five related proceedings were revived in mid-2007 in the following circumstances. By order dated the 21st February, 2007 in the Coyne proceedings the well charging order and order for sale dated 24th November, 2004 was discharged on the basis that the matter had been compromised. At that stage the plaintiffs sought to take carriage of the Coyne proceedings, but subsequently decided not to proceed with that course of action. Instead, by letter dated 18th July, 2007 to P. Delaney and Co., Solicitors, whom I assume had acted for Mr. Lawlor previously, which was copied to Mrs. Lawlor, it was stated that the plaintiffs had taken the decision to re-enter these proceedings and the five related proceedings "for legal reasons in order to protect the Tribunal's security", but it was intimated that the Tribunal did not intend to take any further steps to realise the debts and the matter would be reviewed in mid-2008. Notice to proceed in each of the proceedings was served on 19th July, 2007.

5. Mrs. Lawlor's response was a notice of motion seeking various alternative reliefs ranging from the dismissal of the proceedings for want of prosecution to a direction as to the trial of a preliminary point. By order dated 18th January, 2008, the Court (Laffoy J.), with her consent, ordered that Mrs. Lawlor be joined as a co-defendant in the proceedings. It was further ordered that Mrs. Lawlor be at liberty to issue and serve notice of motion in these proceedings seeking the determination of a point of law as a preliminary issue.

**This application**

6. On this application, which was issued on foot of the order of 18th January, 2008, Mrs. Lawlor seeks the determination of a point of law as a preliminary issue, namely, the determination of the status or effect of the registration of the judgment mortgages which are the subject of these proceedings and the related proceedings in respect of Folio 47924F and Folio 573 of the Register of Freeholders, County Dublin. She also seeks an order that the judgment mortgages "are void and/or are of no effect".

**Title to the lands**

7. The lands now registered on Folio 47924F, County Dublin were originally registered on Folio 573. On 14th November, 1977 Mr. Lawlor and Mrs. Lawlor were registered as full owners on Folio 573 with absolute title. They were deemed to be registered as joint tenants, there being no entry in the register to the effect that they were tenants in common in accordance with s. 91(2) of the Registration of Title Act, 1964 (the Act of 1964). Following the death of Mr. Lawlor, Mrs. Lawlor was registered as full owner on Folio

573 on 7th July, 2006. A note was entered on the Folio to the effect that the previous joint ownership entry had been altered. The judgment mortgage which is the subject of the proceedings Record No. 2003/136SP is the first of a number of judgment mortgages which have been registered as burdens against the folio.

8. Folio 47924F was opened in August, 1983, when the dwelling house, Somerton House, and surrounding land was transferred off Folio 573. On 30th August, 1983, Mr. Lawlor and Mrs. Lawlor were registered as full owners on Folio 47924F. They were deemed to be registered as joint tenants, there being no entry in the register to the effect that they were tenants in common in accordance with s. 91(2) of the Act of 1964. After the death of Mr. Lawlor, Mrs. Lawlor was registered as full owner on 7th July, 2006 and a note was entered on the Folio to the effect that the previous joint ownership had been altered. The judgment mortgage which is the subject of proceedings Record No. 2003/136SP is the first of a number of judgment mortgages registered as burdens on the folio following the registration of two charges as burdens. Somerton House was the family home of Mr. Lawlor and Mrs. Lawlor, but no issue arises on this application under the Family Home Protection Act, 1976.

9. On this application it was represented on behalf of Mrs. Lawlor that she was registered on both Folios as sole owner pursuant to s. 4(c) of the Succession Act, 1965 (the Act of 1965).

#### **Administrator *ad litem***

10. As I have stated, representation has not been raised to the estate of Mr. Lawlor. His brother, Noel Lawlor, agreed to act as administrator *ad litem* for the purposes of the hearing of the preliminary issue. With the consent of the plaintiffs and Mrs. Lawlor, I made an order pursuant to Order 15, Rule 37 of the Rules of the Superior Court, 1986, appointing Noel Lawlor to represent the estate of Mr. Lawlor for the purposes of the preliminary issue. Noel Lawlor appeared at the hearing of the preliminary issue and he was represented by a solicitor. However, no submissions were made on behalf of the estate of Mr. Lawlor.

#### **Agreed facts**

11. A statement of facts was submitted to the Court on the hearing of the preliminary issue on the basis that it was agreed by the parties except for a statement, which was disputed by counsel for the plaintiffs, that the joint tenancy of Mr. Lawlor and Mrs. Lawlor registered on the two folios had not been severed at the date of the death of Mr. Lawlor. Whether severance had occurred is a core issue to be decided by the Court.

12. There are two matters in the statement of facts to which I have not previously alluded, which I mention now merely for completeness.

13. The first records an averment in an affidavit sworn by Mr. Lawlor on 14th October, 2002, which was not put before the Court on the hearing of the preliminary issue, in the following terms:-

"In his Affidavit sworn on the 14th October, 2002 (2003?), the late Liam Lawlor made reference to a Deed of Gift dated 9th May, 1997, which purported to be an assurance of his interest in the premises comprised in the Folios to Hazel Lawlor. Hazel Lawlor was at all times unaware of this Deed, the original is missing, and was never delivered to Hazel Lawlor, and the parties accept that the same was ineffective".

14. The second is a statement that no monies were paid by Mr. Lawlor during his lifetime to the plaintiffs in respect of the sums secured by the judgment mortgages at issue in these proceedings.

#### **Positions adopted by the parties**

15. Counsel for Mrs. Lawlor, who is the moving party on the preliminary issue, contended that the registration of the judgment mortgages against the interest of Mr. Lawlor, who was one of two joint tenants of the freehold registered land against which the judgment mortgages were registered, did not sever the joint tenancy and that on the death of Mr. Lawlor, the joint tenancy not having been severed, Mrs. Lawlor became the sole owner of the lands by right of survivorship free from the judgment mortgages.

16. Counsel for the plaintiffs held the opposite view and submitted that the registration of the judgment mortgages against the interest of Mr. Lawlor did effect severance so that Mr. Lawlor there became the owner of an undivided interest (presumably a moiety) which was subject to the judgment mortgages and, on his death, that undivided interest became part of his estate and the judgment mortgages remained as encumbrances on the estate's interest in the lands.

17. No position was adopted by the administrator *ad litem* on behalf of the estate of Mr. Lawlor.

#### **Decisions in *Irwin v. Deasy***

18. In the two judgments in *Irwin v. Deasy* which have been reported, namely, the judgment of Finlay Geoghegan J. delivered on 1st March, 2004, reported at [2004] 4 I.R. 1, and my judgment delivered on 31st January, 2006, reported at [2006] 2 I.L.R.M. 226, the issue with which the Court was concerned was whether an order for sale in lieu of partition should be made in circumstances where -

- (a) the applicant was a judgment creditor,
- (b) the judgment mortgage affected the interest of one only of two joint tenants of the land and,
- (c) the land was freehold registered land.

19. Finlay Geoghegan J. in her judgment considered that it was not necessary to resolve the question as to whether the registration of the judgment mortgage operated to sever the joint tenancy. In my judgment, although I adverted to the lack of clarity as to whether the registration of the judgment mortgage against the interest of one of the joint owners of registered land severed the joint tenancy, I did not express a view on that issue.

20. In my judgment in *Irwin v. Deasy*, I reviewed the statute law on partition and sale of co-owned land, the judgment mortgage as a method of enforcement of a judgment against the land of a judgment debtor and the nature and consequences of the registration of a judgment mortgage against registered land under the statutory provisions now in force. I concluded that the Court did not have jurisdiction to make an order for sale in lieu of partition of registered land at the suit of a judgment creditor whose judgment mortgage was registered against the interest of one only of two or more joint owners because such a judgment creditor lacked standing to seek such an order. On the basis of that decision, even if the effect of the registration of the first judgment mortgage to be registered against the interest of Mr. Lawlor in the lands was to sever the joint tenancy, the Court would not have jurisdiction to order a sale of the lands in these proceedings. That decision is, however, under appeal to the Supreme Court.

21. While these proceedings are broadly similar to *Irwin v. Deasy*, there are some differences. First, in *Irwin v. Deasy*, Finlay Geoghegan J. made a "well-charging" declaration in favour of the plaintiff judgment creditor. In these proceedings no such order has yet been made in favour of the plaintiffs. However I consider that to be immaterial because a well-charging order was made in the *Coyne* proceedings. Secondly, in this case, the relief is being pursued after the death of the joint tenant against whose interest the judgment mortgage was registered. On the issue of severance, in my view, that difference is immaterial because that issue falls to be determined by reference to the effect of the registration of the judgment mortgage at the time of its registration. Finally, the relief sought in these proceedings is for "sale of the lands" *simpliciter*, not sale in lieu of partition. As was the case in *Irwin v. Deasy*, the endorsement of claim in these proceedings does not disclose the jurisdiction being invoked by the plaintiffs in seeking an order for sale, whether it is the Court's inherent jurisdiction or statutory jurisdiction.

22. The principles outlined in the judgments in *Irwin v. Deasy* are relevant to the overall determination of these proceedings, although the question of law for determination is not whether relief by way of sale in lieu of partition is available to a judgment creditor who has registered a judgment mortgage against one co-owner of registered land, but the narrower question as to whether the registration of such judgment mortgage effects severance where the co-owners are joint tenants. Even if the Court were to hold that it does, unless it is reversed on appeal, *Irwin v. Deasy* is authority for the proposition that the plaintiffs, as judgment creditors against registered land, have no standing to seek a sale of the lands.

### Severance?

23. As is pointed out in Wylie on *Irish Land Law* (3rd ed., Butterworths, 2000) at para. 7.22, in the context of co-ownership of land, severance means the conversion of a joint tenancy into a tenancy in common. There are two main ways of bringing about a severance either at law or in equity: by acquisition of some further interest in the property by one of the joint tenants; and by alienation of his interest in the property by one of the joint tenants, whether whole or partial. In essence, severance involves the destruction of one of the four unities essential for such form of co-ownership (Wylie, *op. cit.*, para 7.24). In the context of the registration of a judgment mortgage against the interest of one of two or more joint tenants, it seems to me, that in determining whether severance takes place, the kernel of the matter is whether the registration of the judgment mortgage by operation of law effects an involuntary alienation of the interest of the judgment debtor.

24. It is well settled that in the case of unregistered land the registration of a judgment mortgage against the interest of one joint tenant will sever the joint tenancy. It was established as long ago as 1881 in *McIlroy v. Edgar* (1881) 7 L.R. Ir. 521 that the registration of a judgment mortgage against the interest of one joint tenant in unregistered land will sever the joint tenancy, (per Lord O'Hagan C. at p. 524). In *Provincial Bank v. Tallon* [1938] I.R. 361, the decision in *McIlroy v. Edgar* was followed in relation to a leasehold interest in unregistered land (per Johnston J. at p. 365). More recently, in *Containercare Limited v. Wycherley* [1982] I.R. 143, which was also a case involving unregistered leasehold land, it was held that the registration of a judgment mortgage against the interest of one of two joint tenants severed the joint tenancy (per Carroll J. at p. 151).

25. In contrast to the situation which prevails in relation to unregistered land, no court has yet pronounced on whether the registration of a judgment mortgage against the interest of one of two or more joint tenants of registered land severs the joint tenancy. The preponderance of opinion on the part of text book writers and academics is that it does not, as the following examples illustrate:-

(1) In McAllister on *Registration of Title in Ireland* (Incorporated Council of Law Reporting for Ireland, 1973), the author, the former Registrar of Deeds and Titles, stated (at p. 210):-

"The registration of a judgment as a mortgage against the interest of a joint owner of unregistered land severs the joint tenancy: *McIlroy v. Edgar* ...; *Provincial Bank of Ireland v. Tallon* ...; but it is extremely doubtful if this would apply to registered land, as it would appear that the terms of s. 71(4) and 69(1) of the Act [of 1964] jointly operate to make a judgment mortgage on registered land a burden. As a charge does not, apparently, sever a joint ownership of unregistered land (see Challis: *Real Property*, 3rd ed., p. 367), such a burden would not likewise sever a joint ownership of registered land."

(2) In Fitzgerald on *Land Registry Practice* (2nd ed., The Round Hall Press, 1995), the author, also a former Registrar of Deeds and Title, stated (at p. 129):-

"From the cases reported in this matter a judgment mortgage against a joint tenant's interest in unregistered land severs the joint tenancy. The effect of the registration of judgment mortgage on the interest of an owner of registered lands as joint tenant with another or others does not appear to have been settled. The considered view would appear to be that the registration of a judgment mortgage does not effect a severance of the joint tenancy of registered land, being a burden merely. In practice, on the registration of such a judgment mortgage, therefore, no notice is entered on the register as to the effect thereof (if any) as regards severance."

26. The last sentence in that quotation is an oblique reference to s. 91(2) of the Act of 1964, to which I have already referred, which provides that, where two or more persons are registered as owners of the same land, they shall be deemed to be joint tenants unless there is an entry in the register to the effect that they are tenants in common. No doubt, if the Court were to decide in these proceedings that the effect of the registration of the first judgment mortgage against the interest of Mr. Lawlor was to sever the joint tenancy, a note would be entered in the registry recording that decision and the deeming provision of s. 91(2) would cease to have effect.

27. The next paragraph in Fitzgerald (at p. 130) deals with what happens on the death of a joint tenant and states:-

"On the registration of any transmission of ownership on death of any of the joint tenants where a judgment mortgage has been registered against the interest of some or one of them, applicant would be required to show title to the interest of the deceased joint tenant or tenants as if (1) the joint tenancy was severed; (2) the joint tenancy *was not* severed".

28. I find that statement difficult to understand. To take the position in relation to Folio 573, up to the death of Mr. Lawlor, Mr. Lawlor and Mrs. Lawlor were registered as full owners on the folio. There was no entry on the folio to the effect that they were tenants in common. Therefore, up to that time, by virtue of s. 91(2) they were deemed to be joint tenants. On the death of Mr. Lawlor, Mrs. Lawlor was registered as full owner. On the basis of the evidence before the Court, Mrs. Lawlor can not have shown title to the interest of Mr. Lawlor as if the joint tenancy had been severed, because representation has not been raised to the estate of Mr. Lawlor.

29. While on this point, I have already referred to the fact that it has been represented on behalf of Mrs. Lawlor that her registration

as sole owner was pursuant to s. 4(c) of the Act of 1965. Section 4 gives specific meanings to the expressions "real estate" and "estate or interest" for the purposes of the Act of 1965 and paragraph (c) thereof provides:-

"The estate or interest of a deceased person under a joint tenancy where any tenant survived the deceased person shall be deemed to be an estate or interest ceasing on his death."

30. That deeming provision merely states that, in the case of a joint tenancy where the right of survivorship applies, the property does not pass to the personal representative of the deceased joint tenant and does not form part of his estate for the purpose of provisions of the Act of 1965 such as the provisions contained in part IX, which deal with a spouse's legal right share and provision for children. In my view, it was general principles of common law, not s. 4(c), which determined how ownership was to be registered on Folio 573 following the death of Mr. Lawlor. However, that is peripheral to the core issue with which I am concerned, namely, what happened on the registration of the first judgment mortgage on Folio 573 at the time of such registration.

(3) In *Irwin v. Deasy* I quoted the following passage from Conway on *Co-Ownership of Land, Partition Actions and Remedies* (Butterworths, 2000) at para. 8.94:-

"Registration of a judgment mortgage against the share of a joint tenant of unregistered land effects a severance. This appears to be based on the fact that the registration of the security involves a transfer of the debtor's rights to the creditor under the 1850 Act [the Judgment Mortgage (Ireland) Act, 1850]. It seems wrong in principle that a different rule should apply to a judgment mortgage imposed against a joint tenant of registered land. However, the latter transaction does not involve any transfer of interest to the judgment creditor and in this respect is similar to a charge. Thus it appears that registration of a judgment mortgage against a joint tenant of registered land does not cause a severance with similar consequences for the respective parties."

31. As I stated in *Irwin v. Deasy*, Conway cites the passages from McAllister and Fitzgerald to which I have referred above as supporting the last sentence in the above quotation. She also states that a number of Canadian cases have also held that registration of a judgment mortgage against a joint tenant does not sever the joint tenancy, the most recent reported case being the decision of the British Columbia Supreme Court in *Sunglo Lumber Limited v. McKenna* (1974) 48 D.L.R. (3d) 154.

(4) In *Irwin v. Deasy* I also referred to the observations of the Law Reform Commission in its Consultation Paper on Judgment Mortgages (March, 2004, L.R.C., C.P. 30 – 2004), where (at para. 6.10) it pointed out that, rather "anomalously", the legal situation is different depending on whether the land is registered or unregistered, indicating that it is "unclear" if the effect of s. 71(4) of the Act of 1964 is that the registration of a judgment mortgage severs a joint tenancy, the courts in this jurisdiction having yet to decide the issue. In a recent article on the Land Conveyancing Law Bill, 2006, Professor John Mee refers to the observations of the Law Reform Commission and concludes that "a severance will result where the land is unregistered but (probably) not where the land is registered" ((2006) 11(4) CPLJ 91).

(5) As is recorded by Wylie (*op. cit.*, para. 7.31), the creation of a charge, as opposed to a mortgage, was held in Northern Ireland to effect no severance because it does not confer a legal or equitable estate or interest on the chargee (*Northern Bank Limited v. Haggerty* [1995] N.I. 211). However, there has been legislative response to that decision in Northern Ireland in Article 50 of the Property (N.I.) Order 1997, which provides that the creation of a charge on the estate of one joint tenant causes (and always has caused) a severance of the joint tenancy.

32. In my view, Conway's conclusion that the registration of a judgment mortgage against one of two or more joint tenants does not cause a severance is correct and she has properly identified the rationale which underlies that outcome.

33. Section 7 of the Act of 1850, which deals with the effect of the registration of an affidavit of judgment in the Registry of Deeds in compliance with s. 6 of that Act, provides that it operates –

"... to transfer to and vest in the creditor registering such affidavit all the lands ... mentioned therein, for all the estate and interest of which the debtor mentioned in such affidavit shall at the time of such registration be seised or possessed at law or in equity ... but subject to redemption on payment of the money owing on the judgment ...; and such creditor, and all persons claiming through or under him, shall, in respect of such lands ..., or such estate or interest therein as aforesaid, have all such rights, powers and remedies whatsoever as if an effectual conveyance, assignment, appointment, or other assurance to such creditor of all such estate or interest, but subject to redemption as aforesaid, had been made, executed, and registered at the time of registering such affidavit."

34. Accordingly, when a judgment mortgage is registered in the Registry of Deeds against one of two or more joint tenants, there is an alienation by operation of law of the interest of the debtor joint tenant against whom the judgment mortgage is registered, in that his interest is transferred to and vested in the creditor. That alienation severs the joint tenancy.

35. In the case of registered land, a judgment mortgage may be registered as a burden affecting the land (s. 69(1)(i)). Section 71 in subs. (1) to (3) prescribes how an affidavit of judgment as required by s. 6 of the Act of 1850 is to be registered against registered land, requiring it to be in the prescribed form and to be expressed to be made as required by s. 6 or by s. 3 of the Judgment Mortgage (Ireland) Act, 1858. Sub-section (4) of that section sets out the effect of such registration as follows:-

"Registration of an affidavit which complies with the said sections and this section shall operate to charge the interest of the judgment debtor subject to –

- (a) the burdens, if any, registered as affecting that interest,
- (b) the burdens to which, though not so registered, that interest is subject by virtue of s. 72, and
- (c) all unregistered rights subject to which the judgment debtor held the interest at the time of registration of the affidavit,

and the creditor shall have such rights and remedies for the enforcement of the charge as may be conferred on him by order of the court."

36. For present purposes, the significant feature of subs. (4) is that it limits the operation of the registration of the judgment mortgage to charging the interest of the judgment debtor. There is no alienation of the interest of the judgment debtor by operation of law to the judgment creditor.

37. Counsel for the plaintiffs laid particular emphasis on s. 62(6) of the Act of 1964. I consider that s. 62 has no application to judgment mortgages. Sub-section (1) of s. 62 provides that a registered owner of land may charge the land with a payment of money and the owner of the charge shall be registered as such. However, subs. (2) makes it clear that to create a charge, otherwise than by will, there must be an instrument of charge in the prescribed form. Subsection (6) provides as follows:-

"On registration of the owner of a charge on land for repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge."

38. Sub-section (6) has no application to a judgment mortgage, which is not a charge created by the registered owner in the prescribed form. As Carroll J. pointed out in *Containercare Limited v. Wycherley* (at p. 150), albeit in the context of unregistered land, a judgment mortgage is not a disposition by an owner purporting to convey an interest; it is a unilateral act by the judgment creditor and the creation of the judgment mortgage is effected by the registration of the affidavit of judgment. It is true that, like a judgment mortgage, a charge on registered land is a section 69 burden (para. (b) of s. 69(1)). However, the effect and consequences of the registration of a charge created by the registered owner as a burden is governed by s. 62, whereas the effect and consequences of the registration of a judgment mortgage created by the judgment creditor registering the affidavit of judgment as a burden is governed by s. 71.

39. A judgment mortgage is a creature of statute. The Act of 1850, in particular s. 7 thereof, governs the effect of the registration of a judgment mortgage on unregistered land. The effect of the registration of a judgment mortgage on registered land is now governed by the combined effect of s. 69(1)(i) and s. 71 of the Act of 1964. The combined effect of s. 69(1)(i) and s. 71 does not give rise to the alienation of any interest of the judgment debtor in the registered land. Therefore, on the basis of the applicable common law principles, in my view, the registration of a judgment mortgage against the interest of one of two or more joint tenants of registered land does not give rise to a severance.

40. There is a helpful exposition of the application of the relevant common law principles in the judgment of the British Columbia Supreme Court in *Sunglo Lumber Limited v. McKenna*, where the Court followed an earlier decision of the British Columbia Court of Appeal in *Re Young* (1968) 70 D.L.R. (2d) 594, stating (at p. 155):-

'In that case it was held by the majority of that Court, that mere registration of a judgment does not sever a joint tenancy. McFarlane, J.A., at p. 605 said:

'In my opinion the mere registration in a Land Registry Office of a judgment against a joint tenant of lands within the district of that Office does not destroy or affect any of the unities of possession, interest, title or time essential to a joint tenancy of land, so as to result in severance of the joint tenancy and creation of a tenancy in common. I agree in substance with the reasons of my brother Maclean on this aspect of the case and for his conclusion that the registration of the judgment does not result in a limitation on the right of survivorship which would make that right subject to a lien or charge of the judgment upon a one-half interest in the land.'

At p. 602 Maclean, J.A., refers to *Power v. Grace* [1932] 2 D.L.R. 793 ..., and says this:

'In my view the registration of a judgment under s. 35 of our Execution Act does not sever a joint tenancy and I revert to the words of the trial judge in the *Power v. Grace* case (approved by the Court of Appeal)...:

The trend of the authorities is that a mere lien or charge on the land, either by a co-tenant or by operation of law, is not sufficient to sever the joint tenancy; there must be something that amounts to an alienation of title'."

#### **Current title to the land**

41. The registration of the first judgment mortgage and the subsequent judgment mortgages registered against the interest of Mr. Lawlor as burdens on the lands registered on Folio 47924F and Folio 573 not having given rise to a severance of the joint tenancy and not having created a tenancy in common, on the death of Mr. Lawlor, the lands accrued to Mrs. Lawlor solely by right of survivorship. Further, Mr. Lawlor's interest in the lands having ceased on his death, the judgment mortgages which affected his interest also ceased.

42. Insofar as authority is necessary in support of that last proposition, it is to be found in *Tempany v. Hynes* [1976] I.R. 101. There the issue being considered by the Supreme Court was the effect of completion of an enforceable contract for the sale of land against which a judgment mortgage had been registered as a burden affecting the interest of the registered owner after the contract had been made. Henchy J., having stated that what had become affected by registration of the judgment mortgage in that situation was the "transient beneficial interest of the registered owner", continued (at p. 109):-

"Section 71, sub-s. (4), of the [Act of 1964] stipulates that on registration of the judgment-mortgage affidavit, the charge thereby created on the interest of the judgment debtor shall be subject to the registered burdens, the burdens taking effect under s. 72 without registration, and "all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit"

The latter category applies here for a 'right' is defined in s. 3, sub-s. (1) of the Act of 1964 as including 'estate, interest, equity and power' – thus covering the estate or interest of the purchaser. Since the judgment creditor (by registering his judgment as a judgment mortgage) could not acquire any greater estate or interest in the land than the registered owner had at the time of such registration, all that could pass to the judgment creditor here was the interest in the land which the registered owner had after making the contract to sell, namely, an interest which would pass out of existence once the sale had been completed, the purchase money paid and the purchaser registered as full owner. It follows, therefore, that if the defendant completes the purchase and becomes registered as full owner, the post contract judgment mortgages will not affect the lands and he will be entitled to have them cancelled from the folios."

43. I would remark that in referring to "all that could pass to the judgment creditor" in that quotation, Henchy J. must have meant all that could have been charged. By analogy, the registration of a judgment mortgage against Mr. Lawlor's interest as joint tenant in the

lands registered on Folio 47924F and Folio 573 was subject to Mrs. Lawlor's right of survivorship in the event that Mr. Lawlor predeceased her without the joint tenancy having been severed. When that happened, the interest of the plaintiffs as judgment creditor passed out of existence.

**Order**

44. While I will hear further submissions from the parties as to the precise form of the order to be made in these proceedings, I propose that the order should be in the form of a declaration that the judgment mortgage registered on 29th July, 2002 for €47,450.00 and interest against the interest of Mr. Lawlor on Folio 573 and Folio 47924F of the Register of Freeholders, County Dublin did not sever the joint tenancy of Mr. Lawlor and Mrs. Lawlor in the lands registered on the said folios and that, on the death of Mr. Lawlor without the joint tenancy having been severed, the lands registered on the folios ceased to be affected by the said judgment mortgage.

45. Similar orders will be made in the related proceedings.