[Neutral Citation Number: 2006 IEHC 25]

THE HIGH COURT

[2003 No. 151 SP]

BETWEEN

LIAM J. IRWIN

PLAINTIFF

AND
THOMAS DEASY
AND (BY ORDER) CARMEL DEASY

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 31st January, 2006.

1. This mortgage suit, which was initiated by a special summons which was issued on 4th April, 2003, has already been the subject of a judgment of this court, the judgment of Finlay Geoghegan J. dated 1st March, 2004, which is reported as *Irwin v. Deasy* [2004] 4 I.R. 1. In the special summons the plaintiff, the Collector General of the Revenue Commissioners, sought a declaration that the monies secured by three judgment mortgages registered by him against the interest of the first defendant, who at the outset was the only defendant in these proceedings, in the lands registered on folio 8249 of the Register of Freeholders, Co. Cork stood well charged on the interest of the first defendant in the said lands and the usual other reliefs sought in a mortgage suit, including an order for payment of the monies secured and, in default of payment, an order for sale in lieu of partition of the lands. When the plaintiff's application first came before the court for hearing the first defendant was represented by a solicitor but the solicitor made no submissions to the court. The second defendant, who is a co-owner with the first defendant, whom in an affidavit sworn by her on 8th October, 2004 she described as her "estranged spouse", of the lands registered on folio 8249 had been served with notice of the proceedings but did not appear when the matter was first before the court.

2. In her judgment delivered on 1st March, 2004 Finlay Geoghegan J. considered the jurisdiction of this court to make an order for sale in lieu of partition of registered lands at the request of a judgment mortgagee and whether such an order could be made in the absence of the second defendant as the co-owner of the lands registered on folio 8249.

3. On the jurisdiction issue, Finlay Geoghegan J. concluded that the registration of the judgment affidavits under s. 71 of the Registration of Title Act, 1964 (the Act of 1964) did not confer on the plaintiff any interest in the lands registered on folio 8249 such as would entitle him to a decree of partition in accordance with established principles, and that it followed from that conclusion that he was not entitled to an order for sale in lieu of partition under either s. 3 or s. 4 of the Partition Act, 1868 (the Act of 1868). However, she went on to consider the jurisdiction conferred on the court by s. 71(4) of the Act of 1964, stating as follows (at p. 9):

> "However, as previously indicated in this judgment, s. 71(4) of the Act of 1964 confers on the court a discretion as to the rights and remedies for the enforcement of the charge which may be conferred by order of the court. I have also previously indicated that it appears to me that such discretion should be construed as giving to the court a jurisdiction and discretion to grant orders similar to those which are and have been granted pursuant to the court's pre-existing equitable or common law jurisdiction for the enforcement of judgment mortgages registered against unregistered land. Hence, as I am satisfied that there continues to exist in the courts jurisdiction to make orders for sale in lieu of partition under ss. 3 and 4 of the Act of 1868 at the request of judgment creditors who have registered judgment mortgage affidavits against unregistered land in the Registry of Deeds, it appears that the provisions of s. 71(4) of the Act of 1964 should properly be construed as including an intention to confer on the courts an analogous jurisdiction in relation to registered land."

4. Having stated that it did not seem to be necessary to resolve the question whether s. 71(4) operated to sever the joint tenancy of the first and second defendants in the lands registered on folio 8249, Finlay Geoghegan J. (at p. 10), set out her conclusions on the jurisdiction issue as follows:

> "Hence, I have concluded that the rights and remedies which the court may order under s. 71(4) for the enforcement of a charge registered pursuant to that section must include in an appropriate case an order for partition and/or an order for sale in lieu of partition. It further appears that the court should by analogy exercise its discretion in accordance with the principles established in relation to the granting of decrees of partition and to the making of orders for sale in lieu of partition in accordance with the provisions of s. 3 and s. 4 of the Act of 1868."

5. On the question whether an order for sale in lieu of partition should be made in the absence of the second defendant as a party to the proceedings, having rejected a submission made on behalf of the plaintiff primarily in reliance on s. 9 of the Act of 1868 that the second defendant was not a necessary party to the proceedings, Finlay Geoghegan J. stated (at p. 10):

> "Even if I did not form this view on s. 9 it appears to me that in accordance with the constitutional principles of fair procedures that where a judgment creditor is seeking an order for sale of the entire property a person who is the only co-owner of the property with the judgment debtor should be joined as a party to the proceedings. Putting them on notice of the proceedings does not appear sufficient. Hence I am not prepared to permit the application for an order for sale in lieu of partition to proceed without Carmel Deasy being joined in these proceedings."

6. Finlay Geoghegan J. also observed that the plaintiff had not set out on affidavit the factual matters which would have to be addressed before the court could consider exercising its discretion by analogy to s. 3 or s. 4 of the Act of 1868.

7. The following orders were made on foot of the judgment of 1st March, 2004:

> (1) a declaration that the principal monies and interest secured by the three judgment mortgages stood well charged on the interest of the first defendant in the lands registered on folio 8249;
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> (2) a finding as to the amounts due on foot of the three judgment mortgages, principal sums aggregating €457,793.81 together with interest at the court rate on the principal sums from the respective dates of the judgments (there being an obvious typographical error in relation to the date of one of the judgments in the perfected order, which should have read 27th January, 2000, rather than 27th January, 2001); and
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> (3) that the second defendant be joined as a co-defendant in the proceedings.

8. Ancillary procedural matters were also dealt with.

9. The special summons was amended by the joinder of the second defendant as a co-defendant. The special summons was duly served on the second defendant, on whose behalf an appearance was entered. Of the reliefs claimed on the amended special summons those which remain to be addressed are as follows:

> (a) an order for payment by the first defendant of the amount which has already been found due to the plaintiff on foot of the judgment mortgages, which has been increasing and which, as of 24th June, 2005, was in the region of €650,000;
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> (b) in default of payment by the first defendant –
>
> > (i) an order directing that all necessary accounts and inquiries be made, and
> >
> > (ii) an order for sale in lieu of partition of the lands registered on folio 8249; and
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> (c) an order providing for costs.

10. I think it is important to emphasise that the only relief sought by the plaintiff directed to the realisation of the secured monies is a sale in lieu of partition. The plaintiff has not sought a partition of the lands nor has he sought an order for sale of the interest of the first defendant. The endorsement of claim on the special summons does not disclose the jurisdiction being invoked by the plaintiff in seeking an order for sale in lieu of partition, whether it is the court's inherent jurisdiction or statutory jurisdiction. It is only fair to record that in all respects, save in relation to the joinder of the second defendant, the endorsement of claim on the special summons remains unamended.

11. Following the amendment of the special summons, the plaintiff served and filed a supplemental affidavit sworn on 29th April, 2004, for the purposes of addressing the factual matters in connection with the exercise by the court of its discretion on principles analogous to a determination under s. 3 or s. 4 of the Act of 1868. A replying affidavit sworn by the second defendant on 8th October, 2004, filed on behalf of the second defendant, addressed the practical implications for her and for third parties of a forced sale of the land registered on folio 8249 and pointed to other options available to the plaintiff to satisfy the plaintiff's judgments against the first defendant. In an affidavit sworn on 24th January, 2005, the plaintiff addressed matters raised in the affidavit of the second defendant sworn on 8th October, 2004. This led to a further affidavit sworn by the second defendant on 26th May, 2005 which, in turn, was responded to in an affidavit sworn on 24th June, 2005 by the current Collector General. No evidence has been put before the court by the first defendant at any stage in these proceedings.

12. The lands registered on folio 8249 comprise 19.513 hectares of farm land near Clonakilty, with farm buildings and a refurbished house on the lands. On the evidence, the lands do not include, and have never included, the family home of the defendants. The second defendant described the lands as the first defendant's "main farm holding" on which a dairy, poultry and farm business is conducted. The plaintiff has put before the court a valuation of the lands as of 20th April, 2004 which put a value of €700,000 on the lands, excluding the potential value of the milk quota attached to the lands, the potential commercial value, if any, applicable to the occupancy or use of the buildings on the land and the investment or commercial yield potential of the dairy business. The valuation was carried out on a "drive by" basis. The second defendant contended that a figure of €700,000 represented a significant undervalue but did not put any alternative valuation evidence before the court.

13. The title position in relation to the lands registered on folio 8249 is that on 24th October, 1973 the first defendant and the second defendant were registered as full owners and, *prima facie*, they are registered as joint tenants. On 9th September, 1974 a charge for future advances repayable with interest was registered in favour of Agricultural Credit Corporation Limited (ACC). The second defendant has averred that, as of 14th May, 2004, €358,303.60 was due to ACC on foot of this charge, with interest of €66.14 accruing daily. Apparently, ACC obtained an order for possession on 17th December, 2001. Apart from that charge, the only live encumbrances or burdens on the folio are the plaintiff's three judgment mortgages.

14. The plaintiff's application was heard on 15th and 16th December, 2005, before the Interpretation Act, 2005 came into force.

15. At the hearing the first defendant was represented by counsel who argued against a proposition advanced by counsel for the plaintiff that an order could be made for the sale of the interest of the defendant solely, on the ground that such relief had not been pleaded, that there is no authority that jurisdiction to make such an order exists, and, in any event, if there is jurisdiction, an order should not be made because it is unrealistic to think that the interest of the first defendant is saleable on its own. Apart from that, counsel recognised, properly in my view, that the first defendant is bound by the judgment of 1st March, 2004.

16. Counsel for the second defendant, however, raised a jurisdictional point which she submitted had not been specifically argued before, or determined by, Finlay Geoghegan J. so that the second defendant was entitled to raise the issue. Alternatively, she submitted that, given that the second defendant was not a party to the proceedings before the judgment of 1st March, 2004 was delivered, she is not bound by it. I have already dealt with the passage from the judgment of Finlay Geoghegan J. in which she dealt with the question whether it was necessary to join the second defendant as a defendant in the proceedings. I think it is quite clear from that passage that what was envisaged by the joinder of the second defendant was that she would have had an opportunity to make any case she considered appropriate in answer to the application for an order for sale in lieu of partition. Therefore, in my view, the second defendant is not precluded from raising the jurisdictional point, which would appear not to have been averted to when the matter was first before the court, and certainly was not adverted to in the written submissions of the plaintiff.

17. Put succinctly, the jurisdictional point raised by counsel for the second defendant in her comprehensive and well reasoned submission was that, in the case of registered land, prior to the enactment of the Act of 1964, this court had no pre-existing inherent jurisdiction, either at common law or in equity, to order a sale in lieu of partition of the entirety of co-owned property to enforce a judgment mortgage or, indeed, for any purpose. The inherent jurisdiction which existed when the Act of 1964 was enacted empowered the court to order partition. The inherent equitable jurisdiction to order a partition survives. However, the jurisdiction to order a sale in lieu of partition was, and still is, wholly statutory and, as was held by Finlay Geoghegan J., does not extend to registered land. Absent express jurisdiction conferred by the Act of 1964 to order a sale in lieu of partition of co-owned registered land at the suit of a judgment creditor, no jurisdiction exists to make such an order.

8. Counsel for the second defendant in support of her submission cited the judgment of the High Court of Northern Ireland in *Northern Bank Limited v. Haggerty* [1995] N.I. 211 and the subsequent introduction in Northern Ireland of Article 48 of the Property (N.I.)

Order 1997, and submitted that the existence of a legal lacuna had been flagged by academic writers and had been "picked up" by the Law Reform Commission in this jurisdiction.

9. Counsel for the plaintiff submitted that the decision of the former High Court (Overend J.) in *Hill v. Maunsell-Eyre* [1944] I.R. 499, in which it was held that a *puisne mortagee* of an undivided moiety of lands is entitled to maintain a suit for the partition of land notwithstanding that the legal estate is not vested in him, is authority for the proposition that a judgment mortgagee in the position of the plaintiff has sufficient interest to maintain a mortgage suit. In my view, it is not: as is clear from the judgment of Overend J., the plaintiffs in *Hill v. Maunsell-Eyre* were equitable mortgagees of freehold unregistered land and had an equitable estate vested in them.

10. Before considering the jurisdictional point, I think it is useful to clarify the issue which is now before the court. It is whether the court has jurisdiction to make an order for sale in lieu of partition where –

(a) the applicant is a judgment creditor,

(b) the judgment mortgage affects the interest of one only of two joint tenants of the land, and

(c) the land is freehold registered land.

11. As counsel for the second defendant suggested, there has indeed been a considerable amount of academic commentary on the position of a judgment creditor in relation to co-owned registered land in recent years. A useful source of current academic thinking is Conway on *Co-ownership of Land Partition Actions and Remedies* (Butterworths, 2000). Confining my consideration to the narrow issue which I have identified, the following passage in Conway at para. 8.98 is apposite:

> "However, the position is more complicated where a judgment mortgage relates to registered land [than where it relates to unregistered land]. In these circumstances, registration of a judgment mortgage does not involve a transfer of the debtor's estate or interest in the property to the judgment creditor. Accordingly, a judgment creditor does not have *locus standi* to bring an action for sale of the entire property under the Partition Acts in the event of non payment by the debtor …"

12. Having outlined the facts, and the decision of this court (Denham J.) in *First National Building Society v. Ring* [1992] I.R. 375, Conway continues at para. 8.100 as follows:

> "Notwithstanding the decision in *First National Building Society v. Ring*, it appears that judgment creditors of an undivided share of unregistered land cannot rely on the Partition Acts as a means of enforcing their security. Instead they are confined to exercising such rights and remedies as may be conferred on them by order of the court under s. 71(4) of the Registration of Title Act, 1964. It is unlikely that the court would order a sale of the entire property under s. 71(4) in the absence of any specific statutory jurisdiction to make such an order. Moreover, the sale of the entire property would involve an unwarranted interference with the rights of the co-owner whose share of the property is not subject to the judgment mortgage …"

13. Conway comments on the different position of a judgment creditor vis-à-vis co-owned unregistered land and co-owned registered land as follows at para. 8.102:

> "It is unfair that such an arbitrary divergence in practice should exist between judgment creditors of unregistered land and those of registered land, the former being able to enforce their security under the Partition Acts while the latter cannot do so due to lack of standing. In the majority of cases, a judgment creditor of registered land will be unaware of this anomaly when he lends money or the debtor incurs the debt that leads to the subsequent registration of the judgment mortgage. The judgment creditor is only likely to discover that he cannot maintain an action under the Partition Acts when he commences proceedings to enforce his security, by which stage it will be too late – the debtor may have incurred a substantial debt which he is unwilling or unable to discharge, and the judgment creditor may be left without any substantive means of recovering this."

15. Conway goes on to state that there is need for reforming legislation to be introduced in this jurisdiction to remedy, *inter alia*, the problems facing judgment creditors of an undivided share of registered land. She suggests that such persons should be entitled to apply for sale (or partition) under the Partition Acts as a means of enforcing their security and further suggests that Article 48 of the Property (N.I.) Order, 1997, to which counsel for the second defendant referred, may prove useful in this context.

16. In the passages which I have quoted from Conway, consideration is given to a judgment creditor of "an undivided share" of registered land. Whether, in a case such as the instant case, where the defendants were originally registered as joint tenants of the lands registered on folio 8249, a plaintiff is a judgment creditor of an undivided share depends on whether severance has taken place. On the question of severance, Conway states as follows 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."

17. As authority for the last proposition Conway cites McAllister on *Registration of Title in Ireland* (1973) at p. 210 *and Fitzgerald on Land Registry Practice* (2nd Ed., 1995) pp. 129 – 130 and a number of Canadian cases.

18. In order to determine whether the submission made by counsel for the second defendant that, because of a legal lacuna, the court does not have jurisdiction to make an order for sale in lieu of partition in this case is well founded, and the passages from Conway which I have quoted above certainly support the proposition, it is necessary to consider the process by which the law in this jurisdiction in relation to judgment mortgages over co-owned registered land developed to the stage it is at now.

19. In my view, the following are the important steps in the development of the law:

(1) In Ireland, the Act entitled "An Act for Jointenants" enacted in 1542 (33 Henry VIII c. 10) (the Act of 1542) gave a joint tenant the right to compel a partition of the land held on joint tenancy for the first time. This was a common law right. With the passage of time an equitable jurisdiction to compel partition of land held on joint tenancy evolved and developed alongside the common law jurisdiction. In the Real Property Limitation Act, 1833 the common law remedy was rendered obsolete when the writ *de partitione facienda* was abolished save as to dower (per Campbell J. in *Northern Bank v. Haggerty* at p. 216). Thereafter exclusive jurisdiction was exercised by the Court of Chancery until the Judicature (Ireland) Act 1877 came into force, from which time the equitable jurisdiction could be exercised in any court.

(2) The judgment mortgage as a method of enforcement of a judgment against the land of a judgment debtor was introduced in Ireland in the Judgment Mortgage (Ireland) Act, 1850 (the Act of 1850). Section 7 of that Act provided that the registration of an affidavit of judgment in the Registry of Deeds should operate to transfer to and vest in the judgment creditor all the lands mentioned in the affidavit for all the estate and interest of the debtor therein, subject to redemption on payment of the money owing on the judgment. The section went on to provide that the creditor, and all persons claiming through or under him, should, in respect of the lands, have all such rights, powers and remedies whatsoever as if an effectual conveyance to him of all such estate or interest, but subject to redemption as aforesaid, had been made. In essence, the Act of 1850 enabled a creditor to convert his judgment into a mortgage over the debtor's interest in the lands in question. The Act of 1850 predated the introduction of a system of registration of title in Ireland.

(3) In relation to co-ownership of land, for present purposes, the important watershed was the enactment of the Act of 1868. Prior to the enactment of that Act, the Court of Chancery was restricted to making an order for partition, which did not always have a satisfactory outcome from the perspective of one or other of the former joint tenants. The Act of 1868, which is still in force in this jurisdiction, empowered the court, where the relevant statutory criteria were complied with, to order a sale in lieu of partition. However, such an order could only be made in a suit for partition where, if the Act of 1868 had not been passed, a decree for partition might have been made. It is well settled that a person seeking to compel the partition of land of which he was a co-owner in a partition suit must have a legal or equitable estate or interest in possession (as opposed to in remainder or reversion) in the land. The position, accordingly, after the enactment of Act of 1868 was that, in order to have *locus standi* to seek an order for sale in lieu of partition, the person deriving an interest from a co-owner had to have a legal or an equitable estate or interest in possession vested in him.

(4) Although a system of registration of title was introduced in this jurisdiction in the Record of Title (Ireland) Act, 1865, that project was a failure and, for present purposes, the Registration of Title Act, 1891 (the Act of 1891) can be regarded as the commencement of the registration of title system in this jurisdiction. Section 21 of the Act of 1891 dealt with the registration of judgment mortgages. Sub-section (1) provided that the registration of an affidavit required by the Act of 1850 for the purpose of registering a judgment as a mortgage upon land should be in the prescribed manner and with such entries as might be prescribed. By the time Glover's *A Treatise on the Registration of Ownership of Land in Ireland* came to be published in 1993, no method for registering a judgment mortgage on registered land had been prescribed. Sub-section (2) of s. 21 provided that upon registration of the affidavit –

> "All such and the same consequences in all respects shall ensue, and all such and the same rights, powers, and remedies in all respects shall be acquired and possessed by every or any person as would have ensued or been acquired and possessed by or by reason of the registration of such affidavit in the Registry of Deeds …"

Commenting on this provision, McAllister pointed out (at p. 212) that its terms, *prima facie*, suggested that the effect of registration of a judgment mortgage was the same in the case of registered land and unregistered land but added that s. 45(1), which was the analogue in the Act of 1891 of s. 69 in the Act of 1964, also provided for registration of a judgment mortgage as a burden only. He observed that in In *Re Strong and Connolly Bros. Limited* 74 I.L.T.R. 177 at p. 182 Murnaghan J. raised the issue of the two provisions with counsel, but in his judgment he appeared to be satisfied that the judgment mortgage in relation to registered land was a charge rather than a transfer of such lands by way of mortgage. Whatever the effect of the provisions of the Act of 1891, they are of historic interest only because the entire Act was repealed by the Act of 1964.

(5) As was pointed out in the judgment of Finlay Geoghegan J., the Act of 1542 was repealed by the Statute Law Revision (Pre-Union Irish Statutes) Act, 1962. Although doubts have been expressed in the past as to whether the court retained inherent jurisdiction to partition (*cf*. Law Reform Commission report on Land Law and Conveyancing Law: (1) General Proposals, LRC 30-1989 at p. 6) the preponderance of judicial opinion now is that the court's jurisdiction to partition continues to exist notwithstanding the repeal of the Act of 1542 (Finlay Geoghegan J. in the judgment of 1st March, 2004, agreeing with Barr J. in *F.F. v. C.F.[*1987] 1 I.L.R.M. 1). As is pointed out in Conway, *op. cit*., the theory that equitable jurisdiction to partition survives the repeal of the Act of 1542 has been supported by a number of academics (para. 6.34).

(6) Ownership of, and regulation of rights and interests in, registered land are now governed by the Act of 1964. Section 69(1) lists burdens which may be registered in the Land Registry as affecting registered land, including, any judgment mortgage. Section 71 deals specifically with the registration of judgment mortgages in the Land Registry. Sub-section (4) of s. 71 sets out the effect of registration of an affidavit of judgment in the Land Registry as follows:

> "Registration of an affidavit … shall operate to charge the interest of the judgment debtor subject to
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> (a) the burdens, if any, registered as affecting that interest,
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> (b) the burdens to which, though not so registered, that interest is subject by virtue of s. 72, and
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> (c) all unregistered rights subject to which the judgment debtor held that 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."

20. Paragraphs (a) to (c) of sub-s. (4) clarify the issue of priority between a judgment creditor and other persons with both registered and unregistered interests in the lands to which the judgment mortgage relates. Section 71(4) also provides a source of jurisdiction for enforcement of the judgment mortgage.

21. Under the long established jurisprudence of the courts in this jurisdiction, the judgment creditor, whether a judgment mortgage is registered against unregistered or registered land, may only enforce the security afforded by the registration of his judgment mortgage by applying to court for a "well charging" order, an order for payment of the amount found due to him on foot of the judgment mortgage within a specified time, and an order for sale in the event of default in payment. As regards registered land, where the judgment debtor is the sole owner of the land against which the judgment mortgage is registered, sub-s. (4) of s. 71 merely confirms the court's existing jurisdiction. The core issue which the jurisdictional point made by counsel for the second defendant raises is on what basis does the court have jurisdiction to give a judgment creditor a remedy for the enforcement of his judgment mortgage that affects not only the judgment debtor but also the co-owner of the judgment debtor. In other words, what is the source of the jurisdiction, if it exists?

22. Where, as here, the land on which the judgment mortgage is registered is co-owned but the judgment mortgage is only registered against the interest of one of the co-owners, in order to give the judgment creditor an effective remedy for the enforcement of the judgment mortgage, it would be necessary to either order partition of the land between the judgment debtor and the co-owner or a sale in lieu of partition and a division of the proceeds of sale. To do so would interfere with the property rights of the co-owner, in this case the second defendant, against whom the judgment creditor has not recourse for the debt in question. In the absence of specific jurisdiction, in my view, it would not be appropriate to make such an order. For the following reasons, I consider that no such jurisdiction exists:

> (i) Even though the court has equitable jurisdiction to make an order to partition land, it cannot do so at the suit of a judgment creditor in the position of the plaintiff, who merely has a judgment mortgage registered against the interest of one co-owner in registered land, whose interest is insufficient to give him *locus standi*.
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> (ii) As a person in the position of the plaintiff does not have sufficient interest to maintain a suit for partition, having regard to the terms of ss. 3 and 4 of the Act of 1868, he cannot pursue the statutory remedy of a sale in lieu of partition. The existence of jurisdiction in this court to make an order for sale in lieu of partition of registered land on the application of a judgment creditor obviously was not questioned in *First National Building Society v. Ring* and the case proceeded on the assumption that such jurisdiction existed. Similarly, in *Farrell v. Donnelly* [1913] 1 I.R. 50, a case cited by counsel for the second defendant, the Court of Appeal proceeded on the assumption that there was jurisdiction under the Act of 1868 to order a sale in lieu of partition at the suit of a judgment mortgagee of the share of one of several co-owners of registered land, the only issue in that case being whether such an order could be made without the consent of the Land Commission, the registered holding having been bought out under the Land Purchase Acts. In their judgments, the Lord Chancellor and Holmes and Cherry LJJ. focused on the narrow issue of the necessity for the consent of the Land Commission, which was the question raised on the case stated which was before the court.
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> (iii) The court never had, and does not now have, jurisdiction to order a sale in lieu of partition independently of the statutory jurisdiction conferred by the Act of 1868. Apart from whatever power the court is given under s. 71(4), there is no doubt but that the court has no jurisdiction whatsoever to order a sale in lieu of partition at the suit of a person in the position of the plaintiff, a judgment creditor whose judgment mortgage affects the interest of one co-owner of registered land. When the Act of 1964 was enacted the judgment mortgage as a process of execution had been on the statute book for over one hundred years and the jurisprudence of the court in providing a remedy to the judgment creditor had developed over that period and by then was well settled. It must be implicit in s. 71(4) that the remedy which the court may confer on a judgment creditor for the enforcement of his security is a remedy which the court had jurisdiction to grant under the existing law, particularly, where such remedy would impinge on the property rights of a third party. I do not agree with the proposition advanced by counsel for the plaintiff that, if there is a lacuna, the court should apply the law in a manner which will obviate treating a judgment mortgagee of registered land differently from a judgment mortgagee of unregistered land, so as to avoid an unfair or anomalous conclusion. As Keane C.J. observed in a different context in *Gleeson v. Feehan* [1997] 1 I.L.R.M. 522 at p. 528, such a conclusion would have to be upheld if it is indeed the state of the law. In my view, there is a lacuna and it is for the legislature to remedy the situation.

23. Accordingly, I am satisfied that counsel for the second defendant is correct in her submission that the court does not have jurisdiction in this case to order a sale in lieu of partition.

24. The Law Reform Commission in its Consultation Paper on Judgment Mortgages (March 2004, L.R.C. C.P. 30-2004) did not address the question whether, under the existing law, a judgment creditor whose judgment was registered as a judgment mortgage on registered land against the interest of one only of two or more joint tenants is entitled to an order for sale in lieu of partition. The issue which it did address is the effect under the existing law of the registration of a judgment mortgage where the land is co-owned. It pointed out (at para. 6.10) 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. I mention this for completeness, because counsel for the second defendant alluded to the position adopted by the Law Reform Commission.

25. In view of the conclusion I have reached that the court does not have jurisdiction to order a sale in lieu of partition of the lands registered on folio 8249 at the suit of the plaintiff, it is not necessary to make any determination on the alternative submission made on behalf of the second defendant that, if the court had jurisdiction and was considering whether a sale should be ordered by analogy to the criteria stipulated in s. 4 of the Act of 1868, the court should find that there is "good reason to the contrary" so that a sale should not be directed.

26. However, I would make the following general observations. If there was jurisdiction, the onus would be on the second defendant to satisfy the court that a good reason exists for not ordering a sale. Matters which would fall for consideration if the family home of the second defendant were located on the lands registered on folio 8249 would not arise in the instant case; the lands here are used for commercial and farming purposes. The submission of counsel for the second defendant was that the court, in considering whether there is a good reason to the contrary, should adopt an approach somewhat similar to the equitable doctrine of marshalling and should consider what other options are open to the plaintiff to enforce its security which would be less prejudicial to the second defendant. The evidence discloses a very complex land owning relationship on the part of the defendants, which is further complicated by the fact that various parts of the lands (and, in the case of three folios, on one of which the family home is located, which are the subject of an agreement for sale which has not been completed, the proceeds of sale of that part) are subject to various encumbrances in favour of various encumbrancers, some of whom are in the course of enforcing their securities. No evidence of the encumbrance-free value of the various parts of the lands is before the court. In the circumstances, even if it were appropriate to adopt the approach suggested by counsel for the second defendant, on the current state of the evidence, it would be impossible to conclude that the second defendant has discharged the onus of proving that there is a good reason why the sale of the lands registered on folio 8249 should not be ordered.

27. Writing over 73 years ago on the judgment mortgage in the context of registered land, Glover commented as follows (at p. 172):

> "Over 50 years ago a Royal Commission, composed for the most part of leading real property lawyers of the day, described a judgment mortgage as 'a trap rather than a security'. It recommended that the system of registering judgments as mortgages should be discontinued, that a judgment creditor should be at liberty to enforce his judgment by proceeding summarily in the High Court or County Court for the sale of the lands of his debtor; that a judgment should only attach as a lien on the debtor's lands on the institution of such proceedings in court, and the registration of them as a *lis pendens* (*First Report [1879] of the Royal Commission on the Registration of Deeds, …*) It proposed by this simple and effective procedure to get rid of the *chevaux de frise* of tedious, trivial, and expensive formalities that the Judgment mortgage (Ir.) Act, 1850 raises between a judgment creditor and his debt. But its recommendations were ignored; and the Act of 1850 continued through the years to harass creditors and increase ultimate liabilities of their debtors. 'Knowledge grows but wisdom lingers'; yet in time sufficient wisdom will accumulate to ensure that the recommendations of the Commission will be given effect to."

28. This case is testimony that sufficient wisdom has not yet accumulated to obviate another judgment creditor being impaled on the *chevaux de frise* of the regulation of judgment mortgages.

29. So much of the plaintiff's application as remains is refused.