ROYAL BANK OF CANADA v. JORDAN

BARCLAYS BANK PLC ET AL v. JORDAN ET AL

CARRINGTON AND SEALY, GARNISHEE

[HIGH COURT - CIVIL SUIT NOS. 680 of 1986 AND 405 OF 1987

(Chase, J.) July 11, 1994]

(1994) 30 Barb. L.R. 321

***Real property** - Joint tenancy - Judgment against one joint tenant for outstanding payments on loans registered but no execution levied prior to his death - Whether the charges created survived death of judgment debtor to constitute a lien on his interest in the joint tenancy - Whether common law principle of jus accrescendi became inoperative on his death.*

Facts: On or about August 22, 1985 the plaintiff R.B.C. made a demand loan to the defendant Keith Jordan, now deceased. On November 6, 1986, the plaintiff bank obtained judgment for the outstanding balance of $28,000 with interest from November 21, 1985 and the judgment was registered on November 14, 1986. On June 15, 1987 judgment for the sum of $4,983.02 with interest was obtained by Barclays Bank PLC and registered against the defendant. The defendant died on July 29, 1987 before any writ of execution was levied in respect of either judgment. On December 21, 1987 a property owned jointly by the deceased and his wife Brenda Jordan was sold on instruction from the Barbados Mutual Life Assurance Society for $265,000 and the proceeds used in part to discharge the mortgage on the property and other joint liabilities of the deceased and his wife secured by the property. Searches conducted on behald of the Barbados Mutual had revealed that the indebtedness of defendant to the two plaintiffs was not his alone. The two plaintiffs sought garnishee orders to satisfy their outstandign judgments from the net proceeds of the sale of the property.

The issue before the court was whether the common law principle of *jus accrescendi* became inoperative when a judgment obtained against a joint tenant was registered and this joint tenant predeceased the other joint tenant before execution of the judgment. The judgment creditors sought to invoke the *Registration of Judgments Act*, Cap. 210, s. 291) which provides that no judgment shall affect any lands, etc. as to purchasers, mortgagees or judgment creditors unless registered. Another question was whether the now repealed *Supreme Court of Judicature Act,* Cap. 117, s. 42(1) also contemplated that a judgment so registered operated as a charge on any real property owned by the person against whom the judgment was obtained.

Held: (i) The principle and the weight of the authorities suggested that registration under the provisions of local enactments was merely a preparatory step in the process of execution of a judgment debt, and in this case, neither of the judgment creditor banks had levied execution to enforce their judgment debts prior to the death of the judgment debtor;
[321]

(ii) to hold that the effect of registration without more constituted each judgment creditor bank an equitable mortgagee from the time of registration of its judgment woud be expressing a legislative intent not contemplated by Parliament. In the result, registration of the judgment did not constitute severance of the joint interest in the property of the judgment-debtor so as to affect the operation of the *jus accrescendi* on his death;

(iii) the surviving joint tenant was entitled in his own right to the net residue of the proceeds realised from the sale of the property and the garnishee was ordered to pay it over to her.

Application dismissed.

Cases referred to:

Caldwell v. Fellows (1870) 39 L.J. Ch. 18; 1870 LR. Eq. 410.

Emerson v. Simpson (1962) 38 W.W.R. 466.

Ex p. Joseph Boyle & Charles Boyle 3 DeG M. & G. 202, 515; 43 E.R. 202.

Jones v. Woodward [1917] 116 L.T. 378.

Lord Abergavenny's Case (1607) 6 Co. Rep. 786.

Power v. Grace [1932] O.R. 357.

Re McDonald 71 W.W.R. 444.

Re Sharer, Abbott v. Sharer (1912) 57 Sol. J. 60.

Re Young Estate (1968) 70 D.L.R. (2d) 594.

Shea v. Moore [1894] I.R. 158.

York v. Stone (1709) 91 E.R. 146.

Statutes referred to:

Execution Act, 1960, Ch. 135, s. 35 (B.C.).

Judgments Act, 1838, s. 13 (U.K.).

Land Registry Act, 1960, Ch. 208, s. 2. (B.C.)

Registration of Judgments Act, Cap. 210, s. 291.

Supreme Court of Judicature Act, Cap. 117, s. 42.

Mr. H. deB. Forde, Q.C., for Barclays Bank.

Mr. J.H. Hanschell of Messrs. Evelyn, Gittens & Farmer for Royal Bank of Canada.

Mrs. Faith Seale for Mrs. Brenda Jordan.

CHASE, J.: The question for determination in these consolidated garnishee proceedings is whether the common law principle of *jus accrescendi* becomes inoperative when a judgment obtained against a joint-tenant of land is registered and the joint tenant against whom the judgment is so registered pre-deceases the other joint tenant before execution of the judgment.

The facts upon which the question arises may be briefly stated as follows: **[322]**

> "On or about August 22, 1985, the plaintiff Royal Bank of Canada made a demand loan to the defendant Keith Jordan (now deceased) at his request.
>
> As at November 21, 1985, the balance outstanding on the loan was $28,800.00 with interest accruing at the agreed rate of 11 3/4%.
>
> On November 6, 1986, the plaintiff Bank obtained judgment fcr the outstanding balance with interest thereon from November 21, 1985 together with taxed costs of $705.00. The judgment with interest accruing and taxed costs was registered on November 14, 1985.
>
> On March 6, 1987, the defendant Keith Jordan was also indebted to the plaintiff Barclays Bank PLC in the sum of $4,983.02 with interest accruing at the rate of 11 3/4%. On June 15, 1987, judgment was entered and registered against the defendant for the sum due with interest thereon from March 6, 1987 together with taxed cost of $564.00.
>
> On July 29, 1987, the defendant, Keith Jordan died, and it is not disputed that at the time of his death no writ of execution had been levied in respect of either of the two registered judgments.
>
> Prior to his death Keith Jordan and Brenda Jordan were husband and wife and they jointly owned a dwelling-house situated on Lots 90 and 91 at Maynards, St. Peter. The property was mortgaged to the Barbados Mutual Life Assurance Society.

On or about April 15, 1987, the firm of Messrs. Carrington & Sealy attorneys-at-law, and garnishee in these proceedings, received instructions from the mortgagee society to set up the property for sale as a result of the default in mortgage payments by Mr. and Mrs. Jordan. On December 21, 1987 the property was duly sold for $265,000.00.

The proceeds of sale were applied in part to discharge the mortgage on the property and other joint liabilities of Mr. and Mrs. Jordan secured by the property.

Searches conducted by the attorneys for the Barbados Mutual Life Assurance Society revealed that the deceased Keith Jordan alone was indebted to Roy Goodridge of Six Mens, St. Peter, Royal Bank of Canada and to Barclays Bank P.L.C.

The two banking institutions, as plaintiffs/judgment-creditors are each seeking a garnishee order to satisfy their outstanding judgments out of the net proceeds from the sale of the property. **[323]**

On October 18, 1989, Brenda Jordan was appointed executrix of the estate of her deceased husband.

In deciding the question raised for determination it is necessary to consider the combined effect of the relevant provisions of the former *Supreme Court of Judicature Act*, Cap. 117 and of the *Registration of Judgments Act*, Cap. 210.

Section 42 of the former *Supreme Court of Judicature Act*, Cap. 117 provided as follows:

"42. (1) Subject as hereinafter mentioned, a judgment entered up in the High Court (whether before or after the commencement of this Act) against any person (in this section called a judgment debtor) shall operate as a charge upon all lands, tenements, rents and hereditaments to or over which the judgment debtor at the date of entry or at any time thereafter is or becomes

(a) seised, possessed or entitled for any estate or interest whatsoever at law or in equity, whether in possession, reversion, remainder or expectancy;

(b) entitled to exercise a power of disposition for his own benefit without the assent of any other person;

and the judgment shall bind

(i) the judgment debtor;

(ii) all persons deriving title under him subsequent to the entry of the judgment; and

(iii) all persons capable of being bound by a disposition by the judgment debtor made after the entry of the judgment, including the issue of his body and all other persons, if any, whom he might, without the assent of another person, have barred from any remainder, reversion or other interest in or out of the said-lands, tenements, rents and hereditaments.

(2) Every judgment creditor shall have the same remedies against the hereditaments so charged or any part thereof as he would have been entitled to if the judgment debtor had power to charge the same, and had by writing under his hand agreed to charge the same, with the amount of the judgment debts and interest thereon."

It is to be noted that the provisions of section 42 are substantially based on **[324]** section 13 of the United Kingdom's *Judgments Act*, 1838, 1 and 2 Vict. C. 110, since repealed by the *Law of Property Act*, 1925. Excepted, however, from the paralled provisions found in section 42(2) of Cap. 117 are the words "in a court of equity" that appear in section 13 of the United Kingdom prototype.

As regards the *Registration of Judgments Act*. Cap. 210 section 2(1) provides that:

> "No judgment obtained or confessed in the High Court shall affect any lands, tenements or hereditaments as to purchasers, mortgagees or judgment creditors unless and until a memorandum or minute in the form mentioned in the Schedule, containing the names of the person in whose favour and against whom judgment is entered up or given and the date of such judgment and the amount of the debt, damages, costs or moneys thereby recovered or secured is left with the Registrar."

From the facts outlined above, it is clear that on registration of their judgments the two judgment-creditors were seeking to invoke the provisions of section 2(1) of Cap. 210. It is also clear that the provisions of section 42(1) of Cap. 117 contemplated that a judgment so entered up should operate as a charge on any real property owned by the person against whom the judgment was obtained.

The issue therefore is whether, in the circumstances of this case, the charge so created survived the death of the judgment-debtor, Keith Jordan, at all, or to such an extent, as to constitute a severance of his interest in the joint-tenancy held in the property situated at Maynards, St. Peter.

Counsel for the plaintiff Barclays Bank contends that registration coupled with the charge created by section 42 of Cap. 117 is to constitute the judgment-creditor Bank an equitable mortgagee from the date of registering the judgment, and to effect a severance of the joint-tenancy.

To support his contention, counsel relies on a passage appearing in the judgment of Turner, L J. in *Ex Parte Joseph Boyle and Charles Boyle* 3 DeG. M. & G. 515, 202 at p. 208, in these terms:

> "Now there can be no doubt upon the construction of 1 and 2 Vict C. 110, s. 13. That statute makes the judgment a charge upon the land of the debtor, and gives the creditor the same remedy as if the debtor had signed a memorandum agreeing to give a charge. It therefore constituted the judgment-creditor an equitable mortgagee from the time of registering the judgment, for the 19th section of the same Act says that no judgment of any of the superior courts shall by virtue of the Act affect any lands, tenements or heraditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the particulars thereof shall be left with the Senior Master of the Court of Common Pleas. I take it to be clear from this that the judgment must affect the lands from the time of registration, because when the 19th section of the statute says that the **[325]** judgment shall not affect lands unless and until a memorandum is entered, the necessary implication is that it does not affect them at the time when the memorandum is entered. The consequence is that a charge is created at the time of entering the memorandum with a suspension in point of remedy for a year after the time of entering up the judgment. The charge exists although the remedy is not to be put in force until the expiration of a year."

This was a case involving the estate of a bankrupt and the question was whether in the state of the law as it then existed, a charge upon the estate of the bankrupt was created from the time of registration. In further support of his submissions, counsel relies greatly on the dissenting judgment of Davey, C.J. of the Court of Appeal of British Columbia, Canada in *Re Young Estate* (1968) 70 D.L.R. (2d) 594.

In that case, a similar question for determination was whether the registration of a judgment against a husband severed the joint-tenancy between him and his wife by reference to the combined effect of section 35 of the *Execution Act*, 1960, Ch. 135, and section 2 of the *Land Registry Act*, 1960, Ch. 208 of the Revised Statutes of British Columbia.

Section 35 of the *Execution Act* provided that:

> "Immediately upon judgment being entered or recovered in this Province, the judgment may be registered in any or all of the Land Registry Offices in the Province, and from the time of registering the same, the judgment forms a lien and charge on the lands of the judgment debtor in tne several land registration districts in which the judgment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of the judgment the judgment creditor may, if he wishes to do so, forthwith proceed upon the lien and charge thereby created."

Counsel for the plaintiff Barclays Bank contends that the foregoing provisions are not *pari materia* with the provisions of the Barbados legislation, but submits, however, that the reasoning of Davey's dissenting judgment ought to be adopted as being a more persuasive approach in determining the issue in this case.

During the course of his judgment, Davey C.J. at page 194 commented as follows:

> "A precursor of section 35 was the *Judgment Act,* 1838, 1 and 2 Vict. Ch. 110, section 13, under which a judgment entered operated as a charge upon the judgment debtor's lands, and *inter alia,* entitled the judgment creditor to the same remedies in a Court of Equity as he would have been entitled to if the judgment debtor had by writing charged the lands with the judgment debt ...
>
> The language of section 13 went considerable beyond that of section 35 by **[326]** expressly charging all the disposable property of the judgment debtor. The words were probably sufficient to charge a judgment debtor's former interest in a joint tenancy in the hands of the surviving joint tenant without severance; there seems to be no authority precisely in point, although *Kinderley v. Jervis* (1856) 22 Beav. 1, 25 L.J. Ch. 538; 52 E.R. 1007, is of interest.
>
> The following reasoning on section 35 seems to produce the result achieved by the express language of section 13.
>
> Section 13 was held to create an equitable charge upon the debtor's property: *Rolleston v. Martin* (1842) 1 Dr. and War. 171 at 195, explained by *Shea v. Moore* (1894) 1 I.R 158, at 168 and 177; *Re Boyle; Ex parte Boyle* (1853) 3 De G.M. and G. 515, at 530, and 533 ... 43 E.R. 202.
>
> I leave aside for the moment the much-debated question whether the equitable charge so created was also an equitable mortgage, as was held by Turner, L.J. and perhaps by Knight Bruce, L J. in the last case at pp. 530 and 533."

I pause here to observe that Davey, C.J. seems to have been acknowledging at the time that the comment by Turner L.J. in *Ex Parte Boyle* to the effect that the change constituted the judgment-creditor an equitable mortgagee remained unresolved.

Continuing his judgment, Davey, C.J. further commented as follows:

> "It seems clear upon the plain meaning of the language of section 35 and upon the above authorities, that registration of a judgment creates a statutory charge in the nature of an equitable charge upon the debtor's interest in lands affected by the registration. Such a charge created by a judgment debtor under his hand and seal could not be a common law charge, which consists of legal mortgages, pledges, and common law possessory liens. The statutory charge created by the *Execution Act* against a joint tenant's interest in land, in the absence of express language like that contained in section 13 will only charge his interest in the joint tenancy after his death, if an equitable charge to which the statutory charge is likened would do so. That would only do so if an equitable charge in equity operates as a severance of the joint tenancy. Whether an equitable charge will effect a severance must be determined not upon legal, but upon equitable principles, which are not identical."

Davey, C.J. then proceeded to consider the case of *Power v. Grace* [1932]) O.R. in which the Court of Appeal held that a joint-tenant was not severed by delivery of a writ of *fieri facias* to the sheriff, but only by execution of the writ. He sought, **[327]** however, to distinguish *Power v. Grace* from the situation in *Re Young Estate* by taking the view that in *Power v. Grace*, the decision turned on section 9 of the *Execution Act*, R.S.O., 1927 Ch. 112 which adopted the principle that delivery of a writ of execution to the sheriff binds the judgment debtor's hands from that time.

Davey, C.J. further disagreed with the view of the Court of Appeal that the word "bind" appearing in the Ontario *Execution Act*, only gave a right to the sheriff to seize the lands, and to prevent the debtor from disposing of them. that it did not create a security on the land, or *per se* effect any change in the title or interest of the debtor; and as such, there was no severance of the joint tenancy.

He referred to some cases determined on the English and Irish Acts which held that registration or a charging order under those Acts created an equitable mortgage, and to other decisions determined on the basis of those Acts where it was held that a charging order or registration created only an equitable charge and not an equitable mortgage. He also cited *Shea v. Moore* [1894] 1 I.R. 158 and *Jones v. Woodward* [1917] 116 L.T. 378 in which it was held that an equitable charge is not necessarily an equitable mortgage.

He expressed the reasons for the uncertainty in this area of the law in these terms:

> "It may be that this lack of certainty whether registration or a charging order creates an equitable mortgage or only an equitable charge and whether an equitable mortgage can be created by a contract simply charging property with the payment of money is due to the lack of precision with which equity judges have used these terms that were alluded to by Scrutton, L.J. in *London County and Westminster Bank Ltd. v. Tompkins* [1918] 1 K.B. 515, at p. 528."

Turning his attention more particularly to the effect of section 35 of the *Execution Act,* Davey, C.J., stated:

> "In the result, it is sufficient for present purposes to treat the registration of a judgment under section 35 of the Act as creating merely a charge in the nature of an equitable charge, not an equitable mortgage, upon the judgment debtor's lands, because the principles upon which equity effects a severance of a joint tenancy are equally applicable to a mere equitable charge.
>
> One of the grounds upon which equity operates to effect a severance is that a joint-tenant has it within his own power to effect a severance by appropriate action and, having that power, equity presumes he intended to effect a severance where that is necessary to implement a contract entered into by him. Equity will therefore do what the joint tenant intended and either expressly or by implication contracted to do."

To support his view that equity will do what the joint-tenant intended doing either **[328]** expressly or by necessary implication, Davey, C.J. referred to *York v. Stone* (1709) 91 E.R. 146 where a mortgage by a joint-tenant severed the interest of the joint-tenant: *Caldwell v. Fellows* (1870) L.J. Ch. 818, where a covenant in an unexecuted marriage settlement to settle the property of the intended wife was held to operate as a severance of the joint-tenancy in the property, and *Re Sharer, Abbott v. Sharer* (1912) 57 Sol. J. 60, which held that a document creating an equitable security for a loan effected a severance of a joint-tenancy in the property upon which the security was given.

On the basis of the decisions reached in these cases and the view taken as to the effect of section 35 of the *Execution Act*, Davey, C.J. came to the conclusion that the charge created by section 36 continued to charge the property to which it was subject even though the judgment debtor predeceased the other joint-tenant.

Reflection on his conclusion, Davey, C.J. observed as follows:

> "I must say I find that result satisfactory, because it makes answerable for a judgment the judgment debtor's interest in the joint-tenancy over which he had in himself complete power of disposal in his lifetime, and avoids one of the highly technical consequences of a joint-tenancy, as contrasted with a tenancy-in-common, that has little to commend it in the light of modern needs. Regrettably, it falls short of making that interest liable, after the joint-tenant's prior death, for his debts generally."

To my mind, the foregoing passage sums up the *ratio decidendi* of Davey, C.J.'s dissenting judgment and it would seem that in the learned Chief Justice's contemplation, the operation of "the highly technical consequences of a joint-tenancy", presumably a reference to the common law doctrine of *jus accrescendi* would not have satisfied the justice of the case as he perceived it.

It is of significance to note, however, that on the issue of severance, he commented in these terms:

> "...in the arguments before us, the question was stressed whether registration of a judgment under section 35 of the *Execution Act* against the interest of one joint-tenant severed the joint tenancy. As I have said, if the judgment debtor had actually charged his interest in the joint tenancy with the payment of the judgment debt it would have, in the absence of restrictive language, severed the joint-tenancy, and therefore have continued to charge the interest after his prior death. It is the end result that must be attributed to registration under section 35. But, because section 35 attributes that end result to registration of the judgment it does not necessarily follow that the section attributes to registration all the intervening steps, such as severance, that would produce that end result. It is enough to say that under section 35 registration creates a charge that continues against the judgment debtor's former interest after his prior debt. While it is not necessary to decide whether registration under section 35 actually severs the joint tenancy, I **[329]** venture the tentative opinion that it does not (at p. 198)"
>
> A noticeable feature of the judgment of the learned Chief Justice is that although he concluded as he did, yet he seems to evince an inclination, not opposed to the view that registration of a judgment did not create a severance of

a joint-tenancy under section 35 of the *Execution Act*: a view which is in accord with that of the majority judgment in *Re Young Estate*. The effect of his dissenting judgment, however, is that under section 35, registration creates a charge against the judgment-debtor's former interest in the joint-tenancy in the hands of the surviving joint-tenant without severance.

The judgment also highlights -

(a) the uncertainty in the law as to whether the charge under section 13 of the *Judgments Act*, 1838, Vict. Ch. 110 created an equitable charge in the nature of an equitable mortgage; and

(b) that the central issue in the cases of *York v. Stone; Caldwell v. Fellows* and *Re Sharer; Abbott v. Sharer* cited by the learned Chief Justice and upon which he must have relied, would seem to have turned more particularly on the act of the joint-tenant in relation to the joint interest which enabled the court in the absence of express language to determine on equitable principles that there was an intention on the part of the joint-tenant to sever the joint interest in the property.

I turn now to consider whether the reasoning of Davey, C.J. is indeed applicable to the present case as urged by counsel.

Counsel for the defendant-judgment-debtor contends that the combined effect of the *Land Registry Act* and the *Execution Act* of British Columbia has the same force as section 42 of Cap. 117, except that by specifying persons, other than the judgment-debtor, who shall be bound by the judgment, and by giving the judgment-creditor certain remedies under section 42 (2), the scope of section 42 is wider than that of British Columbia enactment.

Section 42 of Cap. 117, like section 35 of the *Execution Act,* owes its genesis to section 13 of the United Kingdom *Judgments Act*, 1838, and is indeed wider in scope than section 35 of the *Execution Act* in terms of the persons to be bound, and of the property to be affected by its provisions.

When section 42 of Cap. 117 was in force, it undoubtedly created a statutory charge on any lands and future interests of a debtor against whom a judgment was registered under the *Registration of Judgments Act,* Cap. 210. The registered judgment bound not only the judgment-debtor, but also all persons deriving title under him to the lands or to any of his future interest in land.

To give potency to the enforcement of the statutory charge, section 42 (2) of Cap. 117 conferred on the judgment-creditor the same remedies against the land as **[330]** he would have been entitled to, had the judgment-debtor by writing agreed to charge the land with the amount of the judgment debt. However, in my view, there is nothing in the provisions of section 42 when read as a whole that would support an interpretation to the effect that it was the intention by Parliament to vest in the judgment-creditor an interest in the land by mere registration of the judgment debt, or to alienate the interest of the judgment-debtor to the judgment-creditor by such registration.

It therefore seems more consistent with principle and the weight of the authorities to take the view that registration under the provisions the local enactments is merely a preparatory step in the process of execution of a judgment debt.

Indeed, in the instant case, it is not in dispute that neither of the judgment-creditor banks had levied execution to enforce their judgment debts prior to the death of the judgment-debtor; and this hiatus in the process of execution has given rise to the issue now to be determined by this court.

In the course of their submissions both counsel, apart from citing *Re Young Estate,* also referred to *Lord Abergavenny's Case* (1607) 6 Co. Rep. 786 and *Re McDonald* 71 W.W.R. (1970) 444.

In the *Lord Abergavenny's case* it was held that when a judgment is given against one of two joint tenants for life, in an action for debt, and afterwards that joint tenant releases the joint interest to the other joint tenant before execution, the release shall not bar the execution of the plaintiff. But, if that joint tenant had died before execution, the survivor would hold the land discharged of any execution.

I consider it significant to note that *Lord Abergavenny's Case* was decided in 1607 before the enactment of the United Kingdom *Judgments Act*, 1838, and as such, forms part of the received laws of Barbados.

In Re McDonald, the headnote of the decision of the Supreme Court Chamber, reads:

> "Real property - Land held in joint-tenancy - Filing of Writ of Extent against interest of one joint-tenant - Effect upon *jus accrescendi."*

In that case, it was held that the effect of registration of a writ of extent, pursuant to section 171 of the *Land Registry Act* R.S. B.C. 1960 Ch. 208, against lands held in joint-tenancy is not to sever the joint-tenancy, but merely to bind the land in a limited sense: the unity of possession, interest, title and time remains undisturbed until the lands are placed in execution by seizure with a view to sale.

In that case, the question for determination was whether registration of a writ of extent under section 171 of the *Land Registry Act* resulted in the severance of the joint-tenancy. The section provided as follows:

> 171 (1) There may be registered in the same manner as a charge is registered a certified copy of a writ of extent, *scire facias, diem clausit extremum*, on behalf of the Crown, for the purpose of enforcing, or recovery **[331]** of, any debt due to the Crown, and all lands of the debtor to the Crown in the registration district in which the writ is registered shall be bound thereby, but where the writ is not registered a purchaser for the value of the land of the debtor to the Crown shall take free therefrom.
>
> (2) The Sheriff, after delivery to him of any writ of execution affecting land obtained on behalf of the Crown in right of Canada, shall forthwith deliver or transmit by registered letter to the Registrar of every Land Registry Office in the Province a copy of the writ and of all endorsements thereon, certified by him; and where the title to the land charged by the writ is registered in the name of the debtor to the Crown or his personal representative, the Registrar shall make a notation of the writ on the register.

The facts upon which the question turned were briefly these:

> On June 7, 1961 a certificate under the *Income Tax Act* was filed against Sydney McDonald for certain sums due to the Crown in respect of income tax, penalties and interest.
>
> On July 22, 1905, a writ of extent was issued to the Sheriff directing him in effect to seize whatever lands to which the debtor was entitled.
>
> On December 10, 1965, a copy of the writ was noted on the land register against the title of lands registered in the name of the debtor McDonald and six other persons as joint tenants. The Sheriff however took no further action in respect of the land after registration of the writ.
>
> On January 12, 1968 Sydney McDonald died and administration of his estate was granted to his widow. The six surviving joint-tenants sought to register the title in their joint names free of the writ of extent and the Registrar of Titles gave notice of his intention to accept the application for registration.

In determining whether registration of the writ of extent severed the joint-tenancy, Hinkson L.J. at p. 447 observed that the writ was not registered as a charge under the *Land Registry Act* and that section 171 provided for the mechanics of getting the notation of the writ of extent on the register for the purpose of enforcing the debt due to the Crown. He also referred to a passage appearing in the judgment of Collins, J. in *Emerson v. Simpson* (1902) 38 W.W.R. 466 (BC) at p. 470 in these terms:

> "In my view, the filing of the writ of extent in the Land Registry office was done for the purpose of warning persons who might wish to enter into some **[332]** transaction relating to land registered in the name of the defendant Ernest Alfred Simpson, that the Crown ... had an unsatisfied debt and had placed in the hands of the Sheriff a process of execution with respect thereto that affected the title to his lands. The filing was not for the purpose of seeking the

> protection of any provision of the provincial statute and did not institute any abandonment of the Crown prerogative. On the contrary, it is my view that such filing served as some notice that the Crown ... intended to exercise the royal prerogative."

Hinkson, L.J. concluded his judgment as follows:

> "The effect of registration of the writ of extent is only in my view, to bind the lands in the sense described in *Power v. Grace.* Registration is a preliminary step to execution. Without more, the unity of possession, interest, title and time essential to a joint tenancy of land, is not severed. Further, the *jus accrescendi* is not so modified or abrogated as to result in the surviving joint-tenants taking subject to the claim of the Crown, hence, while the Crown could execute against the interest of the joint-tenant during his lifetime and any purchaser from the joint-tenant would take subject to the rights of the Crown, yet, when the interest passes by operation of law to the surviving joint-tenants, it does so free and clear of the claim of the Crown."

Having examined the decisions to which reference was made by both counsel, it is my view that the reasoning contained in the dissenting judgment of Davey C.J. is inapplicable to the instant case where there is no evidence to support an inference that it was the intention of the judgment-creditor Keith Jordan to grant the judgment creditors an equitable mortgage of his joint-interest in the property and thereby vest an equitable interest in the judgment credit. Registration of the judgment debt was entirely an act of the judgment-creditor banks without any reference to the judgment-debtor.

I find however the reasoning in *Re Young Estate* and *Re McDonald* to be more sustainable in that they each paid due regard to the doctrine of *jus accrescendi* or right of survivorship which, as in Canada, is part of the body of law in this country.

If indeed it was the intention of Parliament to modify the operation of the right of survivorship by way of the combined effect of registration of a judgment and the charge created by section 42 of Cap. 117 so as to effect a severance, then in my view, Parliament would have employed unequivocal language to achieve that objective.

If therefore I were to hold that the effect of registration without more is to constitute each of the judgment creditor banks an equitable mortgagee from the time of registration of their judgments, I would, in my view be expressing a legislative intent which was not contemplated by Parliament. I might add that section 42 has since been repealed and has not been replaced by Parliament. **[333]**

In the result, I and find nothing in section 42 of Cap. 117, that leads me to the conclusion that registration of the judgments in this case constituted a severance of the joint-interest in the property of the judgment-debtor Keith Jordan so as to affect the operation of the *jus accrescendi* on the death of Keith Jordan. His interest in the joint-tenancy became extinguished therefore by operation of law.

It is therefore my view that Brenda Jordan, the surviving joint-tenant, is entitled in her own right to the net residue of the proceeds realised from the sale of their property situated at Lots Nos. 90 and 91, Maynards' St. Peter, with accrued interest.

There will therefore be an order directing that the net proceeds of sale with accrued interest be paid over by the garnishee to the defendant Brenda Jordan.

Accordingly, the applications are dismissed with no order as to costs. **[334]**