

**Judgment Title:** Irwin v Deasy

**Neutral Citation:** [2011] IESC 15

**Supreme Court Record Number:** 110/06

**High Court Record Number:** 2003 151 SP

**Date of Delivery:** 13/05/2011

**Court:** Supreme Court

**Composition of Court:** Macken J., Finnegan J., O'Donnell J.

**Judgment by:** Finnegan J.

**Status of Judgment:** Approved

**THE SUPREME COURT**

**REVENUE**

**RECORD 2006 No. 110**

**Macken J.  
Finnegan J.  
O'Donnell J.**

**BETWEEN**

**LIAM J. IRWIN**

**PLAINTIFF/APPELLANT**

**and**

## **THOMAS DEASY (AND BY ORDER) CARMEL DEASY**

### **DEFENDANTS/RESPONDENTS**

#### **Judgment of Mr Justice Finnegan delivered on the 13th day of May 2011**

The appellant at the time of the issue of these proceedings was the Collector General and an officer of the Revenue Commissioners suing on behalf of the Minister for Finance for the benefit of the central fund. He was succeeded in that office in April 2005 by Gerard Harrahill. By virtue of section 964 of the Taxes Consolidation Act 1997 (as amended) Mr Harrahill is empowered to continue the proceedings and this appeal in the appellant's name.

The respondents are the registered owners as joint tenants of the lands comprised Folio 8249 of the Register County Cork which comprises 19.513 hectares: the lands do not comprise a family home within the meaning of the Family Home Protection Act 1976.

In the Special Summons the appellant sought the following reliefs:-

1. A declaration that under and by virtue of the registration against the lands of three judgment mortgages the sums due on foot of three judgments stand well charged on Mr Deasy's interest in the lands.
2. An order for payment of the sums due on foot of the three judgments.
3. In default of payment of the sums due on foot of the three judgments an order for sale in lieu of partition of the lands comprised in the said Folio.

By order made the 8th day of March 2004 the High Court (Finlay Geoghegan J.) made the well charging order sought and joined Carmel Deasy as co-defendant to the proceedings. The High Court declined to make an order for sale without Carmel Deasy being joined in the proceedings. See *Irwin v Deasy* [2004] 4 I.R. 1.

Carmel Deasy was duly joined as a defendant and further affidavits were filed on behalf of the appellant and on behalf of Mrs Deasy. No affidavits were filed in the proceedings on behalf of Mr Deasy who took no active part in the proceedings. The appellant renewed his application for an order for sale which application came on for hearing before the High Court (Laffoy J.) on the 15th and 16th December 2005. In a written judgment (2006) IEHC 25 delivered on the 31st January 2006 Laffoy J. noted as follows:-

*"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."*

Thus the sole issue before the court was whether in the circumstances of this case the court had jurisdiction to order a sale in lieu of partition of the lands comprised in Folio 8249 of the Register County Clare. Laffoy J. held that the court did not have jurisdiction to order a sale in lieu of partition of registered land at the suit of a judgment mortgagee whose judgment affected the interest of a co-owner. Against that judgment the appellant appeals.

### **Judgment of the High Court (Finlay Geoghegan J.) 1st March 2004**

The learned trial judge made a number of findings of law as follows:-

1. The jurisdiction of the courts to make an order for sale in lieu of partition continues notwithstanding the repeal of the Partition Act 1542 by the Statute Law Revision (Pre-Union Irish Statutes) Act 1962: F.F. v C.F. [1987] I.L.R.M. 1.

2. The jurisdiction to make an order for sale in lieu of partition is that formerly exercised by the Courts of Chancery and following the Supreme Court of Judicature (Ireland) Act 1877 by all courts.

3. An order for sale in lieu of partition could only be made at the suit of a co-owner or someone claiming in right of his title e.g. a mortgagee of the co-owners.

4. An order for sale in lieu of partition can be made at the suit of a judgment mortgagee of unregistered land having regard to the provisions of the Judgment Mortgage (Ireland) Act 1850 section 7 which provides that registration of a judgment mortgage shall have the effect of a mortgage.

5. Registration of a judgment mortgage against registered land creates a charge only and does not operate as a mortgage and does not effect a transfer of the title of the judgment mortgagor. The remedies available to the judgment mortgagee are those conferred by the Registration of Title Act 1964 section 71 (4) –

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

6. An order for partition or sale in lieu of partition should not be made pursuant to the registration of Title Act 1964 section 71(4) where a judgment mortgage is registered against the interest of one co-owner in the absence of the

other co-owner.

Liberty was given to join Carmel Deasy as defendant.

**Judgment of the High Court (Laffoy J.) 31st January 2006**

In her judgment the learned trial judge set out the issue before her as follows:-

*"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.*

The learned trial judge carried out a detailed analysis of the law as it developed concerning the jurisdiction to order partition and sale in lieu of partition. The learned trial judge concluded as follows:-

*"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.*

*(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 sections 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 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*

*Cherry and LJJ. focussed 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.*

*(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 section 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 section 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 mortgage 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 indeed it is the state of the law. In my view, there is a lacuna and it is for the legislature to remedy the situation.*

*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."*

### **The Appeal**

On this appeal the appellant raises two grounds as follows:-

1. Jurisdiction: whether the High Court erred in law in holding that (prior to the commencement of the registration of Title Act 1964) it did not have jurisdiction under sections 3 and 4 of the Partition Act 1868 to make an order for sale in lieu of partition in this case.
2. The proper interpretation of section 71(4) of the Act of 1964: whether the learned trial judge erred in law in holding that section 71(4) of the Act of 1964 did not give her the jurisdiction, in this case, to make an order for sale of the

entire of the lands because the lands were registered – in a situation where, if the lands had been unregistered (registered in the Registry of Deeds), no such difficulty would have arisen.

For the purposes of this judgment the relevant law is that existing prior to the commencement of the Land and Conveyancing Law Reform Act 2009 section 31 which applies to judgment mortgages created after the commencement of that Act on the 1st December 2009.

### **Submissions of the Appellant**

The learned trial judge held that a person in the position of the appellant who had registered judgment mortgages against the interests of a co-owner of jointly owned registered land does not have sufficient interest to give him the necessary locus standi to maintain a suit for the partition of such land. The action between the appellant and the respondents has settled and the appellant now asks the court only to rule as to whether it would, but for the settlement, have granted all or any of the following reliefs:-

1. An order for sale of the lands in Folio 8249 of the Register County Cork.
2. An order for sale of the interest of the first named respondents' interest in the said lands.
3. An order for the partition of the said lands.

For the appellant it was submitted that section 71(4) of the Registration of Title Act 1964 empowers the court to make orders for the purpose of enforcing the charge created by the registration of a judgment mortgage similar to those the courts make for the purpose of enforcing a judgment mortgage registered in the Registry of Deeds against unregistered land.

However the only relief sought in the Special Summons issued in this matter was an order for sale in lieu of partition of the entire of the lands in Folio 8249 of the Register County Cork. An order for partition of the lands or a sale of the interest of the first named respondent was not sought. Accordingly the only issues considered by the High Court concerned the jurisdiction of the court to order a sale in lieu of partition prior to the commencement of the Registration of Title Act 1964 and if the court had no such jurisdiction whether such jurisdiction was conferred by section 71(4) of that Act. Accordingly these issues are the only issues which this court can consider.

The appellant accepts that only a person entitled in possession or entitled to call for legal possession can compel partition. It is well established that a mortgagee can obtain partition: **Davenport v King** 49 L.T.(N.S.) 92. There is no reason to distinguish between a judgment mortgagee of registered and unregistered land and it is clear that a mortgagee of unregistered land is entitled to partition. Under section 21(2) of the Local Registration of Title (Ireland) Act 1891 a judgment mortgagee of registered land was in exactly the same position as a judgment mortgagee of unregistered land with regard to his remedies: **Farrell v**

**Donnelly & Ors** [1913] 1 I.R. 50. Accordingly a judgment mortgagee of registered land prior to the commencement of the Registration of Title Act 1964 was a person coming within sections 3 and 4 of the Partition Act 1868. "Parties interested" in sections 3 and 4 of the Act of 1868 should be given a broader interpretation than that given by the learned trial judge. The judgment mortgagee's right is a right in possession as opposed to in remainder or reversion. It is not necessary to have a right to possession.

Section 71(4) of the Registration of Title Act 1964 provides that a judgment mortgagee shall have such rights and remedies for the enforcement of his charge as may be conferred on him by order of the court. "Right" is defined in section 3 of the Act as including an estate, interest, equity and power. This must include the interest of a judgment mortgagee. The rights of a judgment mortgagee which existed prior to the commencement of the Registration of Title Act 1964 were accordingly carried over by that Act by section 71(4) of the Act of 1964.

Alternatively the phrase in section 71(4) of the 1964 Act –

*"such rights and remedies for the enforcement of the charges may be conferred on him by order of the court" –*

should be interpreted in such a way as to give to a judgment mortgagee of registered land the same rights as are enjoyed by a judgment mortgagee of unregistered land. Section 71(4) should be interpreted so as confer upon the court an analogous jurisdiction in relation to registered land to that enjoyed in relation to unregistered land. In its terms section 71(4) of the Act of 1964 does not in any way fetter the court's discretion.

The Partition Act 1876 section 7 provides that an action for partition shall include an action for sale and that in an action for partition it shall be sufficient to claim a sale and not necessary to claim partition. **Aston v Meredith** [1871] L.R. 11 Eq. 213 held that the court had power to order a sale under the Partition Act 1868 although there was no prayer for partition.

Finally it is submitted on behalf of the appellant that the making of a well charging order has the effect of making a judgment mortgagee a person interested for the purposes of the Partition Acts. No authority is cited for this proposition.

### **Submissions of the Respondent**

At common law prior to the Partition Act 1542 the only persons who could compel partition were coparceners. The Act of 1542 enabled a co-owner to insist on partition in the absence of an agreement. The Court of Chancery developed a parallel jurisdiction. The Partition Act 1868 sections 3 and 4 enabled the court to order sale in lieu of partition where, were it not for the Act, an order for partition might have been made.

The Judgment Mortgage (Ireland) Act 1850 provided for the registration of judgments as mortgages, the effect of registration being that the judgment mortgagee should have all the rights, powers and remedies as if an effectual

conveyance of the judgment mortgagor's estate or interest had been executed in favour of the judgment mortgagee. Having regard to the terms of the Partition Act 1868 section 4 in order to obtain as relief an order for sale in lieu of partition that relief must be claimed and it has not been claimed in these proceedings. The courts have no inherent jurisdiction to make an order for sale in lieu of partition, the only jurisdiction being the statutory jurisdiction. While the Court of Chancery developed a jurisdiction to order partition parallel to the jurisdiction conferred on the common law courts by the Partition Act 1542 it never developed a jurisdiction to order sale in lieu of partition. The common law courts could not order sale in lieu of partition other than at the suit of a co-owner having a legal or equitable estate or interest vested in possession or coupled with the right of possession. Thus co-owners in remainder or reversion are not entitled to partition and accordingly not entitled to sale in lieu of partition: see judgment of Finlay Geoghegan J. in this matter and of Laffoy J. in **Trinity College v Kenny** [2010] I.E.H.C. 20.

The effect of registering a judgment mortgage on registered land differs from that of a judgment mortgage registered on unregistered land. The former creates a charge only and does not effect a transfer of title to the judgment mortgagee: Registration of Title act 1964 section 71. Accordingly the judgment mortgagee does not enjoy sufficient interest to obtain an order for partition or an order for sale in lieu of partition.

The Registration of Title Act 1964 section 71(4) has not the effect of conferring on the court jurisdiction to order partition or sale in lieu of partition. Had the legislature intended to confer such power it would have done so expressly.

In her judgment Finlay Geoghegan J. held that a judgment mortgagee was not a person in whose favour an order for partition might be made and accordingly an order for sale in lieu of partition could not be made in his favour. She also considered that the effect of section 71(4) of the Registration of Title Act 1964 which, while couched in wide terms giving a wide discretion to the High Court as to the orders which it may make for the purpose of enforcing a judgment mortgage, must be given an interpretation consistent with the Constitution. Such an interpretation requires that regard be had to the property rights of persons other than the judgment mortgagee. In interpreting the provision the court should have regard to the orders which the courts traditionally made pursuant to its equitable jurisdiction for the purpose of enforcing a judgment mortgage. Speaking obiter she went on to say:-

*"The probable intention of the Oireachtas in enacting in section 71(4) of the Act of 1964 was to give the court a jurisdiction to make orders for the purpose of enforcing the charge created by the registration of a judgment mortgage on registered land similar to those the courts make for the purpose of enforcing a judgment mortgage registered in the Registry of Deeds against unregistered land...section 74(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"*

Laffoy J. took a different view in the passages from her judgment which are set

out above. A judgment mortgagee of registered land is not a person to whom the Partition Act 1868 sections 3 and 4 apply, his interest as the owner of a charge being insufficient to bring him within these provisions. The effect of so holding is that the remedies available to a judgment mortgagee of unregistered land are quite different to those of a judgment mortgagee of registered land. The court has no jurisdiction apart from the Registration of Title Act 1964 section 71(4) to make an order for sale in lieu of partition at the suit of a judgment mortgagee of registered land.

When the Act of 1964 was enacted the judgment mortgage as a process of execution had been on the statute books for over one hundred years and the jurisprudence of the court providing a remedy to the judgment mortgagee had developed over that period and by then was well settled. It is implicit in section 71(4) that the remedy which the court may confer on a judgment creditor for the enforcement of a 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. An anomaly exists between the respective rights of a judgment mortgagee of registered and unregistered land but it is for the legislature to remedy the same. Accordingly Laffoy J. held that the court does not have jurisdiction at the suit of a judgment mortgagee of registered land to order a sale in lieu of partition under section 74(4) of the Act of 1964. For the respondent it is submitted that the conclusion of Laffoy J. is correct.

## **Discussion**

### Partition

At common law co-owners could put an end to their relationship by agreement. They could divide the properties so that each became full owner of part or they could sell the property and divide the proceeds of sale. However one co-owner, other than a co-parcener, could not force a partition on the other co-owners. To improve the position of co-owners the Irish Parliament passed the Act for Joint Tenants (1542) 33 Henry VII C.10. which enacted:-

*"That all joynt tenants and tenants in comen, that now bee, or hereafter shall bee, of any estate or estates of inheritance in their owne rightes, or in the right of their wives, or any mannours, landes, tenements, and hereditamentes within this land of Ireland, shall and may bee coacted and compelled by virtue of this present act to make partition between them of all such mannours, landes tenements and hereditamentes as they now holde, or hereafter shall hold, as joynt tenantes or tenants in common, by writte de participatione facienda, in that case to bee devised in the King our Sovereign Lord's Court of Chancerie of this land, in like manner and forme as coparcioners by the common lawes of this land have been and are compellable to do, and the same writte to be pursued at the common law."*

Thenceforth at common law joint tenants and tenants in common could compel

partition.

While the Act of 1542 referred expressly to the courts of common law, the Court of Chancery shortly thereafter developed a similar jurisdiction. In more modern times it was found more convenient to avail of the jurisdiction of the Court of Chancery and by the Real Property Limitation Act 1833 section 36 the writ of partition was abolished. From the passing of the Supreme Court of Judicature (Ireland) Act 1877 section 21 all courts could grant an order for partition.

A person in possession could claim partition: *co.lit.p.* 167a, ***Evans v Bagshaw*** 8 Eq. 469. A person entitled to call for legal possession could also claim partition: ***Taylor v Grange*** [1880] 15 Ch. D 165. An action for partition did not lie at the suit of a reversioner or remainder man: ***Evans v Bagshaw*** [1870] 5 Ch. App 340. A mortgagee could bring an action for partition: ***Fall v Elkins*** [1861] 9 W.R. 861, ***Re Hawkesworth*** L.R. Ir.1 Eq. 179. An alternative relief available was the appointment of a receiver of the rents of the undivided share of the mortgagor: ***Fall v Elkins***.

A sale could not be ordered unless all parties were before the court: ***Mildmay v Quicke*** 20 Eq. 538. After the abolition of the writ of partition the Court of Chancery exercised exclusive jurisdiction: ***Agar v Fairfax*** [1810] 17 Ves. 533, 2 ***White & Tudor*** L.C. 419. Notwithstanding the abolition of the writ of partition it was held in ***Mayfair Property Co. v Johnston*** [1894] 1 Ch. 513 that the English Statute of Henry VII, corresponding to the Irish Act of 1542, still provides for partition. Under the Act of 1542 both at law and equity partition is a right and an order will be made no matter how inconvenient: ***Mayfair Property Co.***, and ***Story, Equity Jurisdiction***. Indeed it has been suggested that the courts directed inconvenient partition to encourage the parties to agree to a sale: Land Law in Ireland, Andrew Lyall p.424, and ***Turner v Morgan*** [1803] 8 Ves. Jun. 143.

#### Sale in lieu of Partition

Prior to the Partition Act 1868 the court had no power to order a sale in lieu of partition. The Act provides in section 3 as follows:-

*"3. In a suit for partition, where, if this Act had not been passed a decree for partition might have been made, then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct sale of the property accordingly, and may give all the necessary or proper consequential directions."*

The section has application only where prior to the passing of the Act a decree for partition might have been made. The power to order sale in lieu of partition is discretionary. The power will be exercised only where the court is satisfied that a sale would be more beneficial for the parties interested than a division. The onus lies on those who wish a sale to show that it would be more beneficial:

**Huddersfield v Jacomb** [1874] W.N.80. The court may order partition of part and a sale of the rest: **Roebuck v Chadebet** 8 L.R. Eq. 127. A mortgagee of part of the property is a person interested and a sale may be decreed at his request: **Re Hawkesworth** 1 L.R. Ir. 179.

Section 4 of the act provides as follows:-

*"4. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."*

Again this section operates only where a decree for partition might have been made. This section is imperative to the effect that if parties interested to the extent of one moiety or upwards request a sale the court shall order a sale unless it sees good reason to the contrary: **Drinkwater v Ratcliffe** L.R. 20 Eq. 528, **Gilbert v Smith** 8 Ch. D. 548. A mortgagee is a party interested and will be reckoned in the proportion of his interest under the section: **Davenport v King** 29 L.T. 92. The onus rests on the person opposing sale to establish a good reason why it should not be ordered otherwise the court is bound to order it: **Penderton v Barnes** 6 Ch. 693. There are many authorities as to what will or will not amount to a good reason: where partition was as easy as a sale and would cause no loss to the plaintiff, while a sale would cause great loss to the defendant and the action was vindictive, this was held to be a good reason: **Saxton v Bartley** 48 L.J.Ch. 519, **Re Langdale** I.R. 5 Eq. 572. See also **First National Building Society v Ring** [1992] I.R. 375.

Is a judgment mortgagee a "person interested?"

The Act of 1542 applies to joint tenants and tenants in common. It applies where they have any other estate of inheritance in their own right or in the right of their wives however acquired. A legal mortgagee of the interest of one co-owner is a person interested as the effect of the mortgage is to transfer the interest of that co-owner to the mortgagee. The co-owner who mortgages his share has no right to partition or sale, except on terms of paying off the mortgage, as he has divested himself of his interest: **Gibbs v Haydon** 47 L.T. 184. However where the entire property is in mortgage a partition action may be maintained without interfering with the mortgage, presumably on the basis that the co-owners are within section 3 "as presumptively interested" and the property can be sold without interfering with the mortgage: **Sinclair v James** [1894] 3 Ch. 554. In

that case the mortgagees were dismissed from the action there being no cause of action against them.

Under the Local Registration of Title (Ireland) Act 1891 section 21, registration of a judgment mortgage operated as a mortgage. In those circumstances the judgment mortgagee was a person interested. However under the Registration of Title Act 1964 section 71 a judgment mortgage operates only as a charge and not as a mortgage: see **Lawlor v Mahon**, the Supreme Court, Finnegan J., unreported 25th November 2010. A judgment mortgagee is not a person entitled to an estate or interest in possession. No interest of the judgment mortgagor passes to the judgment mortgagee by virtue of the registration of the judgment mortgage, the effect of registration being to charge the interest of the judgment mortgagor. Accordingly he has no entitlement to apply for partition or sale in lieu of partition.

With regard to **Aston v Meredith** the court notes that the opposite was held in *Teal v Watts* L.R. 11 Eq. 213 and **Aston v Meredith** was not followed in **Holland v Holland** [1872] L.R. 13 Eq. 406. Section 7 of the Partition Act 1876 provides that the court may order partition where an order for sale is sought. There is, however, no provision empowering the court to order a sale where an order for partition is sought: neither has any authority been cited for that proposition.

Finally on this question I am satisfied that **First National Building Society v Ring** and **Farrell v Donnelly** were in each case decided on the assumption that jurisdiction existed to make an order for sale in lieu of partition of registered land on the application of a judgment creditor: however that issue was not canvassed or considered in either case.

#### Registration of Title Act 1974 section 71(4)

The relief available to a judgment mortgagee is provided for in section 71(4) of the Registration of Title Act 1964 –

*"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."*

Thus a wide discretion is conferred upon the court.

It is submitted on behalf of the appellant that the discretion conferred on the court by section 71(4) encompasses a power for the court to treat a judgment mortgagee of registered land as having the rights of a judgment mortgagee of unregistered land and the rights formerly enjoyed by a judgment mortgagee of registered land under the Local Registration of Title (Ireland) Act 1891. Had this been the intention of the Legislature it could have expressed that intention in clear terms by re-stating in the 1964 Act section 21(2) of the 1891 Act but it did not do so. The 1964 Act clearly distinguishes between a charge created by a registered owner, which has the effect of a mortgage, and a judgment mortgage which has not that effect: see section 62(6) as to the effect of a charge created by a registered owner and section 71(4) as to the effect of a judgment mortgage. The change effected in the position of a judgment mortgagee by section 71(4) of the 1964 Act from that under section 62(6) of the 1891 Act is such that I am

satisfied that it was the legislative intention to differentiate between the positions of a judgment mortgage of registered land and a judgment mortgage of unregistered land.

The explanation for not assimilating the position of a judgment mortgagee of registered and unregistered land becomes apparent, in my view, when the Act of 1964 is placed in context. The Act of 1891 section 22 made registration compulsory where the land had been at any time sold and conveyed to or vested in a purchaser under any of the provisions of the Purchase of Land (Ireland) Acts and was subject to any charge in respect of an annuity or rent charge for the repayment of an advance made in respect of the purchase money. Otherwise registration under the Act was voluntary. Section 95 of the Act defined Purchase of Land (Ireland) Acts as meaning the Irish Church Act 1869, the Landlord and Tenant (Ireland) Act 1870, the Landlord and Tenant (Ireland) Act 1872, the Land Law (Ireland) Act 1881, the Tramways and Public Companies (Ireland) Act 1883, the Purchase of Land (Ireland) Act 1885, the Land Law (Ireland) Act 1887, the Purchase of Land (Ireland) Amendment Acts 1888 and 1889 and any Act amending any of the said Acts. The following Acts also made registration compulsory:-

Small Dwellings Acquisition Act 1899

Fisheries Act 1939

Tuberculosis (Establishment of Sanitaria) Act 1945

Forestry Act 1936

State Property Act 1954

Forestry Act 1956

Derelict Sites Act 1961

Local Government (Sanitary Services) Act 1964

Landlord and Tenant (Ground Rents) Act (No. 20) Act 1978

By virtue of these Acts a great deal of the land in the State by 1964 had become registered or would in the future become registered. Part III of the Act of 1964 provides for compulsory registration. Sections 23 and 24 of the Act provide as follows:-

*"23(1) The registration of the ownership of freehold land shall be compulsory in the following cases:-*

*(a) where the land has been, or is deemed to have been, at any time sold and conveyed to or vested in any person under any of the provisions of the Land Purchase Acts or the Labourers Acts 1883 to 1962;*

*(b) where the land is acquired, after the commencement of this Act, by a statutory authority;*

*(c) in any case to which subsection (2) of section 24 applies.*

*(2) The registration of the ownership of a leasehold interest shall be compulsory in the following cases:-*

*(a) where the interest is acquired after the commencement of this Act, by a statutory authority;*

*(b) in any case to which subsection(2) of section 24 applies.*

*(3) The provisions of this Act in relation to registration of ownership do not apply to an estate or interest in reversion, remainder or expectancy.*

*24(1) The Minister for Justice may by order provide that this section shall apply to any county or county borough or any portion thereof on or after a specified day not being earlier than six months after the making of the order.*

*(2) In an area to which this section applies the registration of ownership shall, if not already compulsory, become compulsory*

*(a) in the case of freehold land, upon conveyance on sale;*

*(b) in the case of a leasehold interest, on the grant or assignment on sale of such an interest.*

*(4) In this part "conveyance on sale" and "assignment on sale" mean an instrument made on sale for money or monies worth by virtue of which there is conferred or completed a title in respect of which an application for registration as owner may be made, and include a conveyance or assignment by way of exchange where money is paid for equality of exchange and also include any contract, agreement, condition or covenant affecting the property comprised in the conveyance or assignment and entered into or made as part of or in association with such conveyance or assignment."*

Fitzgerald, Land Registry Practice at para 1.2 states:-

*"When the Registration of Title Act 1964 was passed and brought into operation in 1967, it was clearly the stated policy of the Act that registration of title be extended to all land in the State by compulsory methods. Accordingly Part III of the act contained provisions for the general extension of compulsory registration to all land. It was envisaged that the system of registration of title would replace the registration of deeds and result ultimately in closing the Registry of Deeds."*

By S.I. No. 87 of 1969 compulsory registration was extended to counties Carlow, Laois and Meath. However the extension of compulsory registration did not proceed as expeditiously as the Legislature might have anticipated. Fitzgerald attributes this to lack of resources for the updating of ordnance maps and staffing limitations imposed by economic restrictions. He anticipated that the pace of compulsory registration would quicken as technology advanced. This has indeed taken place. Compulsory registration was extended to Longford, Westmeath and Roscommon from the 1st April 2006, to Clare, Kilkenny, Louth, Sligo, Wexford and Wicklow from the 1st October 2008 and to remaining counties other than Cork and Dublin from the 1st January 2010. By S.I. No. 516 of 2010 compulsory registration will extend to the counties and cities of Cork and Dublin from the 1st June 2011.

According to the Property Registration Authority 93% of the total land mass of the State and almost 88% of the legal titles are now registered in the Land Registry. For this reason, if for no other, it would be inappropriate to construe section 71(4) of the 1964 Act so as to assimilate the position of a judgment mortgagee of registered land with one of unregistered land.

In any event I am satisfied that the provisions of section 71(4) are clear and unambiguous and must be given effect.

### **Decision**

I am satisfied the learned trial judge was correct in holding that she did not have jurisdiction under sections 3 and 4 of the Partition Act 1868 to make an order for sale in lieu of partition at the suit of the appellant, a judgment mortgagee of registered land. Further I am satisfied that section 71(4) of the Registration of Title Act 1964 does not confer upon the court power to make an order for partition or an order for sale in lieu of partition at the suit of a judgment mortgagee of registered land: had it been the intention of the legislature to confer that power upon the court it would have done so in clear terms.

I would dismiss the appeal and affirm the order of the High Court.