RICHARD SHELDON STONE-HOUSE (*Plaintiff*) ..... APPELLANT;

1961

*Oct. 17
Dec. 15

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Real property—Joint tenancy—Transfer of half-interest to stranger—Joint tenancy severed—Registration of deed after death of grantor—Duty of Registrar—Claim against assurance fund fails—Land Registry Act, R.S.B.C. 1948, c. 171, s. 35(1).*

The plaintiff and his wife were the registered owners of certain land as joint tenants. The wife, without telling her husband what she was doing, conveyed "all her interest in and to" this property to her daughter by a former marriage. From the time of its execution until after his wife's death, three years later, the plaintiff was unaware of the existence of the deed which remained unregistered until the day following the death of the wife, when the latter's daughter made application for its registration. The Registrar of Titles, before registering this three-year old deed, omitted to make inquiry as to whether the grantor was dead or alive. The husband brought an action for recovery from the assurance fund under s. 223(1) of the *Land Registry Act*, R.S.B.C. 1948, c. 171. The trial judge ruled in favour of the plaintiff but the Court of Appeal held that his action should be dismissed. The plaintiff appealed to this Court.

*Held:* The appeal should be dismissed.

The opening words of s. 35(1) of the Act "except as against the person making the same" expressly make operative an unregistered instrument against the party making the same. *Davidson v. Davidson*, [1946] S.C.R. 115, applied; *Wright v. Gibbons* (1948-1949), 78 C.L.R. 313, distinguished. It was, therefore, apparent that the deed in question operated as an alienation of the wife's interest, and the very fact of her interest being transferred to a stranger of itself destroyed the unity of title without which a joint tenancy cannot exist at common law. The effect of the deed was to change the character of the husband's interest from that a joint tenancy to that of a tenancy in common and thus to extinguish his right to claim title by survivorship.

Having regard to the state of the register and to the fact that the unregistered deed was operative to sever the joint tenancy at common law, the Registrar was under no obligation to inquire as to whether the grantor was dead or alive at the time of application for the registration of the deed. There being no suggestion of any other omission, mistake or misfeasance on the part of the Registrar, the plaintiff's claim necessarily failed.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Ritchie JJ.

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APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Manson J. for the plaintiff in an action to recover from the assurance fund under the *Land Registry Act*. Appeal dismissed.

*D. M. Norby,* for the plaintiff, appellant.

*M. M. McFarlane, Q.C.,* for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia[1], reversing and setting aside the judgment of the trial judge by which the appellant had been awarded damages against the Attorney-General of British Columbia under the provisions of s. 223(1) of the *Land Registry Act,* R.S.B.C. 1948, c. 171, which read as follows:

> 223. (1) . . . any person sustaining loss or damages caused solely as a result of any omission, mistake, or misfeasance of the Registrar, or any of his officers or clerks, in the execution of their respective duties under this Act, may bring and maintain an action in the Supreme Court against the Attorney-General as nominal defendant for the purpose of recovering the amount of the loss or damages and costs from the Assurance Fund.

On March 23, 1956, at which time the appellant and his wife were the registered owners of 3384 Southeast Drive in Vancouver as joint tenants, Mrs. Stonehouse, without telling her husband what she was doing, conveyed "all her interest in and to" this property to Mrs. Shirley Munk, her daughter by a former marriage. From the time of its execution until after his wife's death on March 1, 1959, the appellant was unaware of the existence of this deed which remained unregistered until March 2, 1959, when Mrs. Munk made application for its registration at the office of the Registrar of Titles at Vancouver.

It is contended on behalf of the appellant that by reason of the provisions of s. 35(1) of the *Land Registry Act* the unregistered deed from Mrs. Stonehouse to her daughter had no effect on the appellant's interest as a joint tenant and that when this three-year old deed was presented for registration the Registrar should have been alerted to the possibility of the grantor having died since its execution and the whole title having thus become vested in the appellant as the surviving joint tenant. It is the failure of the Registrar to make inquiry before he

[1] (1960-61), 33 W.W.R. 625, 26 D.L.R. (2d) 391.

registered this deed as to whether the grantor was dead or alive that is now claimed to constitute "an omission or mistake" which was the sole cause of the appellant sustaining damage and which accordingly entitled him to bring and maintain the present action against the Attorney-General in accordance with the provisions of s. 223(1).

When, as in this case, application is made for registration of a transfer of land, the title to which is registered, the Registrar is placed under the duty described in s. 156 of the *Land Registry Act* as follows:

> 156. . . . the Registrar, upon being satisfied that the conveyance or transfer produced has transferred to and vested in the applicant a good safe-holding and marketable title, shall, upon production of the former certificate or duplicate certificate of title, register the title claimed by the applicant in the register.

When Mrs. Munk applied for registration there was in force and uncancelled a certificate of indefeasible title which certified that the appellant and his wife were absolutely entitled to the property in question as "joint tenants" subject only to an outstanding judgment which Mrs. Stonehouse had registered against her husband's one-half interest and by virtue of the provisions of s. 38(1) such a certificate is

> . . . conclusive evidence . . . as against Her Majesty and all persons whomsoever, that the person named in the certificate is seised of an estate in fee-simple in the land therein described . . . .

Sheppard J.A. has said of this section in the course of his decision in the Court of Appeal that,

> As the certificate is conclusive of the owner being seised as against all persons, . . . it would be conclusive against the Registrar.

Counsel for the appellant, however, contends that this section must be read in conjunction with s. 156, and that once it is accepted that the unregistered deed did not sever the joint tenancy, it follows that the Registrar could not be satisfied that a three-year old deed from one joint tenant had "transferred to and vested in the applicant a good safe-holding and marketable title" to an undivided one-half interest in the property until he had also satisfied himself, by inquiry if necessary, that the grantor of that deed was still alive. I do not, however, find it necessary to decide this question because I have formed the opinion that the joint tenancy in question was severed at the time of the execution and delivery of the deed to Mrs. Munk.

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As has been indicated, the contention advanced on behalf of the appellant in this latter regard is based on the provisions of s. 35(1) of the *Land Registry Act*, the relevant portions of which read as follows:

> 35. *Except as against the person making the same, no instrument . . .* executed and taking effect after the thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein, *shall become operative to pass any estate or interest, either at law or in equity, in the land . . . until the instrument is registered in compliance with the provisions of this Act; . . . .* (The italics are mine.)

In finding that the joint tenancy had not been severed by the execution of the unregistered deed and that the *jus accrescendi* operated in favour of the appellant immediately on his wife's death so as to vest the whole title in him to the exclusion of Mrs. Munk, the learned trial judge relied, in great measure, as did the appellant's counsel before this Court, on the case of *Wright v. Gibbons*[1]. This is a decision of the High Court of Australia which held that under the *Real Property Act* of Tasmania the registration of a document evidencing mutual transfers of their interests *inter se* between two out of three registered joint tenants had the effect of severing the joint tenancy. This case is cited as authority for the proposition that a registered estate as joint tenants can only be severed by some dealing which results in an alteration of the register book, but the decision is of necessity based on the provisions of the *Real Property Act* of Tasmania of which Riche J. says at 78 C.L.R. 326: "The scheme of transfer and registration is the only method by which any alienation or disposition of a share or interest in land may be made." This observation clearly indicates that the statute under consideration in that case did not include the exception which is made a part of the British Columbia scheme of transfer and registration by the opening words of s. 35(1) and in the absence of some evidence that those words were considered by the High Court of Australia, the case of *Wright v. Gibbons, supra,* cannot be considered as an authority bearing in any way directly on the present case.

[1] (1948-1949), 78 C.L.R. 313.

In *Davidson v. Davidson*[1], Estey J. had occasion to consider the opening words of s. 35(1), and speaking on behalf of this Court at p. 119 he said:

> These words, "except as against the person making the same", expressly make operative an unregistered instrument against the party making the same. Therefore, the transfer executed by the respondent was operative to transfer to the Minto Trading and Development Company Limited whatever estate, either at law or in equity, he was in possession of.

It is, therefore, apparent that the deed here in question operated as an alienation of the interest of Mrs. Stonehouse, and the very fact of her interest being transferred to a stranger of itself destroyed the unity of title without which a joint tenancy cannot exist at common law.

The effect at common law of a conveyance by one joint tenant to a stranger in title is accurately stated in Cheshire's Modern Real Property, 8th ed., at p. 308, in the following terms:

> . . . it has long been the law that one joint tenant can alienate his share to a stranger. The effect of such alienation is to convert the joint tenancy into a tenancy in common, since the alienee and the remaining tenant or tenants hold by virtue of different titles and not under that one common title which is essential to the existence of a joint tenancy.

The following passage from the decision of Vice-Chancellor Sir Page Wood in *Williams v. Hensman*[2], is to the same effect. He there says:

> A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*.

There is nothing in the *Land Registry Act* which changes the effect of the common law in this regard as between the two joint tenants in the present case, and it follows that because the unregistered deed was operative against the share of Mrs. Stonehouse it had the effect of severing the joint tenancy. As Davey J.A. has said in the course of his decision in the Court of Appeal: "It is the binding effect upon himself of an owner's dealings with his own property that effects a severance of the joint tenancy."

[1] [1946] S.C.R. 115, 2 D.L.R. 289.
[2] (1861), 1 John & H. 546, 30 L.J. Ch. 878.

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Under the provisions of s. 35 an unregistered deed could not be operative "to pass any estate or interest either at law or in equity" other than that of the grantor, but the effect of Mrs. Munk's deed was not "*to pass*" any such estate or interest of Mr. Stonehouse but rather to change its character from that of a joint tenancy to that of a tenancy in common and thus to extinguish his right to claim title by survivorship which is an incident of the former but not of the latter type of interest. The right of survivorship under a joint tenancy is that, on the death of one joint tenant, his interest in the land passes to the other joint tenant or tenants (Megarry and Wade, The Law of Real Property, 2nd ed., p. 390). But, on the execution and delivery of the transfer by Mrs. Stonehouse, she divested herself of her entire interest in the land in question. At the time of her death, therefore, there was no interest in the land remaining in her which could pass to her husband by right of survivorship.

The "omission or mistake" within the meaning of s. 223 attributed to the Registrar by the learned trial judge was that he "omitted to make inquiry as to whether the deed was delivered in the lifetime of the grantor and as to whether she was dead or alive". The learned trial judge's finding that there was no delivery of the deed during the lifetime of the grantor was properly set aside by the Court of Appeal and was not relied on by the appellant's counsel in this Court, and in my opinion, having regard to the state of the register and to the fact that the unregistered deed was operative to sever the joint tenancy at common law the Registrar was under no obligation to inquire as to whether Mrs. Stonehouse was dead or alive at the time of the application for the registration of Mrs. Munk's deed. As there is no suggestion of any other omission, mistake or misfeasance on the part of the Registrar, the appellant's claim must fail.

I would accordingly dismiss this appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, respondent: Jestley, Morrison, Eckardt, Ainsworth & Henson, Vancouver.*

*Solicitors for the defendant, respondent: Lawrence, Shaw, McFarlane & Stewart, Vancouver.*