Appeal would seem to be equally so under the New Brunswick Marriage Act, with the result that only marriages performed in accordance with, or subsequently validated by the terms of the Act, are valid in New Brunswick.

Roderick M. Bryden*

REAL PROPERTY — CONCURRENT OWNERSHIP — TENANCY BY ENTIRETIES — PROPERTY ACT, R.S.N.B., 1952, c. 177, s. 19 — MARRIED WOMAN'S PROPERTY ACT, R.S.N.B., 1952, c. 140, s. 2(c) — INTERPRETATION ACT, R.S.N.B., 1952, c. 114, s. 38(13).

Today we ordinarily hear of only two types of concurrent ownership in land: tenancy in common and joint tenancy. However, the common law knew two other types of concurrent ownership: tenancy by entireties and coparcenary. Coparcenary was the descent of land on intestacy in the absence of a male heir to several daughters as co-heirs. This form of tenure has now vanished because of its inconsistency with the provisions of the Devolution of Estates Act.[1] But tenancy by entireties raises more difficult problems, and the purpose of this note is to consider whether or not this old form of common law tenancy has also, in effect, been abolished by provincial legislation.

Tenancy by entireties was peculiar to the marital status. If a husband and wife took land in such a way as would make them joint tenants but for the fact that they were married, they were deemed to have taken as tenants by entireties,[2] and this was so even if the land were expressly conveyed to them as joint tenants.[3] The interests of the spouses were joint and unseverable; neither spouse could alienate any part of the estate without obtaining permission to do so from the other. Upon the death of one spouse, the other became seised of the whole estate, but during their joint lives, there were, as between husband and wife, no moieties.[4] A tenancy by entireties could exist in any estate, whether in fee, for life, for years, or otherwise.[5]

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1 R.S.N.B., 1952, c. 62.

2 *Green d. Crew v. King* (1778), 2 Wm. Bl. 1212, at p. 1212; 96 E.R. 713, at p. 714.

3 *Pollok v. Kelly* (1856), 6 I.C.L.R. 367.

4 *Marquis of Winchester's Case* (1583), 3 Co. Rep. 1a, at p. 52; 76 E.R. 621, at p. 631.

5 Megarry, *A Manual of the Law of Real Property*, 2nd ed., at p. 261.

We must now examine a number of New Brunswick statutory provisions that may affect tenancy by entireties. The first is section 19 of the Property Act.[6] It states:

> 19. An estate hereafter created, granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy; but every estate vested in trustees or executors as such shall be held by them in joint tenancy.

The effect of a similar provision, section 10 of chapter 82 of the Consolidated Statutes of Upper Canada, was discussed in *Shaver v. Hart*.[7] Section 10 enacted that whenever by any assurance executed after July 1, 1834, land shall be granted to two or more persons, it shall be considered that such persons took as tenants in common, and not as joint tenants, unless an intention sufficiently appeared on the face of the assurance that they were to take as joint tenants. In *Shaver v. Hart,* property was conveyed to a married couple in 1836, and the court had to decide if they held as joint tenants or as tenants by entireties. The court found that the couple held as tenants by entireties, and that section 10 did not affect a conveyance of property to husband and wife. Morrison, J., stated at page 607:

> . . . the only conveyances in the mind of the Legislature were those which without the Act would have passed the lands in joint tenancy, and, . . . a conveyance to husband and wife would not do so.[8]

When *Shaver v. Hart* was decided there was in existence a statute[9] which gave married women the right to hold real estate separately, but this Act was not in force when the conveyance was made in 1836 and the court did not make reference to this provision in reaching its decision. This provision is now contained in clause (c) of section 2 of the New Brunswick Married Woman's Property Act, which reads:

> 2. Subject to the provisions of this Act, a married woman shall
>
> . . . .
>
> (c) be capable of acquiring, holding and disposing of any property.[10]

This section is intended only to enable a married woman to deal with land as a *feme sole.* The words "shall be capable" are permissive, and not mandatory.

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6 R.S.N.B., 1952, c. 177.
7 (1872), 31 U.C.Q.B. 603.
8 *Ibid.*, at p. 607, *per* Morrison, J.
9 C.S.U.C., 1856, c. 73.
10 R.S.N.B., 1952, c. 140.

The combined effect of this provision and the provision providing that a grant to two or more persons *prima facie* creates a tenancy in common was discussed in *Re Wilson and Toronto Incandescent Light Company*,[11] where H and W were married in 1864 and in 1874 property was conveyed to them as husband and wife. The wife died in 1887. The Married Woman's Property Act was passed in Ontario in 1872 and this raised the following question: is the husband the sole owner of the estate as he would be if H and W held by the entireties or does he inherit only half the estate which would be the case if H and W held as tenants in common? In arriving at his decision, Falconbridge, J., examined *Shaver v. Hart*, and a number of English decisions, including *Re Jupp*[12] and *Re March*.[13] He found that *Shaver v. Hart* was not in point because the conveyance in that case had been made before the Married Woman's Property Act was passed. He then decided, relying on the English decisions, that under the conveyance made in 1874 H and W took as strangers, and so were tenants in common by virtue of the Ontario provision similar to section 19 of the New Brunswick Property Act.

Spring v. Kinee,[14] a 1928 Ontario Court of Appeal decision, followed *Re Wilson and Toronto Incandescent Light Company*. The facts in the two cases were essentially the same, and Middleton, J.A., giving the judgment of the court, said:

> . . . the effect of the Married Woman's Property Act is to enable the wife to take as though she were a *feme sole*, and so the effect of the marital relationship is ended so far as real property is concerned.[15]

It would appear, then, from *Spring v. Kinee* that the Married Woman's Property Act enables the wife to take real property as though she were a *feme sole*, and as such, she and her husband come under section 12 of the Conveyancing and Law of Property Act and take as tenants in common rather than as joint tenants.

The finding of the Court of Appeal of Ontario in *Spring v. Kinee* rested undisturbed until 1958. In that year the Ontario Court of Appeal in *Campbell v. Sovereign Securities & Holding Company, Limited*[16] handed down a decision that placed a different interpretation on the Married Woman's Property Act from that applied in *Spring v. Kinee*. In the *Campbell* case, the

11 (1891), 20 O.R. 397.
12 (1888), 39 Ch. D. 148.
13 (1883), 24 Ch. D. 222.
14 (1928), 62 O.L.R. 562.
15 *Ibid.*, at p. 564.
16 [1958] O.R. 441.

plaintiff and her husband entered into a contract to sell land to X, who later assigned the contract to the defendant. This was an action by the plaintiff for specific performance of the contract of sale and purchase of the land by the defendants. The plaintiff and her husband did not own the land at the time they agreed to sell to the defendant. However, they agreed to purchase this land from a vendor who had sold them land before. The previous land sold by the vendor to the husband and plaintiff had been conveyed to them as joint tenants. The husband died before a deed from the vendor could be delivered to him and his wife, the plaintiff. However, at trial the plaintiff testified that the intention was to have the land conveyed by terms that would have made her and her husband joint tenants in this new parcel of land, and not tenants in common. The trial judge believed the plaintiff's testimony in this matter. In other words, at the date of the husband's demise, a mere *executory agreement* for the sale and purchase of land existed between the vendor and the plaintiff. After her husband's demise, the plaintiff proposed to obtain a deed from the original vendor to *her and her husband* as joint tenants, and then transfer a deed to the defendants from herself in her personal capacity as survivor. The defendants did not repudiate the contract of purchase, but they failed to discharge their obligations under it, contending that a transfer of title in the way proposed by the plaintiff was not satisfactory to them. Stewart, J., in the High Court of Justice found for the plaintiff. He held that the executory contract between the plaintiff and the original vendor was not an "assurance" of land within section 12 of the Conveyancing and Law of Property Act of Ontario. The section reads as follows:

> 12. (1) Where by any letters patent, assurance or will, made and executed after the 1st day of July, 1834, land has been or is granted, conveyed or devised to two or more persons other than executors or trustees in fee simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint tenants.
>
> (2) This section shall apply notwithstanding that one of such persons is the wife of another of them.[17]

Stewart, J., further held that since the agreement for sale did not fall within section 12, then the husband and wife took as tenants by entireties and not as tenants in common. This decision, which was later confirmed on appeal to the Ontario Court of Appeal,[18]

17 R.S.O., 1950, c. 68.
18 [1958] O.R. 441.

is contrary to *Re Wilson* and *Spring v. Kinee* in that it holds that the Married Woman's Property Act did not abolish tenancy by entireties:

> I do not think that the Married Woman's Property Act ousts the doctrine of the unity of the husband and wife (and upon which the concept of tenancy by entirety is really based) . . .[19]

The *Campbell* case can be authority only for executory agreements for the sale of realty. The case does not decide that had the facts here been caught by section 12 of the Conveyancing and Law of Property Act, the tenancy would have been by entireties.

The question then, as far as New Brunswick is concerned, is: does section 19 of our Property Act differ sufficiently from section 12 of the Conveyancing and Law of Property Act of Ontario to include an executory agreement for the sale of realty such as existed in the *Campbell* case? The pertinent words used in section 19 are "an estate . . . created, granted, or devised". In the *Campbell* case, there was no devise or grant. There may, however, have been a "creation" of an estate. Section 12 of the Conveyancing and Law of Property Act does not use the word "create", but rather the words "granted, conveyed or devised". In an executory agreement for the sale of realty, the purchaser, before any deed is passed, has an equitable interest or right in the property and may call for specific performance of the agreement should the vendor refuse to convey. Does this "equitable interest or right" arising out of the agreement of sale amount to an estate? According to the New Brunswick Interpretation Act, section 38(13):

> 38. (13) "estate" or "property" means real and personal property; and "real estate", "land" or "lands" includes lands, houses, tenements and hereditaments, all *rights* thereto and incident therein;[20]

It is submitted that an executory agreement for the sale of realty creates an estate in equity. If this is so, then section 19 of the Property Act would control such an agreement. Consequently an agreement of sale between H and W, purchasers, and X, vendor, could not amount to a tenancy by entireties on the authority of the *Campbell* case.

To summarize, in Ontario there is a division of judicial opinion concerning the interpretation of the Married Woman's Property Act: *Spring v. Kinee* held that that Act ended the marital

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19 *Ibid., per* Stewart, J., at p. 444; this view is criticized by Professor Laskin in a case comment in (1959), 37 Can. Bar Rev. 370.

20 R.S.N.B., 1952, c. 114. (italics mine)

relationship so far as real property is concerned, and the *Campbell* case held the opposite. Both are court of appeal decisions. In New Brunswick, section 19 of the Property Act may be somewhat wider in its scope than section 12 of the Conveyancing and Law of Property Act of Ontario, and may control executory agreements for the sale of realty as well as actual conveyances. If so, tenancy by entireties would appear to be impossible in this province.

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