[HIGH COURT OF AUSTRALIA.]

THE REGISTRAR-GENERAL OF NEW SOUTH WALES . . . . . } APPELLANT;

AND

WOOD . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Aug.* 20, 23; *Nov.* 12.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Husband and Wife—Land held as tenants by entireties—Separate property of wife—Transfer of wife's interest under writ of fieri facias—Registration of transfer—Married Women's Property Act 1901 (*N.S.W.*) (*No.* 45 *of* 1901), *secs.* 3, 5, 8, 26 *—Conveyancing Act* 1919 (*N.S.W.*) (*No.* 6 *of* 1919), *sec.* 26.

Held, by *Isaacs*, *Rich* and *Starke* JJ. (*Knox* C.J. and *Higgins* J. dissenting), that since the passing of the *Married Women's Property Act* 1893 (N.S.W.) a transfer of land in New South Wales to a husband and wife as tenants by entireties, of which land they become registered under the *Real Property Act* 1900 (N.S.W.) as tenants by entireties, confers upon the wife a separate estate and interest of which, under sec. 5 of the *Married Women's Property Act* 1901 (N.S.W.), she can dispose as if she were a feme sole; and therefore that the Registrar-General was bound to register a transfer by the sheriff, pursuant to a sale by him under a writ of *fieri facias* issued against the wife, of all the wife's estate and interest in such land.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Wood*, (1925) 26 S.R. (N.S.W.) 1, affirmed.

APPEAL from the Supreme Court of New South Wales.

By memorandum of transfer dated 14th October 1918 there was transferred to Annie Wood and William Harry Wood, her husband, as tenants by entireties, by the said Annie Wood, who had acquired the same in February 1910 from one George Weeks, all the land

comprised in a certain certificate of title, being lots 28 and 29 on a certain plan, in the parish of Wilton and county of Camden; and William Harry Wood and his wife were and had been since 26th November 1918 the registered proprietors as tenants by entireties of the said land. By memorandum of transfer dated 6th April 1914 there was transferred by the Nepean Estate Co. Ltd. to William Harry Wood and his wife as tenants by entireties all the land comprised in a certain certificate of title, being lot 27 on a certain plan, in the parish of Wilton and county of Camden, and William Harry Wood and his wife were and had been since 6th May 1914 the registered proprietors as tenants by entireties of the said land. On or about 18th March 1925 there was issued out of the Supreme Court of New South Wales a writ of *fieri facias* in an action in the said Supreme Court in which one Kenneth McDonald White was the plaintiff and the said Annie Wood was defendant, and on or about 19th March 1925 the said writ directed against the said lands of the said Annie Wood was lodged in the Department of the Registrar-General. The said writ bore a notification that it was intended to bind all the land comprised in the aforesaid certificates of title. It was entered on the proper register books on 2nd April, the memorials on the said register books stating that the writ affected the undivided interest of Annie Wood. The Sheriff duly caused to be sold on 1st June 1925 the interest of the said Annie Wood in the said lands and William Harry Wood duly purchased the same from the Sheriff. Thereafter the Sheriff on or about 26th June 1925 executed a memorandum of transfer whereby he purported to transfer to William Harry Wood all the estate and interest of Annie Wood in the whole of the said lands. The Registrar-General refused to register the said transfer, stating that "the transfer to the proprietors in this case must upon registration be deemed to have conveyed the subject land to them, subject to all the incidents attending a tenancy by entireties at common law. If this is so, then, having regard to the nature of such a tenancy, the wife's interest cannot be regarded as her separate property, and consequently such interest was not liable or competent to be taken in execution (Act No. 45 of 1901, sec. 3 (2)). On this footing, the writ of *fieri facias* was not properly issued and should not have

H. C. OF A. 1926.

REGISTRAR-GENERAL (N.S.W.) v. WOOD.

been enforced, and the transfer in pursuance of it should not be registered."

William Harry Wood thereupon obtained an order nisi for a mandamus directed to the Registrar-General, ordering him to register the memorandum of transfer of 26th June 1925, and the Full Court made the order absolute: *Ex parte Wood* (1).

From that decision the Registrar-General now, by special leave, appealed to the High Court.

Brissenden K.C. (with him *McKell*), for the appellant. The Supreme Court was wrong in holding that the *Married Women's Property Act* 1893 (N.S.W.) had the effect of abolishing tenancies by entireties. A statute will not be held to alter the common law unless the alteration is made in express terms (*In re Jordison* (2); *Edwards* v. *Porter* (3)). Sec. 26 of the *Married Women's Property Act* 1901 only applies to a case of a gift to a husband and wife and another person, and does not affect this case. If the *Married Women's Property Act* 1893 had the effect of putting an end to tenancies by entireties, then sec. 26 of the *Conveyancing Act* 1919 (N.S.W.) would be useless. Secs. 3, 5 and 8 of the *Married Women's Property Act* 1901 do not operate so as to sever the interest of a married woman in land of which she and her husband are tenants by entireties. [Counsel also referred to *In re Jeffery*; *Nussey* v. *Jeffery* (4); *Thornley* v. *Thornley* (5).]

Flannery K.C. (with him *Owen*), for the respondent. Before the *Married Women's Property Act* 1893 a tenancy by entireties meant the estate which was given in fee to two persons who happened to be husband and wife. It was the logical consequence of the legal fiction that a man and his wife were one person. As soon as that fiction ceased and the incapacity of a married woman to hold property ended, the tenancy by entireties became a joint tenancy. That result was brought about by secs. 3, 5 and 8 of the present Act. A tenancy by entireties was a joint estate of a husband and wife subject to a limitation on the capacity of the parties which resulted from

(1) (1925) 26 S.R. (N.S.W.) 1.
(2) (1922) 1 Ch. 440, at pp. 451, 465.
(3) (1925) A.C. 1, at p. 29.
(4) (1914) 1 Ch. 375.
(5) (1893) 2 Ch. 229.

the fiction that husband and wife were one person (see *Halsbury's Laws of England*, vol. XXIV., p. 202, par. 386, note (*k*); *Murray* v. *Hall* (1)). The fact that the transfer was made to the husband and wife after the *Married Women's Property Act* 1893 and as tenants by entireties makes no difference. The effect is the same as if the gift were to strangers as tenants by entireties: they would hold as joint tenants. Sec. 26 of the *Conveyancing Act* 1919 may be treated as a rule of construction, but it has no application to the present case.

Cur. adv. vult.

Nov. 12.

The following written judgments were delivered:—

KNOX C.J. This is an appeal from an order of the Supreme Court making absolute an order nisi for a mandamus directed to the appellant, ordering him to register a memorandum of transfer under the *Real Property Act* from the Sheriff of New South Wales to the respondent of the interest of the respondent's wife, Annie Wood, in the lands comprised in two certificates of title. Each parcel of land was transferred to the said Annie Wood and the respondent as tenants by entireties, one by the Nepean Estate Co. in the year 1914, and the other by the said Annie Wood in 1918. Upon registration of these transfers the said Annie Wood and the respondent became, and they have since remained, registered proprietors of the respective parcels as tenants by entireties. In the year 1925 a writ of *fieri facias* directed against the lands of the said Annie Wood was lodged with the Registrar-General. The writ, which bore a notification that it was intended to bind the lands comprised in the before-mentioned certificates of title, was entered in the register books, the memorial stating that the writ affected the undivided interest of the said Annie Wood. Subsequently the Sheriff sold and transferred to the respondent all the estate and interest of the said Annie Wood as proprietor in both parcels of land. The appellant refused to register this transfer, and now appeals from the order of the Supreme Court directing him to do so.

The decision of the Supreme Court rested on two grounds, namely,

(1) (1849) 7 C.B. 441, at p. 455 (note).

H. C. OF A. 1926.

REGISTRAR-GENERAL (N.S.W.) v. WOOD.

KNOX C.J.

(1) that the estate known as "tenancy by entireties" had by force of the *Married Women's Property Act* 1893 ceased to exist in all cases of property the title to which accrued after the passing of that Act, and that the effect of the transfers to Annie Wood and the respondent was to make them joint tenants; (2) that, even if the *Married Women's Property Act* 1893 did not prevent the creation of interests in husband and wife similar to those which they would have taken at common law as tenants by entireties, the interest of Annie Wood, having been acquired after the passing of that Act, belonged to her for her separate estate, and that she was entitled to hold and dispose of it as if she were a feme sole.

As to the first ground it must be observed that by the express words of each transfer to Annie Wood and the respondent the land included in it was transferred to them as tenants by entireties. The Supreme Court has in effect decided that, by reason of the provisions of the *Married Women's Property Act* 1901, these transfers, in common with all transfers in similar terms executed after 17th April 1893, must be construed as if the words "as joint tenants" were substituted for the words "as tenants by entireties." The Act contains no express provision to that effect, but it is said that, by restoring, or creating, a separate personality for a married woman so far as her right to property is concerned, Parliament has put an end to the estate known as a tenancy by entireties. This view appears to me to be inconsistent with sec. 26 of the *Conveyancing Act* 1919, which is in the words following:—"(1) In the construction of any instrument coming into operation after the commencement of this Act a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as tenants in common, and not as joint tenants. (2) This section does not apply to persons who by the terms or by the tenour of the instrument are executors, administrators, trustees, or mortgagees, nor in any case where the instrument expressly provides that persons are to take as joint tenants or tenants by entireties." This enactment recognizes that a conveyance coming into operation after 1st July 1920 may expressly provide that persons are to take as tenants by entireties, and provides that the rule of construction

prescribed by sub-sec. 1 shall not apply to any such conveyance. The necessary implication is that such a conveyance is to be construed according to its express terms, and I can find nothing in the *Married Women's Property Act* which forbids such a construction. It may well be that a conveyance to husband and wife simpliciter without the addition of the words " as tenants by entireties," if made after the *Married Women's Property Act*, should, subject to the provisions of sec. 26 of the *Conveyancing Act* 1919, be construed as creating a joint tenancy, the interest of the wife being her separate estate. But where, as in this case, the express limitation is to husband and wife " as tenants by entireties," I do not feel at liberty to discard those words or to substitute for them the words " as joint tenants." In my opinion, the effect of the transfers was to pass to the husband and wife respectively the same interests in the land transferred as they would have taken at common law under a conveyance to them as tenants by entireties.

But it is said that, even if this be so, the interest of Mrs. Wood in the lands transferred to her and her husband became her separate property by force of the *Married Women's Property Act*, and therefore the transfer by the Sheriff of her interest ought to have been registered. I am unable to agree in this view. When land is vested in husband and wife as tenants by entireties, both are seised together in entireties in right of the wife (*Polyblank* v. *Hawkins* (1); *Lush on Husband and Wife*, 2nd ed., p. 31). The husband is entitled to a freehold estate in the rents and profits during the coverture, and can dispose of this estate without the concurrence of the wife. But neither husband nor wife can, without the concurrence of the other, make any disposition of the land which will be effectual after the termination of the coverture. This form of tenancy confers no power of severance (*Challis on Real Property*, 2nd ed., p. 344 (note)). The passage from *Cruise's Digest* cited by *Street* C.J. seems to me to show that—subject to the right of the husband to the rents and profits during the coverture—the estate of which husband and wife are seised by entireties is one and indivisible and that neither can during the coverture take any separate estate or interest in the land (*Cruise's Digest*, tit. XVIII., ch. 1, sec. 45). It seems to me

(1) (1780) 1 Doug. 329.

H. C. OF A. 1926.

REGISTRAR-GENERAL (N.S.W.) v. WOOD.

KNOX C.J.

to follow that during the coverture the estate in fee simple in these lands was vested in Mr. and Mrs. Wood as one person and that there was no separate estate or interest in the land vested in Mrs. Wood capable of belonging to her for her separate estate. It is true that, by the operation of the *Married Women's Property Act*, property which Mrs. Wood acquired in 1910 or 1914 would belong to her for her separate estate. But, being entitled to have these lands conveyed to her, in which case they would have belonged to her for her separate estate, she chose to dispose of them by conveying them or procuring their conveyance to herself and her husband as tenants by entireties, and I am unable to find any provision in the *Married Women's Property Act* which prohibited her from so doing. The result of her dispositions is, in my opinion, that there is no interest in the land capable of being regarded as belonging to her for her separate estate.

For these reasons I am of opinion that the appeal should be allowed.

ISAACS J. The only material facts are these :—In 1914 a limited company transferred certain land in New South Wales under the *Real Property Act* to Annie Wood and her husband, William Harry Wood, as tenants by entireties. In 1918 Annie Wood transferred other land under the Act to herself and her husband as tenants by entireties. In 1925 one White sued Annie Wood in the Supreme Court of New South Wales, recovered judgment, and issued a *fieri facias*. Under the writ the Sheriff sold all the estate and interest of Annie Wood in the lands mentioned to her husband. The husband lodged the transfer for registration, which was refused by the Registrar-General on the ground that the wife's interest in the land could not be regarded as her separate property, and therefore did not pass under the execution. The Supreme Court did not agree with that view, and ordered a mandamus to issue. This is an appeal from that decision.

I am of opinion that the decision was correct, and should be affirmed.

The whole question is : " Was the wife's interest in the land her separate property ? " Whether there can be a tenancy by entireties

is not the test, and it is very necessary to bear this in mind. The basic argument for the appellant is the ancient fiction that a wife has no independent existence, her personality being merged in that of her husband. It was a very deeply-rooted fiction, and in some departments of the law, where it has some relation to common sense or convenience in establishing a settled rule, as, for instance, in domicil, it still persists. But for the purposes of daily life it is so opposed to fact and experience and to present-day habits of thought that outside the solemn precincts of a Court no one in his senses would venture to affirm it. Inside those precincts it certainly needs a little, but only a little, in my opinion, to enable a Court to disregard it. So far as this case is concerned, I am of opinion the Legislature of New South Wales has brought the law of the community into accord with its general sentiment. It is true that the rule at common law, as the Privy Council has said in *Dias* v. *De Livera* (1), that "a gift to a man and his wife, and to a third person, is to be construed as a gift of a moiety to the husband and wife and a moiety to a third person, is founded on the doctrine of the English law that husband and wife are, for most purposes, one person." Their Lordships, however, go on to say: "And yet any indication, however slight, of an intention that each shall take *separately* has been held to defeat the application of this doctrine." That concluding observation may very probably be extended to the intention of the Legislature. It is probably true that the New South Wales Parliament, finding that according to English decisions its main legislation still permitted the primeval doctrine to prevail in such a case as that referred to by the Privy Council, passed what is now sec. 26 of the *Married Women's Property Act* 1901. That section provides: "In the construction of any gift or limitation of real or personal property made after the sixteenth day of April, one thousand eight hundred and ninety-three, by any will, deed, or other instrument, to more than one individual jointly or in common, a husband and wife shall not be regarded as one person for the purpose of deciding the proportionate shares of such individuals respectively, unless a contrary intention therein appears." I read that section as assuming that as between themselves husband

(1) (1879) 5 App. Cas. 123, at pp. 135-136.

H. C. OF A. 1926.

REGISTRAR-GENERAL (N.S.W.) v. WOOD.

Isaacs J.

and wife already took individual shares, and the section merely prescribed the *quantum* where a third person was affected. It is a strong confirmation of the interpretation placed by the Supreme Court on secs. 5 and 8. The words are: "to more than one individual jointly or in common." The expression "a joint tenancy" is not used, though even that would not be inconsistent.

It was strongly urged on behalf of the appellant that a tenancy by entireties was in its essential nature different from that of a joint tenancy. That is not so. A tenancy by entireties is, or rather was, a joint tenancy of husband and wife. It was different only in the incapability of severing the respective interests of husband and wife. *Co. Litt.*, 326a, says: "Where the husband and wife are *jointly* seised to them and their heirs of an estate *made during the coverture.*" As *Challis* (3rd ed., p. 376 (note)) observes, *Coke* regards a tenancy by entireties as being a species of joint tenancy, with the distinguishing characteristic that it confers no power of severance. That characteristic arose not from the different nature of the disposition by which the grantees obtained their interests, but by the nature of the relation existing between them, which, once the interests were acquired, so operated as to preclude the power of severance, but the interests were in no other way different from an ordinary joint tenancy. *Fearne* (8th ed.), at p. 36, says of a limitation to a husband and wife: "His wife having a joint estate of freehold with him, and there being no moieties between them," &c. At p. 40 he says: "If a joint estate be made to husband and wife, and a third person, the husband and wife have but one moiety, and the third person will have as much as them both; because the husband and wife are but one person in law." In *Moody* v. *Moody* (1) Lord *Camden* L.C. refers to the distinction made by *Co. Litt.*, 187, between a joint estate "given to the husband and wife during the marriage" and a "joint estate" to them before marriage, and the Lord Chancellor says: "In the former case their interest is not severable, in the latter case they take in moieties." (See also *Williams on Real Property*, 23rd ed., p. 339.)

I entertain no doubt that the *Married Women's Property Act* was intended to emancipate married women in this respect. Finding

(1) (1767) Amb. 649, at p. 650.

it necessary to complete the task, sec. 26 of the present Act was passed, not for the benefit of anyone but the wife. The impelling motive may have been to apply to a case where a third beneficiary was one of the objects the same doctrine of independent existence as in other cases, but the words of the section, if that be necessary, apply just as well to husband and wife alone as in *conjunction* with a third person. The word "individual" distinguishes between husband and wife in the earlier part quite as much as in the latter part. For the reasons given, I do not think that section essential here, but it would be sufficient.

In sec. 26 of the *Conveyancing Act* 1919 (No. 6) occurs the expression "tenants by entireties." At first sight that may seem a little disturbing, but on consideration it does not appear to me to stand in the way of affirming the judgment under appeal. It is true the Supreme Court says there is now no tenancy by entireties. But if that is understood as I think it was meant to be understood, namely, as meaning that there is no such tenancy having the old common law quality of non-severability, it is correct. Sec. 26 of the *Conveyancing Act* is directed purely to "construction."

The matter, when analyzed, works out in the following way:— The nature of a tenancy by entireties at common law is already stated, and further as to this I refer to my judgment in *McCormick* v. *Allen* (1). But the *Married Women's Property Act* 1901, as to all "real and personal property" accruing to her after 17th April 1893, declares that she "shall be entitled to have and to hold, and to dispose of" it "as her *separate property*, in the same manner as if she were a feme sole, without the intervention of any trustee." Suppose, then, she and her husband became transferees as "tenants by entireties" of land in fee simple, has she any "real property" within the meaning of the *Married Women's Property Act*? The words undoubtedly satisfy the burden of construction required by sec. 26 of the *Conveyancing Act*; but do they in any way affect her capacity to have and to hold and to dispose of her interest "as her separate property" as if she were a feme sole? Unquestionably she has "real property" by reason of the tenancy by entireties, because "real property" includes every incident of ownership in

(1) *Ante*, 22.

H. C. OF A. 1926.

REGISTRAR-GENERAL (N.S.W.) v. WOOD.

Isaacs J.

land, not being a mere chattel interest. And, unless extraordinary violence is to be done to the words " separate estate " in the statute, her incidents of ownership in the land—whatever they may be—are by statute her separate property. That is to say, as between her husband and herself the " property " she has in the land is hers and not his. That is the effect of the Act. The steps by which that consummation has been reached is well stated in *Cheshire on Modern Real Property* (1925), at pp. 728-730. At p. 729 the learned author says with reference to the Married Women's Property Acts :— " The principle of these has been, not to let the existence of separate property depend upon the intention of the donor, but to provide that in all cases property of married women shall be separate property. Thus in effect separate property in equity has given way to statutory separate property." This is also the view of *Kay* J. in *In re Jupp*; *Jupp* v. *Buckwell* (1). The learned Judge says (2) :—" The Act only enlarges her capacity to take such property 'as her separate property.' That is, as I read it, as between her and the grantor she takes the same as before, but as between her and her husband what she takes is 'her separate property.' " That was the learned Judge's construction of the Act independently of authority. He does not agree with *In re March*; *Mander* v. *Harris* (3), as to the abolition of *status*. He adds (4) :—" The capacity of a married woman to take property is only altered between herself and her husband. The true view seems to me to be that the wife had an unlimited capacity before the Act to acquire property, but that upon its acquisition *the marital right of the husband gave him certain interests in it which the Act has interfered with.*" That applies here exactly. A tenancy by entireties was a species of joint tenancy referable only to the status of husband and wife. The status remaining, such a tenancy is still possible of creation. If created, it repels the notion of tenancy in common under sec. 26 of the *Conveyancing Act*. But it does not in any way affect the " separate estate " legislation of the *Married Women's Property Act*. The legal consequence is that the " separate estate " of Annie Wood was validly sold and transferred to her husband, and the transfer should be registered.

(1) (1888) 39 Ch. D. 148, at p. 152.
(2) (1888) 39 Ch. D., at p. 153.
(3) (1883) 24 Ch. D. 222.
(4) (1888) 39 Ch. D., at p. 154.

I have so far dealt with the matter as if the purchaser from the Sheriff were not the husband, but a stranger. But the fact of the purchaser being the husband makes the appellant's contention, in my opinion, border on the ridiculous. It is conceded that between them the husband and wife had the complete fee simple. The wife had either some interest or no interest in the land. If she had no interest, her husband must now have all, and so should be registered as the proprietor in fee simple. If she had some interest, then, whatever that interest was, it passed to her husband by the law, and none the less because, as is urged, her identity is merged in his. *Quacunque via*, if reason is to play any part in the matter, he must now be the complete and sole owner of the land. The alternative is that the combined will and conduct of husband, wife and Supreme Court, with its law of judgment and execution behind it, to say nothing of the effect of the *Married Women's Property Act*, have been unable to invest the husband with the complete ownership of the land. The immovable object has triumphed over the irresistible force.

In my opinion, however, the appeal should be dismissed.

HIGGINS J. In my opinion this appeal must be allowed. I cannot find anything in the *Married Women's Property Act* 1901 that either expressly or by necessary implication puts an end to tenancy by entireties of husband and wife—anything that compels us to treat the words " as tenants by entireties " in a certificate or in a transfer as if they were " as joint tenants."

Probably the section in the more recent *Conveyancing Act* 1919 (sec. 26) is really conclusive on the subject. It provides that, in the construction of any instrument coming into operation after 1st July 1920, a disposition of the beneficial interest in any property to two or more persons is to be deemed to be made to them as tenants in common and not as joint tenants ; but that the section is not to apply to executors &c. " nor in any case where the instrument expressly provides that the persons are to take as joint tenants or *tenants by entireties.*" But even without this express reference to tenancy by entireties as still subsisting, I should come to the

H. C. OF A. 1926.

REGISTRAR-GENERAL (N.S.W.) v. WOOD.

Higgins J.

conclusion which I have stated: sec. 26 of the *Conveyancing Act* is not due to any oversight on the part of the draughtsman.

The facts may be summarily stated in order:—February 1910, Annie Wood, wife of W. H. Wood, acquired from Weeks lots 28 and 29; no doubt, as her separate property under the *Married Women's Property Act*. 6th April 1914, the Nepean Estate Co. Ltd. transferred lot 27 to W. H. Wood and Annie Wood as "tenants by entireties"; and the transfer was so registered. 18th October 1918, Annie Wood transferred lots 28 and 29 to W. H. Wood and Annie Wood "as tenants by entireties"; and the transfer was so registered. 18th March 1925, writ of *fieri facias* in action *White* v. *Annie Wood*. This writ was lodged with the Registrar-General, with a memorial stating that it affected all the interest—the "undivided interest"—of Annie Wood in these three lots. 1st June 1925, Sheriff sold all the "undivided interest" of Annie Wood in the lots to her husband, W. H. Wood; and 26th June 1925, Sheriff executed a transfer of that interest to W. H. Wood. The Registrar-General refused to register the transfer, because in a tenancy by entireties the wife has no separate interest that can be taken in execution.

There can be no doubt that the Registrar-General was right as to the effect of a tenancy by entireties, if the *Married Women's Property Act* 1901, or if its predecessor the *Married Women's Property Act* 1893 to the same effect, did not abolish tenancy by entireties. Under such a title in fee simple the two spouses constitute a kind of compound owner, resembling an incorporated association of persons: neither husband nor wife can alienate without the other. The common law principle on which such a tenancy is based is that husband and wife are to be treated as one person. They are not joint tenants *inter se*, each with a separate interest in an undivided share; but the principle of survivorship applies, so that if either spouse die before joint alienation the survivor takes the whole (*Doe d. Freestone* v. *Parratt* (1)).

There seems to be no doubt, also, that under sec. 3 (1) of the Act of 1901 a married woman is made "capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as

(1) (1794) 5 T.R. 652.

her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee." Therefore Mrs. Wood was capable of acquiring and she acquired lots 28 and 29 from Weeks; and having acquired the lots she disposed of them by conveying to Wood and herself as tenants by entireties. No point is taken as to the validity of a transfer from A to A and B. As to lot 27, the affidavit states merely that the lot was transferred direct by the company to Wood and his wife as "tenants by entireties."

In his reasons for judgment, *Street* C.J. points out the fluctuations of opinion on the English Bench as to the effect of the *Married Women's Property Act* of which the New South Wales Act is mainly a copy; and he has also pointed out that the New South Wales Act has a section, sec. 26, which has no counterpart in England. There have been lately some very drastic changes made on the subject in England (15 Geo. V. c. 20, sec. 37; 15 Geo. V. c. 23, sec. 46); but these changes do not affect our problem. Sec. 26 of the New South Wales Act of 1901 provides: "*In the construction of any gift or limitation* of real or personal property made after the sixteenth day of April, one thousand eight hundred and ninety-three, by any will, deed, or other instrument, to more than one individual *jointly or in common*, a husband and wife shall not be regarded as one person *for the purpose of deciding the proportionate shares* of such individuals *respectively, unless a contrary intention therein appears.*" But this provision, on its very face, is merely a change in a principle of construction, shifting the onus as to the meaning of certain words. It does not say (as the recent English Act says) that a husband and wife shall be treated as two persons, but that they shall not be regarded as one person for a certain definite purpose. From the doctrine of the unity of husband and wife there had resulted a quaint anomaly in conveyancing, so that a conveyance to A and his wife and B had to be treated prima facie as conveying one half undivided share to A and his wife and one half to B—not as conveying one third undivided share to each of the three persons (*Williams' Real Property*, 14th ed., 240). Since the cases cited in the reasons for judgment, it has been made clearer than ever that this rule is a mere

H. C. OF A. 1926.

REGISTRAR-GENERAL (N.S.W.) v. WOOD.

Higgins J.

rule of construction (*In re Dixon*; *Byram* v. *Tull* (1); *In re Jeffery*; *Nussey* v. *Jeffery* (2)); but this had already been established expressly by the authority of the Judicial Committee, the tribunal which binds our Courts (*Dias* v. *De Livera* (3)). By this sec. 26 the limitation is prima facie to be construed as a limitation to three persons not two—not as being prima facie a limitation to A and his wife as one joint tenant with B, or as one tenant in common with B. But if this is the true effect of sec. 26, there remains no substance in the contention that the doctrine of unity of person of husband and wife is abolished for all purposes, or for any purpose other than that defined in sec. 26. It is always to be presumed that the Legislature does not intend to make any substantial alteration in the law beyond that which it explicitly declares in express terms or by necessary implication (*Maxwell on Statutes*, 6th ed., p. 149); and this principle has been actually implied in the matter of this very doctrine in the recent decision of the Judicial Committee in *Attorney-General of Alberta* v. *Cook* (4).

But it is said that, even if tenancy by entireties has not been abolished and the spouses are tenants by entireties, Mrs. Wood as one of such tenants has such an interest in the lands as must be treated, under the *Married Women's Property Act* (sec. 3 (1)), as being her statutory separate property; and that the Registrar-General ought to have registered the transfer by the Sheriff of this interest. The answer to this contention seems, to my mind, obvious —one of two tenants by entireties has no separate or separable interest. The whole interest in the lands is vested in the compound person, husband and wife; neither can alienate without the other—even as a member of an incorporated company cannot alienate any interest in the company's lands; and there is no interest in the company's lands that can be sold in execution for his debt (*Doe d. Freestone* v. *Parratt* (5)).

With regard to the words used by *Romer* J. in *Thornley* v. *Thornley* (6), and quoted by my brother *Starke*, it is sufficient for my present purpose to say that they relate merely to a conveyance made after the *Married Women's Property Act* to husband and wife "as joint

(1) (1889) 42 Ch. D. 306.
(2) (1914) 1 Ch. 375.
(3) (1879) 5 App. Cas., at p. 135.
(4) (1926) A.C. 444, at p. 460.
(5) (1794) 5 T.R., at p. 654.
(6) (1893) 2 Ch., at p. 234.

tenants" (or the equivalent); and that the learned Judge was considering the effect of the English Act of 1882 on the interest "*so given.*" As *Kay* J. has said, in *In re Jupp*; *Jupp* v. *Buckwell* (1), "the Act only enlarges her" (a married woman's) "*capacity* to take such property 'as her separate property'"; and therefore, in a conveyance to husband and wife "as joint tenants," there was no obligation on the Court to treat the words as if they were "as tenants by entireties." There is no expression of opinion that, since the *Married Women's Property Act*, a conveyance made to husband and wife expressly as "tenants by entireties" is to be treated as if it were a conveyance to them as joint tenants. If the conveyance said "as joint tenants" the wife would, of course, have a separate interest which she could hold (according to *Kay* J.) under the Act as her separate property; but not if the conveyance said (as here) "as tenants by entireties." The pronouncement of *Romer* J. was only applicable to a case where the conveyance to husband and wife was expressly to them as joint tenants.

I am therefore of opinion that the Registrar-General's refusal to register the Sheriff's transfer of Mrs Wood's interest on the ground which he has stated was quite justified, and that the order absolute for a writ of mandamus should be set aside.

It is therefore unnecessary for me to consider a point which has not been taken either by the Registrar-General or in the argument—that a married woman is not liable, under the *Married Women's Property Act*, either in contract or in tort, except in respect of and to the extent of "her separate property" (sec. 3 (2)).

RICH J. I agree with the conclusions arrived at by *Street* C.J.

The essential characteristic of the form of co-ownership called tenancy by entireties which distinguishes it from joint tenancy is that there can be no severance. "Neither can sever the jointure, but the whole must accrue to the survivor" (*Green d. Crew* v. *King* (2)). This arises from the fact that the spouses are together seised or possessed of a single estate or interest—"the husband and wife shall have no moieties" (*Co. Litt.*, sec. 291). No right of property is vested in each over the whole, but one right of property over the

(1) (1888) 39 Ch. D., at p. 153. (2) (1778) 2 W. Bl. 1211, at p. 1213.

H. C. OF A. 1926.

REGISTRAR-GENERAL (N.S.W.) v. WOOD.

Rich J.

whole is vested in both. This is expressed by saying they hold *per tout et non per my.*

In respect of estates and interests acquired during coverture after the commencement of the *Married Women's Property Act*, it is enacted that the wife is entitled to hold and dispose of all property as her separate property. If this provision applies to an estate which otherwise would be held by tenancy by entireties it operates to destroy its essential characteristic. The wife is to take a separate right of property and is to have a power of alienation which must in addition involve severance. Moreover, the wife is to be capable of acquiring, holding and disposing of real and personal property as a feme sole. Her incapacity as a separate person to hold a separate right was the ground of the unity of property necessary to co-ownership in entireties. There can be no doubt that these provisions apply to all property without exception. The legislation known as the *Married Women's Property Act* is therefore inconsistent with the creation of tenancy by entireties and any attempt to convey or transfer such an estate results in the assurance of a joint tenancy to the spouses. It was suggested that sub-sec. 2 of sec. 26 of the *Conveyancing Act* 1919 is decisive in the matter, but in my opinion it is not a legislative recognition of the continuance of the form of ownership formerly known as tenancy by entireties, but merely of the fact that instruments may lawfully provide that donees are to take as tenants by entireties.

In my opinion the appeal should be dismissed.

STARKE J. "A tenancy by entireties is peculiar to a gift to two persons being at the time when the gift takes effect husband and wife" (*Preston on Abstracts of Title*, vol. II., p. 39; *Challis on Real Property*, 3rd ed., p. 376). Apparently, however, at common law the husband and wife sometimes had the freehold by moieties, sometimes jointly as joint tenants, sometimes by entireties and sometimes the husband and wife were seised in right of the wife (*Preston on Conveyancing*, vol. II., p. 54; cf. *Co. Litt.* 187b); but if land were conveyed to a husband and wife jointly they took an estate by entireties (*Pollok* v. *Kelly* (1); *Challis on Real Property*, 3rd ed., 376).

(1) (1856) 6 Ir. C.L.R. 367.

The problem in this case is the effect of the *Married Women's Property Act* upon a conveyance or transfer made after that Act of lands to a husband and wife in fee simple as tenants by entireties. In *Thornley* v. *Thornley* (1) *Romer* J. had to consider the effect of the *Married Women's Property Act* upon lands conveyed after that Act to husband and wife so as to give them at common law an estate by entireties. He said (2): "What is the effect of the Act of 1882 upon the interests so given to the wife? In my judgment, the wife's interest, such as it was, clearly became hers for her separate estate, and to hold, not in entireties, but as joint tenant with her husband, her interest as joint tenant being for her separate use." The reason was expounded by *Kay* J. in *In re Jupp* (3):—"The capacity of a married woman to take property is not altered as between her and the grantor. That was always complete. Whatever property, real or personal, was devised, bequeathed, conveyed, or assigned to a married woman, as between her and the grantor, passed absolutely. The Act only enlarges her capacity to take such property 'as her separate property.' That is, as I read it, as between her and the grantor she takes the same as before, but as between her and her husband what she takes is 'her separate property.'" Again, he says (4): "The operation of the statute upon an interest of a husband and wife held by entirety was determined by the Court of Appeal in *In re March* (5), to be that the husband would be entitled to one-half of the joint share in his own right, and the wife the other half for her separate use."

The construction put upon the will which was under consideration in that case by *Kay* J. has been criticized in *In re Dixon*; *Byram* v. *Tull* (6), and *In re Jeffery*; *Nussey* v. *Jeffery* (7), but the passages I have cited remain quite untouched by those criticisms. Those decisions appear to me to be decisive of this case and the necessary result of the provisions of the *Married Women's Property Act* 1901 of New South Wales, especially secs. 3, 5 and 8 referred to by *Street* C.J. in his judgment. It makes no difference, in my opinion, that the lands in this case are transferred to husband and wife as tenants

(1) (1893) 2 Ch. 229.
(2) (1893) 2 Ch., at p. 234.
(3) (1888) 39 Ch. D., at p. 153.
(4) (1888) 39 Ch. D., at p. 151.
(5) (1884) 27 Ch. D. 166.
(6) (1889) 42 Ch. D. 306.
(7) (1914) 1 Ch. 375.

H. C. OF A. 1926.

REGISTRAR-GENERAL (N.S.W.) v. WOOD.

Starke J.

by entireties and not jointly, for in the latter case the husband and wife took an estate by entireties according to the common law. It was the legal construction of the words used in the grant as applied to the circumstances of the case. If the effect of the *Married Women's Property Act* is to sever the entirety in the latter case, so also must that be its effect in the former.

The provisions of the *Conveyancing Act*, sec. 26, sub-sec. 2, create I think, no difficulty. It provides for the construction of an instrument in cases in which the words "tenant by entireties" are found, but in no wise controls or alters the effect of the provisions of the *Married Women's Property Act*.

In my opinion the decision of the Supreme Court of New South Wales should be affirmed.

Appeal dismissed with costs.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *M. Finlay*.

B. L.