[HIGH COURT OF AUSTRALIA.]

WRIGHT AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

GIBBONS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1948-1949.

HOBART, 1948. *Nov.* 8.

MELBOURNE, 1949. *Feb.* 22.

Latham C.J., Rich and Dixon JJ.

Real Property—Joint tenancy—Three joint tenants—Two tenants cross-transferring interest to each other—Single instrument of transfer—Severance—Real Property Act 1862-1935 (*Tas.*) (25 *Vict. No.* 16—26 *Geo. V. No.* 99).

A, B and C were registered as joint tenants for an estate in fee simple in land under the provisions of the *Real Property Act* 1862-1935 (Tas.). By one instrument of transfer A purported to transfer to B her undivided interest in the land and B purported to transfer to A her undivided interest in the land to the intent that A, B and C should all three be tenants in common in equal shares.

Held that upon registration of the memorandum of transfer the joint tenancy was severed, and that A, B and C became tenants in common. The alienation of the share of one joint tenant to another joint tenant and the exchange of shares between joint tenants at common law and under the provisions of the *Real Property Act* 1862-1935 (Tas.), discussed.

Decision of the Supreme Court of Tasmania (*Clarke* J.) reversed.

APPEAL from the Supreme Court of Tasmania.

Olinda Gibbons, Ethel Rose Gibbons and Bessie Melba Gibbons were registered, under the provisions of the *Real Property Act* 1862-1935 (Tas.), as joint tenants for an estate in fee simple of certain land at Hobart, subject to a registered mortgage. By a document executed on 6th December 1945, duly registered by the Recorder of Titles as a memorandum of transfer, Ethel Rose Gibbons,

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in consideration of the transfer to her of the one-third share in the joint tenancy by Olinda Gibbons, transferred to Olinda Gibbons all her one-third share estate and interest in the said piece of land; and Olinda Gibbons, in consideration of the transfer above described, transferred to Ethel Rose Gibbons all her one-third share estate and interest in the said piece of land. On registration the appropriate certificate of title was indorsed with a memorial of the memorandum of transfer as a result of which the former joint tenants were registered as tenants in common in equal shares. Bessie Melba Gibbons who survived the two other tenants, sought a declaration in the Supreme Court of Tasmania that the memorandum of transfer did not effect a severance of the joint tenancy, and consequently that she, as survivor of the three, became solely entitled to an estate in fee simple, the defendants being Reginald Charles Wright (the executor of the wills of Ethel Rose Gibbons, who died on 26th January 1946, and Olinda Gibbons, who died on 30th November 1946) and the Recorder of Titles.

Pursuant to an order for the determination of the question before trial, *Clark* J. held that the joint tenancy had not been severed by reason of the memorandum of transfer. His Honour said that in contemplation of law joint tenants are jointly seised for the whole estate they take in land and no one of them has a distinct or separate title interest or possession; and it followed that an attempt on the part of two or three joint tenants mutually to assure each to the other his or her undivided share in the hope that each of their two shares will be taken by a new title and so enure as a several undivided interest must fail because it can accomplish nothing.

From that decision the defendants appealed to the High Court.

H. S. Baker (with him *C. A. S. Page*), for the appellant R. C. Wright. For the purposes of alienation, joint tenants have separate shares (*Co. Litt.*, 18th ed. (1823), vol. 2, p. 186a; *Challis, Law of Real Property*, 3rd ed. (1911), p. 367; *Bacon, Abridgement of the Law*, 7th ed. (1832), vol. 4, p. 514, note (a); *Beckwith's Case* (1); *Halsbury's Laws of England*, 1st ed., vol. 18, p. 343; *Hills* v. *Webber* (2); *Cowper* v. *Fletcher* (3); *Prideaux's Precedents in Conveyancing*, 15th ed. (1893), vol. 1, pp. 256, 257, note (p); *Butterworth's Encyclopaedia of Forms and Precedents*, 1st ed. (1907), vol. 12, p. 488). They have the same power of alienation to each other, as to strangers (*Cruise's Digest of the Laws of England, Respecting Real Property*, 3rd ed. (1824), vol. 2, pp. 452, 453; *Co. Litt.*, 18th ed. (1823),

(1) (1589) 2 Co. Rep. 56b, at p. 58a [76 E.R. 541, at p. 549].
(2) (1901) 17 T.L.R. 513.
(3) (1865) 12 L.T. 420.

p. 193a, s. 304). Alienation by one of three joint tenants works a severance of his undivided share only (*Cruise's Digest*, 3rd ed. (1824), vol. 2, p. 453, par. 24). The proper mode of conveyance by one joint tenant to another was by release (*Co. Litt.*, 18th ed. (1823), p. 200b; *Holdsworth's History of English Law*, vol. 3, p. 232; *Williams, Law of Real Property*, 21st ed. (1910), p. 140); so long as the release was necessary between joint tenants. This may account for the view stated in *Sheppard's Touchstone*, 7th ed. (1821), vol. 2, p. 291 that joint tenants cannot exchange their shares. A common-law exchange presented difficulties in the case of joint tenants, because all its requirements were not applicable (*Halsbury's Laws of England*, 1st ed., vol. 24, p. 295; *Sheppard's Touchstone*, 7th ed. (1821), vol. 2, p. 289). But a grant was allowed to pass the interest from one joint tenant to another (*Sheppard's Touchstone*, 7th ed. (1821), vol. 2, p. 326, note (b); *Chester* v. *Willan* (1); *Eustace* v. *Scawen* (2)). By the *Real Property Act* 1846 (in England the *Real Property Act* 1845 (8 & 9 Vict. c. 106)) and the *Conveyancing and Law of Property Act* 1884, s. 59, the statutory grant became the method of conveying all corporeal hereditaments (*Challis, Law of Real Property*, 3rd ed. (1911), pp. 381, 382; *Williams, Law of Real Property*, 21st ed. (1910), pp. 206, 207; *Cheshire, Modern Law of Real Property*, 5th ed. (1944), p. 591). The land being under the Torrens system, the interests pass by force of the statute (*Real Property Act* 1862, ss. 1, 3, 34 (3), 39, 42, 87; *Real Property Act* 1886, s. 15; *Kerr, Principles of the Australian Lands Titles (Torrens) System*, (1927), p. 41; *Hogg, Australian Torrens System*, (1905), p. 877; *English, Scottish & Australian Bank Ltd.* v. *Phillips* (3); *Lewis* v. *Keene* (4); *Mahony* v. *Hosken* (5); *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Hosken* (6); *Fink* v. *Robertson* (7); *Kerr, Principles of the Australian Lands Titles (Torrens) System*, (1927), p. 40, note (35); *Wiseman, The Transfer of Land Acts*, 1st ed. (1925), p. 67.) A severance is effected on the basis of an agreement between Olinda and Ethel Gibbons to hold as tenants in common (*Halsbury's Laws of England*, 2nd ed., vol. 27, p. 663, note (r)).

M. P. Crisp (with him *Everett*), for the appellant, the Recorder of Titles. Generally the Torrens system introduced a new system

(1) (1670) 2 Wms. Saund. 96a, at pp. 96b, 97a [85 E.R. 768, at pp. 769-773].
(2) (1624) Cro. Jac. 696 [79 E.R. 604].
(3) (1937) 57 C.L.R. 302.
(4) (1936) 36 S.R. (N.S.W.) 493.
(5) (1912) 14 C.L.R. 379, at p. 384.
(6) (1912) 14 C.L.R. 286, at p. 290.
(7) (1907) 4 C.L.R. 864, at p. 871.

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of conveyancing, but has not changed the substantive rules of the common law as to the nature and incidents of estates and interests in land. In respect of joint tenancy in particular the substantive rules of the common law have been expressly adopted (*Fink* v. *Robertson* (1); *Real Property Act* 1862, ss. 86, 87, 88) but rules having their origin in the formalities of common-law conveyancing should be disregarded, e.g. no provision was made for release (*Real Property Act* 1862, ss. 1, 3, 41, 42, 86; First Schedule Form IV.). Joint tenants had to come in by the same title (*Co. Litt.*, 18th ed. (1823), vol. 2, p. 188b, s. 292; *Challis, Law of Real Property*, 3rd ed. (1911), pp. 336, 337; *Halsbury's Laws of England*, 2nd ed., vol. 27, p. 659, note (e); *Cheshire, Modern Law of Real Property*, 5th ed. (1944), p. 551); though seised *per my et per tout*, for the purposes of alienation they have separate shares and can either convey such share to a stranger (*Co. Litt.* 18th ed. (1823), vol. 2, p. 186a, s. 288; *Challis, Law of Real Property*, 3rd ed. (1911), p. 367) or release it to a fellow joint tenant (*Co. Litt.*, 18th ed. (1823), vol. 2, p. 193b, s. 305; *Sheppard's Touchstone*, 7th ed. (1821), vol. 2, p. 327). A grant to a fellow joint tenant would be construed as a release (*Sheppard's Touchstone*, 7th ed. (1821), vol. 2, pp. 327, 328; *Cruise's Digest*, 4th ed. (1835), vol. 2, pp. 382-384); if one joint tenant alienates his share the alienee comes in by a different title and it works a severance (*Co. Litt.*, 18th ed. (1823), vol. 2, p. 188b, s. 292; *Cruise's Digest*, 4th ed. (1835), vol. 2, p. 379). If one out of three or more joint tenants either alienates to a stranger or releases to a fellow it works a severance as to his share only (*Co. Litt.*, 18th ed. (1823), vol. 2, pp. 189a, 193a, 196a, ss. 294, 304, 312; *Cruise's Digest*, 4th ed. (1835), vol. 2, p. 382; *Denne d. Bowyer* v. *Judge* (2)). So that if in the case of A, B and C, joint tenants, C releases to B, then (1) A and B hold two-thirds as joint tenants; (2) B holds one-third as tenant in common with A. If by subsequent deed B, as to the two-thirds held jointly with A, granted his undivided share to C, then C must hold one-third as tenant in common with A and the last vestige of the joint tenancy would be destroyed (*Tucker* v. *Coleman* (3); *Napier* v. *Williams* (4)). Under the Torrens system the same result would follow whether by separate transfers or mutual transfers in the same instrument (*Tucker* v. *Coleman* (5)). The conveyancing rules as to exchange at common law are not applicable.

(1) (1907) 4 C.L.R. 864, at pp. 871, 891.
(2) (1809) 11 East 288 [103 E.R. 1014].
(3) (1885) 4 N.Z.L.R. 128, at p. 133.
(4) (1911) 1 Ch. 361, at p. 368.
(5) (1885) 4 N.Z.L.R., at pp. 133-135.

Sholl K.C. (with him *Burbury*), for the respondent Bessie Melba Gibbons. The onus of showing severance is on the appellants (*Re Denny* (1); *Flynn* v. *Flynn* (2)). The nature of joint tenancy is explained in *Australian Law Journal*, vol. 9, p. 431; *Holdsworth's History of English Law*, vol. 3, pp. 126-128; *Preston* on *Estates*, 2nd ed. (1820), vol. 1, pp. 136-139; *Blackstone's Commentaries*, 19th ed. (1836), vol. 2, pp. 183, 191; 14th ed. (1803), vol. 2, p. 181; *Carr* on *Collective Ownership*, (1907) Chap. IV, esp. p. 33; *Challis*, *Law of Real Property*, 3rd ed. (1911) p. 367). Thus, until alienation, it is incorrect to talk about "A," "B" or "C" having any share at all. There is unity of interest, and all have the same thing. If "A" alienates a "share" to a stranger, it is only then that it becomes a "share." The right of alienation by a joint tenant is referred to in *Preston* on *Estates*, 2nd ed. (1820), vol. 1, pp. 136-139; *Partriche* v. *Powlet* (3); *Blackstone's Commentaries*, 19th ed. (1836), vol. 2, note II.; *Hood & Challis*, *Property, Settled Land, Trustee and Administration Acts*, 8th ed. (1938), pp. 105, 106. Alienation by a joint tenant to a stranger, or release of one joint tenant's share to another (i.e. operating as an extinguishment) constitutes a severance because the alienee comes in by a different title and the unity of title is destroyed. The *Real Property Act* recognizes joint tenancies. Severance is achieved (*Williams* v. *Hensman* (4); *Flynn* v. *Flynn* (5); *Cruise's Digest*, 3rd ed. (1824), vol. 2, pp. 447-462) (*a*) by alienation which must destroy one of the four unities (apart from time) (*Cruise's Digest*, 3rd ed. (1824), vol. 2, p. 447, par. 1; *Cheshire*, *Modern Law of Real Property*, 5th ed. (1944), pp. 555-558); (*b*) by grant or transfer (*Halsbury's Laws of England*, 2nd ed., vol. 27, pp. 662, 663; *Blackstone's Commentaries*, 14th ed. (1803), vol. 2, p. 185; *Watkins*, *Principles of Conveyancing*, 8th ed. (1833), p. 99; *Jenks*, *Modern Land Law*, (1899), p. 171; *Cruise's Digest*, 3rd ed. (1824), vol. 2, p. 449, par. 10); (*c*) by release to the other, or another, joint tenant (*Eustace* v. *Scawen* (6); *Chester* v. *Wilson* (7); *Chester* v. *Willan* (8); *Carr*, *Collective Ownership*, (1907) p. 45; *Co. Litt.*, 18th ed. (1823), vol. 2, p. 193a, s. 304, note (1): and see explanation in *Co. Litt.*, 18th ed. (1823), vol. 2, p. 273 (b); *Butterworth's Encyclopaedia of Forms and Precedents*, 1st ed. (1907), vol. 12, p. 499; *Evatt and Beckenham*, *Conveyancing Precedents and Forms*, 2nd ed. (1938), p. 159; *Goodeve and Potter*,

(1) (1947) 116 L.J. Ch. 1029, at p. 1031.
(2) (1930) I.R. 337, at p. 343.
(3) (1740) 2 Atk. 54 [26 E.R. 430].
(4) (1861) 1 J. & H. 546 [70 E.R. 862].
(5) (1930) I.R. 337, at p. 343.
(6) (1624) Cro. Jac. 696 [79 E.R. 604].
(7) (1670) 1 Vent. 78 [86 E.R. 55].
(8) (1670) 2 Wms. Saund. 96a [85 E.R. 768].

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Modern Law of Real Property and Chattels Real, 6th ed. (1929), p. 393; *Radcliffe, Real Property Law*, 1st ed. (1933), pp. 30 et seq.; *Watkins, Principles of Conveyancing*, 8th ed. (1833), p. 99; *Cruise's Digest*, 3rd ed. (1824), vol. 2, p. 452, par. 22). A conveyance void at law would not sever a joint tenancy (*Watkins, Principles of Conveyancing*, 8th ed. (1833), p. 105; *Moyse* v. *Gyles* (1)); a purported mutual exchange of respective interests would have been such a void conveyance. A release by one joint tenant to all the others does not effect a severance at all; the others continue to hold as joint tenants, though one has gone (*Co. Litt.*, 18th ed. (1823), vol. 2, p. 193b.; *Cruise's Digest*, 3rd ed. (1824), vol. 2, p. 452, par. 24). A severance is also achieved by (*a*) express agreement which must be by all joint tenants and not be "behind the back" of one of them, or by unilateral act (*Williams* v. *Hensman* (2); *Partriche* v. *Powlet* (3); *Millard, The Law of Real Property in New South Wales*, 5th ed. (1939), p. 47; 6th ed. (1948), p. 40); (*b*) course of conduct; (*c*) contract binding and enforceable in equity by one joint tenant to sell to a third person (*Brown* v. *Raindle* (4); *Kingsford* v. *Ball* (5)). A contract to sell by all joint tenants, does not effect a severance because there is nothing to exchange since each is seised of the whole estate; nor would it destroy any of the four unities (cf. *Co. Litt.*, 18th ed. (1823), vol. 2, pp. 188b., 189a., ss. 292, 294; *Challis, Law of Real Property*, 3rd ed. (1911), pp. 366, 367; *Cruise's Digest*, 3rd ed. (1824), vol. 2, pp. 447-449, pars. 1-9; *Carr, Collective Ownership*, p. 42). The basis of severance is that the alienee must come in by different title (*Co. Litt.*, 18th ed. (1823), vol. 2, p. 188b., s. 292). A mere purported exchange of shares by two out of three joint tenants is ineffective to release any part of the property from anything: each negatives the other. The result is not the same as if one out of three joint tenants releases or "transfers" his interest to one or the other, in which case there is a release and extinguishment of the releasor's rights. The only unilateral act which will suffice to produce severance is effective alienation to a stranger. Statutory changes do not affect the above essential principles. *Real Property Act* 1845 (Eng.), s. 2, and *Conveyancing and Law of Property Act* 1884 (Tas.), s. 59, do not mean that a release between joint tenants is no longer effective. The section was facultative. It only substitutes "grants" *quantum valebant*. If

(1) (1700) Prec. Ch. 124 [24 E.R. 60].
(2) (1861) 1 J. & H., at pp. 557, 558 [70 E.R., at pp. 866, 867].
(3) (1740) 2 Atk. 54 [26 E.R. 430].
(4) (1796) 3 Ves. Jun. 256 [30 E.R. 998].
(5) (1852) 2 Giff. (App.) 1 [66 E.R. 294].

grants had included releases, the section would have removed feoffments, &c., as an alternative method of release. But joint tenants could not grant, &c. to each other (*Watkins, Principles of Conveyancing*, 8th ed. (1833); *Challis, Law of Real Property*, 3rd ed. (1911), p. 415, note on s. 2). The section does not abrogate releases. The standard books still give releases as precedents (*Butterworth's Encyclopaedia of Forms and Precedents*, 1st ed. (1907), vol. 12, p. 499; *Evatt and Beckenham, Conveyancing Precedents & Forms*, 2nd ed. (1938), p. 159). At the very highest, s. 42 of the *Real Property Act* only means that a registered transfer replaces a release as well as a grant. But the *Real Property Act* recognizes the general law as to joint tenancies that lies behind its procedure (see s. 87). The Act in no way affects the common-law characteristics of an estate in joint tenancy or its incidents. This still leaves for consideration whether two simultaneous mutual inter-transfers by two out of three joint tenants under the *Real Property Act* can be any more effective in law than simultaneous mutual inter-releases under the general law. The only effect of the "transfers" is to operate as a deed (s. 39). And such a deed would achieve nothing. The *Real Property Act* thus does not alter the fundamental principles on which severance operates at general law.

H. S. Baker, in reply.

Cur. adv. vult.

Feb. 22.

The following written judgments were delivered:—

LATHAM C.J. These are appeals by each of two defendants in an action in which Bessie Melba Gibbons sought a declaration that she was entitled as the survivor of three joint tenants of certain lands to an estate in fee simple therein. The defendant R. C. Wright is the executor of the wills of the other two joint tenants, Olinda Gibbons and Ethel Rose Gibbons. Ethel Rose Gibbons died on 20th January 1946 and Olinda Gibbons died on 30th November 1946. The defendant Leonard Charles Pitfield is the Recorder of Titles of the State of Tasmania. An order was made that the following point of law raised by the pleadings should be heard and disposed of before trial:—"Whether by reason of the acts deeds and instruments admitted or alleged in the defence the joint tenancy subsisting between the plaintiff and Olinda Gibbons and Ethel Rose Gibbons was severed."

Olinda Gibbons and Ethel Rose Gibbons were sisters. They, together with their sister-in-law, the plaintiff Bessie Melba Gibbons,

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were seised of an estate in fee simple as joint tenants in certain lands under the general law and in certain other lands under the *Real Property Act* 1862-1935 (Tas.). All the lands were subject to a mortgage to the Bank of Australasia.

On 11th October 1944 Olinda Gibbons and Ethel Rose Gibbons by separate instruments mortgaged their interests as joint tenants in the lands under the general law to R. C. Wright. It was contended for the defendants that these mortgages were effective to sever the joint tenancy theretofore existing in the lands under the general law, and this contention was upheld by the learned trial judge. There is no appeal with respect to this part of the order.

On 6th December 1945 Ethel Rose Gibbons and Olinda Gibbons executed a document which was registered by the Recorder of Titles as a transfer, No. 109689, under the *Real Property Act* 1862-1935 (Tas.) (a Torrens Act). The transfer described each of the two sisters as being registered as the proprietor of an estate in fee simple in one-third share of the lands under the Act as joint tenant with their sister-in-law, Bessie Melba Gibbons. By that document Ethel Rose Gibbons transferred to Olinda Gibbons her one-third share in the said lands and Olinda Gibbons transferred her one-third share to Ethel Rose Gibbons ; that is, the two sisters made cross-transfers of their interests to each other. This was done by a single instrument.

The legal representatives of the two sisters claim that the joint tenancy was severed by the transfer, and that the legal representative of each of them is entitled to a one-third interest in the lands as tenant in common, Bessie Melba Gibbons having the same interest. The plaintiff, on the other hand, claims that there was no severance of the joint tenancy and that she is entitled to the lands by survivorship. The learned judge upheld the contention of the plaintiff in the case of the lands under the *Real Property Act*. The order made was interlocutory, and leave to appeal to this Court was given.

The decision of the question which arises depends upon the true effect of the document of transfer of 6th December 1945. That document was in the following form :—" I, Ethel Rose Gibbons of Hobart in Tasmania spinster and I, Olinda Gibbons of Hobart in Tasmania spinster each being registered as the proprietor of an estate in fee simple in one third share as joint tenant with Bessie Melba Gibbons subject, however, to such encumbrances, liens, and interests as are notified by memorandum underwritten or indorsed hereon, in all that piece of land situated in the City of Hobart containing eighteen perches and two-tenths of a perch be the same

a little more or less and being the land comprised and described in certificate of title volume 328 folio 93 subject to memorandum of mortgage No. 75757 to the Bank of Australasia to secure advances not exceeding two thousand three hundred pounds

In consideration of the transfer to the other of us by the transferror of her one third share in the said joint tenancy I the said Ethel Rose Gibbons do hereby transfer to the said Olinda Gibbons all my one third share estate and interest in the said piece of land as tenant in common with the said Bessie Melba Gibbons and myself of land above described and I the said Olinda Gibbons for the consideration aforesaid do hereby transfer to the said Ethel Rose Gibbons all my one third share estate and interest in the said piece of land as tenant in common with the said Bessie Melba Gibbons and myself And it is hereby declared that the value of the interest of the said transferrors does not exceed the sum of three hundred and fifty pounds."

It will be observed that there is some confusion in the statement of the consideration. Ethel Rose Gibbons is stated to transfer to Olinda Gibbons " all my one third share " " as tenant in common " with Bessie and herself (Ethel Rose) in consideration of the transfer " to the other of us " by the " transferror " of " her one third share," i.e. the share of Olinda Gibbons. " To the other of us " plainly ought to be " to me Ethel Rose Gibbons." So also the consideration for the transfer by Olinda Gibbons is misdescribed. But whatever confusion there may be in this respect, the transfer operates, if it operates at all, as a deed (*Real Property Act* 1862, s. 35 (4)) and is not prevented from being operative by the imperfect statement with respect to the consideration.

Further, the transfer recites the existence of interests as joint tenants, but it may be read as purporting to transfer interests as tenants in common with the sister-in-law—though no such interests could exist unless and until the joint tenancy had been severed. *Clark* J. read the document as if the words " to be held by her " were interpolated immediately before the words " as tenant in common with Bessie Melba Gibbons." Such an interpretation is in accord with the evident intention of the parties.

It was suggested for the defendants that the cross-transfers constituted an exchange of interests between the two sister joint-tenants. To meet this suggestion reference was made to *Sheppard's Touchstone*, 8th ed. (1826), vol. 2, p. 291, where it is said : " But joint-tenants, tenants in common, and coparceners, cannot exchange the lands they do so hold one with another, before they have made partition." The reference to partition shows that the author is

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contemplating a transaction whereby the interest of a co-owner would become an interest in a part only of the lands which were the subject of co-ownership. As *Clark* J. pointed out, no question as to the creation of separate interests in parts of the lands held arises in the present case.

I do not think that the defendant's case can be supported upon the basis that the sisters simply exchanged their interests. When an exchange of interests in land takes place the result is that what was previously the interest of B becomes the interest of A and vice versa. But in the present case the essence of the defendant's contention is that the transferees each got an interest, namely as tenant in common, which was different from the interest which the transferors had—namely an interest as joint tenant.

It has always been the law that a joint tenancy may be severed and converted into a tenancy in common by an agreement. This doctrine, however, does not help the defendants in the present case because the third joint tenant, Bessie Melba Gibbons, was not a party to the transaction between her co-tenants. There is no authority that some only of a number of joint tenants can bring about a severance of a joint tenancy *inter se*, though it is clear that all the joint tenants can bring about that result by an agreement to which they are all parties. But, further, the document upon which the defendants rely is a transfer and not an agreement. It is effective as a transfer or as nothing.

All the authorities concur in stating that alienation of his interest by a joint tenant to a stranger severs the joint tenancy so as to produce the result stated: see, for example, *Lyttleton, Treatise of Tenures*, (1841), ss. 292, 304; *Williams* on *The Law of Real Property*, 1st ed., pp. 132, 133, repeated in subsequent editions; *Halsbury's Laws of England*, 1st ed. (before the *Law of Property Act* 1925), vol. 24, p. 204. But in the present case two of the three joint tenants have attempted to alienate their interests to one another. The learned trial judge held that there was no true alienation, but that the cross-transfers left the two parties to that transaction just as they were. His Honour said: "It seems to me that such a transfer could operate nothing. Each party would be at once giving and receiving the same thing. It would be a futility." But this statement, with all respect to the learned judge, assumes rather than proves the proposition which is in question. If the transfer leaves A and B as they were, that is as joint tenants, with the same interests, then there is obviously no creation of a tenancy in common. But the question whether the transfer does so leave them, or whether it operates so as to make the joint tenants tenants

in common is just the question to be decided. It is true that if one joint tenant A successfully transferred to another joint tenant B his interest as a joint tenant and B successfully transferred to A his interest as a joint tenant, the parties would be left just where they were, because the interest of each joint tenant is absolutely identical. But no transfer of an interest as a joint tenant so as to make the transferee a joint tenant with other joint tenants is possible when the transferee is a stranger to the joint tenancy. The transfer, if it could be effective, would destroy unity of time and unity of title so far as the interest of the transferee was concerned. Therefore he could not be a joint tenant with the other original joint tenants. No joint tenant can alienate to a stranger so as to make that person joint tenant with his co-tenants, but he can alienate so as to make that person a tenant in common with his co-tenants. In the present case the question is whether such an alienation to another joint tenant is possible.

The interests of each joint tenant in the land held are always the same in respect of possession, interest, title and time. No distinction can be drawn between the interest of any one tenant and that of any other tenant. If one joint tenant dies his interest is extinguished. He falls out, and the interest of the surviving joint tenant or joint tenants is correspondingly enlarged.

Where a joint tenant alienates his interest to a stranger the joint tenancy is severed and the alienee becomes a tenant in common as to an undivided share of the land. If there were only one other joint tenant, then the alienee and the continuing joint tenant hold as tenants in common. If, however, there were three joint tenants A, B and C, and A transferred his interest to a stranger, D, then D would own a one-third interest as tenant in common with B and C, and B and C would hold a two-thirds interest as between themselves as joint tenants. The survivor of B and C would take the whole of the two-thirds interest, but D would not either gain or lose by the survivorship of any person.

When one joint tenant transfers his interest to another joint tenant the transfer (which at common law was effected by release because each joint tenant is conceived as holding every part and the whole of the land—"*per my et per tout*") does not operate by way of extinguishment of the estate. A mere extinguishment would enure in favour of B and C, and not only in favour of B in accordance with the intention of the parties. Accordingly such a transfer is said to pass (*mitter*) the estate. See *Coke's* note upon *Littleton*, 18th ed. (1823), vol. 2, p. 193a., s. 304. Section 304 is as follows:—"And, if three joyntenants be, and the one release

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by his deed to one of his companions all the right which he hath in the land, then hath he to whom the release is made, the third part of the lands by force of the said release, and he and his companion shall hold the other two parts in joynture (*et il et son companion teigneront les auters deux parts en joynture*). And as to the third part, which he hath by force of the release, he holdeth that third part with himselfe and his companion in common." *Coke's* note is :—" Upon this case these two things are to be observed. First, that in this case this release doth enure by way of *mitter l'estate*, and not by way of extinguishment, for then the release should enure to his companion also, and he is in the *per* by him that maketh the release."

But although such a transaction should be carried out by release, a grant is interpreted as being a release : see *Eustace* v. *Scawen* (1) ; *Chester* v. *Willan* (2).

The *Real Property Act* does not alter the law with respect to joint tenancy. It leaves the incidents of joint tenancy standing as they are determined by the common law and any other relevant statute. But it requires that documents transferring interests in land under the Act should be in a particular form and should be registered : ss. 42, 39.

If there are three joint tenants, A, B and C, and one joint tenant A transfers his interest to another joint tenant B, the result is that A then has no interest in the land, B becomes a tenant in common as to one-third interest in the land, and remains a joint tenant with C as to a two-thirds interest. If subsequently B transfers to A the interest which he still has as a joint tenant (A then having become a stranger to the title, his interest having passed to B), there is a further and complete severance. A becomes a tenant in common as to one-third interest with B and C, the transfer working a severance of the joint tenancy between B and C in the two-thirds interest in the land. The final result is that A, B and C become tenants in common, each having a one-third interest.

If the transfer by B to A were made on a day subsequent to the transfer by A to B, as I have assumed in what has just been said, there would be no doubt as to the result. The difficulty in the present case arises from the fact that there was only one document which came into operation at a particular moment of time, namely upon registration : see *Real Property Act* 1862, ss. 35 (2), 39 (1). But if the document is construed in accordance with the principle *ut res magis valeat quam pereat*, the transaction can be upheld by

(1) (1624) Cro. Jac. 696 [79 E.R. 604].

(2) (1670) 2 Wms. Saund. 96 [85 E.R. 768].

regarding the words of transfer by A to B as equivalent to a release and by regarding the words of transfer by B to A as constituting a grant. The transfer by A to B made B a tenant in common with C as to a one-third interest, leaving B and C as joint tenants in respect of a two-thirds interest. That joint tenancy of B and C was severed when B transferred his interest as joint tenant to A. If the document is so interpreted effect is given to the plain intention of the parties so that A, B and C became tenants in common of the land, each owning a one-third interest.

In my opinion the appeals should be allowed and the point of law determined by declaring that the joint tenancy in the land under the *Real Property Act* was severed by the registration of the transfer dated 6th December 1945.

Rich J. The questions raised by the facts alleged in the statement of claim in the action before the learned primary judge related to two parcels of land of which the parties were seised in fee simple as joint tenants. The title to one parcel was under the old system and the other parcel was registered under the Torrens system of conveyancing. The question in each case was whether the transaction concerning the particular parcel of land effected a severance of the joint tenancy. *Clark* J. before whom the action was tried, decided in favour of severance in the first case but against severance in the case of the land under the Torrens system. We, however, are not concerned with the question relating to the old system land because this appeal is limited to the land under the Torrens system.

The material facts may be briefly stated. At the relevant date —6th December 1945—the plaintiff Bessie Melba Gibbons, Olinda Gibbons and Ethel Rose Gibbons were registered under the *Real Property Act* as the proprietors of an estate in fee simple as joint tenants of the land the subject of this action. And on the date mentioned they executed a memorandum of transfer in the following terms:—"I, Ethel Rose Gibbons of Hobart in Tasmania spinster and I, Olinda Gibbons of Hobart in Tasmania spinster each being registered as the proprietor of an estate in fee simple in one third share as joint tenant with Bessie Melba Gibbons, subject, however, to such encumbrances, liens, and interests as are notified by memorandum underwritten or indorsed hereon, in all that piece of land situated in the City of Hobart containing eighteen perches and two tenths of a perch be the same a little more or less and being the land comprised and described in certificate of title volume 328 folio 93 subject to memorandum of mortgage No.

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75757 to the Bank of Australasia to secure advances not exceeding two thousand three hundred pounds In consideration of the transfer to the other of us by the transferror of her one third share in the said joint tenancy I the said Ethel Rose Gibbons do hereby transfer to the said Olinda Gibbons all my one third share estate and interest in the said piece of land as tenant in common with the said Bessie Melba Gibbons and myself of land above described and I the said Olinda Gibbons for the consideration aforesaid do hereby transfer to the said Ethel Rose Gibbons all my one third share estate and interest in the said piece of land as tenant in common with the said Bessie Melba Gibbons and myself And it is hereby declared that the value of the interest of the said transferrors does not exceed the sum of three hundred and fifty pounds. In witness whereof we have hereunto subscribed our names this sixth day of December 1945." This transfer was only registered on 21st January 1946. The defendants contend that this document effected a severance of the joint tenancy.

I think that some confusion has occurred by concentrating attention on the principles of common-law conveyancing and not observing the innovation effected by the new or Torrens system. The Torrens system, which is in use in all the States and in New Zealand, originated in two statutes passed in 1858 by the Parliament of South Australia prompted by Sir Robert Torrens whose name the system commemorates. Its basal features are that transactions in land should be carried out by their registration in a government office, thus guaranteeing ownership of an absolute and indefeasible title to realty and that by the exclusive use of a transfer in the statutory form conveyances and assurances which under the old system had become cumbersome and intricate should be simplified.

An examination of the relevant Act—the *Real Property Act* 1862 (Tas.) as originally enacted—shows how the system works. "Land" includes every estate and interest in land, and "transfer" means the passing of any estate or interest in land under this Act, whether for valuable consideration or otherwise (s. 3). "Joint tenants," by the statutory fiction "deemed," are treated as joint proprietors or co-proprietors (ss. 87, 88). Registration is provided for in ss. 34 (3), 37, 42 and Form IV. in the first schedule. 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.

The ownership by two or more persons of real property with the requisites of unity of possession, interest, title and time confers on

each such person a share or right severable and capable of alienation. The instrument in question is an adaptation of the form provided in the schedule which is the appropriate and only form by which any share in land registered under the Act can be disposed of. In the instant case the fact that there is only one document and not separate transfers does not, in my opinion, result in a "futility" but is effective and operates as a severance.

The statutory forms "may be used with such alterations as the character of the parties or the circumstances of the case may render necessary": s. 3, concluding provision: cf. *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Hosken* (1). Under the old system severance may be effected by alienation to a stranger or by release (operating as an extinguishment of right) or by grant from one joint tenant to another. Even the grant of a lease by one joint tenant to another has been considered to effect a severance: *Cowper* v. *Fletcher* (2); *In re Armstrong* (3). Having regard to the acts of the parties, I would give effect to their intention and construe the transfer as constituting a severance.

I would add that, even assuming that the form used by the parties could be regarded as so vitally irregular as to be incapable, upon registration, of producing the result which it was obviously intended to produce—that of vesting the legal estate in Ethel Rose Gibbons and Olinda Gibbons as to one-third each as tenants in common—nevertheless it is clear that it would operate in equity as an agreement for valuable consideration by each to vest in the other a one-third interest as tenant in common, an agreement which would in equity be specifically enforceable by an order directing the execution of whatever might be the proper form of instrument, and would, pending such execution, operate in equity to sever the joint tenancy and create equitable interests as tenants in common: *Brown* v. *Raindle* (4); *Parker* v. *Taswell* (5); *Caldwell* v. *Fellowes* (6); *In re Hewett*; *Hewett* v. *Hallett* (7); *Zimbler* v. *Abrahams* (8); *In re Fireproof Doors Ltd.*; *Umney* v. *The Company* (9); *Wellington City Corporation* v. *Public Trustee, McDonald, and District Land Registrar, Wellington* (10).

For these reasons I would allow the appeal.

(1) (1912) 14 C.L.R. 286.
(2) (1865) 6 B. & S. 465, at p. 472 [122 E.R. 1267, at p. 1270]; 13 W.R.Q.B. 739, at p. 740.
(3) (1920) 1 I.R. 239.
(4) (1796) 3 Ves. Jun. 256 [30 E.R. 998].
(5) (1858) 2 De G. & J. 559, at pp. 570, 571 [44 E.R. 1106, at pp. 1110, 1111].
(6) (1870) L.R. 9 Eq. 410.
(7) (1894) 1 Ch. 362, at p. 367.
(8) (1903) 1 K.B. 577, at p. 588.
(9) (1916) 2 Ch. 142, at pp. 150, 151.
(10) (1921) N.Z.L.R. 1086.

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DIXON J. These are two consolidated appeals from the same order. The order, which was made by *Clark* J., determined a point of law set down for hearing and disposal before the trial of the action.

The plaintiff and two other ladies now deceased had been joint tenants of certain parcels of land in Hobart. The question for determination was, in effect, whether before their deaths the two deceased ladies had severed the joint tenancies in the several parcels of land so that the three became tenants in common and the plaintiff took nothing by survivorship. With respect to so much of the land as is under the general law *Clark* J. decided that the joint tenancy had been severed by certain dealings by way of mortgage, and from that decision the plaintiff does not appeal.

But with respect to so much of the land as is under the *Real Property Acts* his Honour decided that there had been no severance and that the plaintiff was therefore entitled to take by survivorship what had been the undivided shares of the deceased ladies. From the part of the order embodying this decision appeals are brought, one by the executor of the two deceased and another by the Recorder of Titles, who is joined as a defendant. The attempt to sever the joint tenancy had been made by the execution by the two deceased joint tenants in their life time of a memorandum of transfer containing what were intended as cross-transfers of their undivided shares as joint tenants one to another as tenants in common (*scilicet* with the third joint tenant, the plaintiff, and with one another). The defendant, the Recorder of Titles, registered this memorandum of transfer. Part of the consequential relief claimed by the plaintiff is rectification of the register, presumably under s. 138 of the *Real Property Act* 1862, though no question as to the title to relief arises under the order now in question. The Recorder appeals from the order, so his counsel tells us, because it appears to him to make doubtful the practice of allowing joint tenants to transfer to themselves as tenants in common. The defendant executor, of course, appeals on the more obvious and tangible ground that the decision means the loss to the estates of his two testatrixes of their respective aliquot interests in the land.

The memorandum of transfer is expressed in a manner which must be the result of some confusion.

After pointing out how in stating the mutual considerations the denominations of the parties had been transposed and the apposition of the expression " as tenants in common " had been confused, *Clark* J. in the end accepted the view that the document should be interpreted as sufficiently expressing the intention claimed for it.

At all events his Honour entertained no doubt that what the instrument meant to say was that each of the two ladies in consideration of the transfer to her of the undivided one-third share of the other transferred her own one-third share to that other and that they were to be tenants in common with the plaintiff. His Honour said that this was how the plaintiff's legal advisers had been content to read the document. In my opinion, notwithstanding the presence of some confusion in the use of language, that is plainly the meaning of the memorandum of transfer and it should be so interpreted.

The case can, on this footing, be stated in an abstract way. A, B and C are joint tenants for an estate in fee simple in land under the *Real Property Acts*. By one instrument of transfer A purports to transfer to B his undivided interest in the land and B purports to transfer to A his undivided interest in the land to the intent that they shall all three be tenants in common in equal shares. Upon registration of the transfer is there a severance so that they become tenants in common in equal shares? *Clark* J. answered this question in the negative. The full force of his Honour's reasons for this conclusion can only be understood from a study of the judgment and the learning it contains. The foundation of the decision may, I believe, nevertheless be stated almost in a sentence. It is that in contemplation of law joint tenants are jointly seised for the whole estate they take in land and no one of them has a distinct or separate title, interest or possession. It follows that an attempt on the part of two of three joint tenants mutually to assure each to the other his or her undivided share in the hope that each of their two shares will be taken by a new title and so enure as a several undivided interest, must fail because it can accomplish nothing. An alienation by a joint tenant of an undivided interest to a stranger, upon this view, imparts a several interest because such a power is incident to joint tenancy; but that is very different from identifying the respective interests of joint tenants and transposing them.

The principle thus employed is described by *Blackstone*, vol. 2, p. 182, as one "of a thorough and intimate union of interest and possession."

"They [i.e. two joint tenants] have not, one of them a seisin of one-half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety."

A sentence in *Bracton*, taken to be sure from its context, has found its way through *Coke* into modern books as an expression of

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the conception: *Et sic totum tenet et nihil tenet scilicet totum in communi* (or *conjunctim* as *Coke* has it) *et nihil separatim per se. Bracton*, fo. 430, Woodbine's ed., vol. 4, p. 336; *Co. Litt.*, 186a. *Nihil tenet et totum tenet* became in *Littleton per my et per tout*, "*my*," as it appears now to be agreed, being the *mie* still shown in some French dictionaries as a negative expletive particle, and not *mi*, "half" as *Blackstone* seems to have taught many generations of lawyers to believe. (See Serjeant *Manning's* notes to *Daniel* v. *Camplin* (1) and *Murray* v. *Hall* (2): see further *Radcliffe's Real Property Law*, p. 33.) There it is said of joint tenants:—"Each of them has a right shared with his co-tenants to the whole common property, but no individual right to any undivided share in it . . . for this reason, joint tenants should not be spoken of as holding undivided shares."

Mr. *Joshua Williams* in his *Lectures on the Seisin of the Freehold*, (1878), p. 117, went as far as saying that joint tenants in fact were considered by the law as one person for most purposes.

Logical as may seem the deduction that joint tenants have not interests which in contemplation of law are sufficiently distinct to assure mutually one to another, there are many considerations which show that, to say the least, the consequence cannot be called an unqualified truth. The fact is that the principle upon which the deduction is based must itself be very much qualified. It represents only one of two not altogether compatible aspects of joint tenancy, a form of ownership bearing many traces of the scholasticism of the times in which its principles were developed. "Albeit they are so seised" says *Coke*, (186a) ("*scil. totum conjunctim, et nihil per se separatim*") "yet to divers purposes each of them hath but a right to a moitie." For purposes of alienation each is conceived as entitled to dispose of an aliquot share. The alienation may be partial. One joint tenant for an estate in fee simple may grant a lease of his equal share and during the lease the jointure is suspended and there is a temporary severance and apparently it would not matter that the lease did not commence until after the death of the joint tenant granting it. A joint tenant may grant an estate for life in his share, though in that case it seems that it works a severance of the entire fee simple. If one joint tenant suffered a forfeiture it was not the whole estate but only his aliquot share that was forfeited. If one joint tenant proved to be an alien the Crown, on office found, took only his

(1) (1845) 7 Man. & G. 167, at p. 173, note (c) [135 E.R. 73, at p. 75, note (c)].

(2) (1849) 7 C.B. 441, at p. 455, note (a) [137 E.R. 175, at p. 180, note (a)].

share. Execution on a judgment for debt against one joint tenant bound his aliquot share and continued to do so in the hands of the survivor if the execution debtor afterwards died. See *Comyns, Digest*, vol. 4, S.V. Estates, K.6 & 7. Each joint tenant could declare uses and they could declare different uses of their respective shares: *Sanders Uses*, Ch. II., s. 7, p. 218 (1). In two places *Richard Preston* summed up the result: "Joint tenants are said to be seised *per my et per tout*. They are in under the same feudal contract or investiture. Hence livery of seisin from one to another is not sufficient. For all purposes of alienation, each is seised of, and has a power of alienation over that share only which is his aliquot part": *Essay on Abstracts of Title*, (1824), vol. 2, p. 62. "The real distinction is, joint tenants have the whole for the purpose of tenure and survivorship, while, for the purpose of immediate alienation, each has only a particular part"; *On Estates*, 2nd ed. (1820), vol. 1, p. 136. An alienation by one joint tenant to a stranger might be made by the appropriate means of assurance and in respect of the aliquot share of the alienor the stranger would come in with the remaining co-tenant or co-tenants as a tenant in common.

But with respect to the alienation of the share of a joint tenant to a companion, special rules applied. Because the alienee was regarded as already in by the infeudation creating the joint tenancy the proper means of assuring the share of the alienor to him was release. The release operated as a discharge of the benefit of the infeudation or feudal contract from one joint tenant to another: *Watkins, Conveyancing*, 9th ed. (1845), Coote's note, p. 167. "But though this release will, for all purposes of conveyance, pass the moiety of the releasing joint-tenant to his companion, yet the usual practice was to take a conveyance by lease and release" (*ibid.*). "The proper assurance between joint tenants is a release. One may release to all. Several may release to the others. One or more may release to some or one of the others: and if they convey by lease and release or by feoffment, such lease and release or feoffment will operate as a release; but then there must be a deed": *Preston, Essay on Abstracts of Title*, 2nd ed., (1824), vol. 2, p. 61. "If one of three or more joint tenants release to another of them, the share so released will be held in severalty; and as to the remaining shares the parties will continue joint tenants. The releasee is in by way of conveyance or title as an assignee and not under the original feudal contract": *Preston* (*ibid.*).

(1) (1589) 2 Co. Rep. 58a [76 E.R. 549].

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Take then the present case. A, B and C are joint tenants. A might release or grant (and a grant would be given effect as a release) his aliquot share to B and B would take that share as tenant in common with C. B would retain his own original aliquot share as joint tenant with C. B's two aliquot shares would be distinguishable by their different incidents. A has become a stranger to the jointure. Surely B could by an appropriate assurance impart B's original aliquot share to A. If so he would come in as a tenant in common. He would then " be in by way of conveyance or title as an assignee." If the two assurances were made separately and in proper succession it would not matter how short a time elapsed between them. The result would be that A, B and C, having been joint tenants up to the execution of the first assurance, that is up to the release or its equivalent, would upon the execution of the second assurance become tenants in common in equal shares. What is an appropriate assurance for the second transfer or assignment (that of B's original share to A) has of course differed at different times, feoffment, lease and release and grant, but that is immaterial.

Suppose again that A, B and C being joint tenants for an estate in fee simple, A and B joined in an assurance, let us say a grant, of their two aliquot shares to X, as a grantee to uses, to the use of A and B and their respective heirs as tenants in common in equal shares. Would that not have operated to make them tenants in common not only between themselves but also with C ? I have not seen a precedent for nor a reference to such an assurance, but I can see no objection to it, unless it be on the alleged ground that, for the purposes of the *Statute of Uses*, the feoffor, any more than the person seised, cannot be identical with the person entitled to the use. But that has never been the rule where the person entitled to the use takes a different estate or interest or under different limitations or in another right.

While these two instances may show that, independently of the Torrens system, by the use of appropriate assurances, A and B could have severed the jointure between C and themselves as well as between one another, the objection still remains that they could not have done so by mutual releases one to another nor by mutual grants one at least of which must have operated, if at all, as a release. That objection is probably a good one. The strength of the objection will be seen by taking one of the two mutual attempts to transfer the interests. As a release the attempt by A to transfer his share to B cannot operate unless B continues in his position in the jointure. But as a grant it cannot operate unless B has already

ceased to occupy his position in the jointure. For him to attempt to change it *eo instanti* with the operation of the grant or release by himself to A therefore would appear to be inconsistent with both alternatives.

The foregoing shows that under the general law the question depended upon the conveyance or assurance used to effect the mutual transfers of the aliquot shares of the two joint tenants who desired to bring about a severance of the jointure with their companion as well as between themselves. This conclusion, to my mind, reduces the matter to a question of the operation of the *Real Property Acts*. It does so for two reasons. In the first place the conclusion must mean that not only for the purpose of alienations to strangers but also for the purpose of alienation of a share by one joint tenant to another, the aliquot share of each existed in contemplation of law as a distinct and ascertained proprietary interest.

The second reason is that it shows that the obstacle to concurrent cross-transfers of interests was that, except by employing the *Statute of Uses*, no assurance existed capable of effecting the transfers simultaneously but only by successive steps.

In approaching the *Real Property Acts*, it must be borne in mind that the interests of each joint tenant fell within the general statutory principle that all lands and all interests therein lie in grant.

Section 39 of the *Real Property Act* 1862 provides that upon registration of an instrument the estate or interest specified in the instrument shall pass in the manner set forth and specified in the instrument. Section 42 says that when land is to be transferred (and that must mean an interest therein) the registered proprietor shall execute a memorandum of transfer in the prescribed form containing an accurate statement of the estate or interest intended to be transferred. Section 87 provides that two or more persons who may be registered as joint proprietors of an estate or interest in the land shall be deemed to be entitled to the same as joint tenants. These provisions result in each joint proprietor being entitled as a registered proprietor to transfer his interest by a memorandum of transfer presented for registration (see *Tucker* v. *Coleman* (1)). When this system for the conveyance of distinct legal proprietary interests is applied to the common-law conceptions of the interests of joint tenants it appears to me to follow that an exclusive method of assuring the aliquot share of a joint tenant is

(1) (1885) 4 N.Z.L.R. 128.

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provided and that all the consequences ensue which at common law followed the transfer or legal assignment of such a share. Moreover it supplies a method of assurance of general application, that is to say one that will be apt and effective to impart any transferable interest. It is of course subject to the law of capacity or law of persons. But if it is a legal interest, as opposed to equitable, in property and is alienable the system enables the transfer thereof to be made. It is of course true that this train of reasoning still falls short by one step of establishing that the transfer by one joint tenant of his interest may be made to his companion and *e converso* of the companion's share to him. But in my opinion the considerations that have preceded the discussion of the *Real Property Acts* are enough to make good that step. For those considerations appear to show first that there is no incapacity in one of three joint tenants to take as a tenant in common a transfer of a companion's share; secondly that the companion's share is in contemplation of law a distinct and ascertained proprietary interest; thirdly that by a means of conveyancing that is superseded the result might have been brought about.

The consequence is that if A, B and C are joint tenants, in my opinion cross-transfers may be made at the same time of the respective aliquot interests of A and B to one another and the result is to produce a tenancy in common among A, B and C.

It follows that I think that the appeal should be allowed. So much of the order of 23rd January 1948 should be discharged as relates to the land comprised in Certificate of Title Registered Volume 328 Folio 93 and in lieu thereof it should be ordered and declared that the joint tenancy subsisting among Olinda Gibbons, Ethel Rose Gibbons and the plaintiff was severed by reason of the making and registration of a memorandum of transfer dated 6th December 1945 registered No. 109689. The appellant Wright as executor of the wills of the above-named deceased should receive his costs of the appeal. The costs of the determination of the points of law are reserved by the order and no doubt they will be dealt with in the Supreme Court when the action is disposed of.

I have considered the question whether the Recorder of Titles should receive his costs of the appeal and not without hesitation I have come to the conclusion that he should do so. The conclusion is based on the grounds in combination: (1) that he was a party to the proceeding; the prima-facie consequence of the order was to affect him and the register under his keeping and subject to leave he had a right of appeal; and (2) that he is a public officer whose

judgment on what is and what is not important to his administration should not be put aside without good reason.

Appeals allowed with costs. Order of Supreme Court as to land under the Real Property Act discharged and in lieu thereof declare that the joint tenancy between Olinda Gibbons, Ethel Rose Gibbons and the plaintiff was severed by reason of the making and registration of memorandum of transfer dated 6th December 1945, *registered number* 109689.

Solicitors for the appellants : *Page, Seager, Doyle, Crisp & Wright.*

Solicitor for the appellant Recorder of Titles : *M. P. Crisp,* Crown Solicitor for Tasmania.

Solicitors for the respondent : *Burbury & Dixon.*

R. C. W.