close of the case for the defence, it is only in very exceptional cases that such a course should be permitted.

R. v. Hodgkinson, it is respectfully submitted, is not such an "exceptional case", nor did any matter arise *"ex improviso"* which the Crown could not foresee. Even though the Supreme Court did not "feel constrained" to accept English decisions on matters of procedure, it seems that its decision in this case conflicts with that of the High Court in *Shaw's* case, and, to a lesser extent, with that in *Titheradge v. The King,* where the statement of the law by Tindal C.J. was adopted.

The Court did not accept *Reg. v. Owen,*[10] a decision of the English Court of Criminal Appeal which held that it is too late to allow further evidence to be given after the summing up, on the ground that a later decision of the same Court, *Reg. v. Sanderson,*[11] ignored it. This view is incorrect, for the latter case contained clear evidence of exceptional circumstances which even Tindal C.J. would have accepted as such.

The position in Victoria, therefore, is that the latest decision of the Supreme Court on this point is in direct conflict with the law already laid down by the High Court. Even if the High Court for reasons of practical convenience affirms, rather than overruling *R. v. Hodgkinson,* we will be left with diverging streams of authority—one for England and the other for Australia.

Such a situation, as we have seen in respect of the diverging authorities regarding, for example, the burden of proof in divorce petitions based on adultery, is hardly satisfactory.

P. G. NASH

[10] [1952] 2 Q.B. 362.

[11] (1953) 37 Cr. App. R. 32.

TRANSFER OF LAND—MENTAL INCAPACITY OF TRANSFEROR—VOIDABILITY, BUT NO AVOIDANCE, OF INSTRUMENT OF TRANSFER

An interesting case dealing with a problem of some importance is *Gibbons v. Wright.*[1]

Two sisters and the appellant, their sister-in-law, became joint tenants of land in Hobart in 1943. The respondent was the executor of the sisters' wills. The joint tenancy was established by means of transfers whereby each joint tenant transferred her interest to the other in consideration of a similar transfer by the other to her. These transfers were duly registered and the three joint owners shortly afterwards purported to sever the joint tenancy and establish a tenancy in common. If the instruments of transfer took effect according to their terms, they were effectual in vesting a tenancy in common in the three women in equal shares.

[1] [1954] A.L.R. 383.

However, when the two sisters died, the appellant, the third joint tenant or tenant in common, brought proceedings, culminating in this appeal to the High Court, claiming that the instruments of transfer were ineffectual in destroying the joint tenancy because of the mental incompetence of the other two joint tenants. Therefore the appellant claimed a complete interest in the joint tenancy by operation of the doctrine of survivorship.

At the original trial, the jury, in answer to specified questions, found that at the date of the instruments of transfer which were purported to destroy the joint tenancy both sisters were incapable of understanding the effect of the deed each one executed. The Chief Justice of Tasmania, before whom the case was heard at first instance, held that upon these findings the transfers were null and void. On appeal the Full Court disagreed with the Chief Justice's decision, and held that "a disposition of property made for valuable consideration by a person incapable of understanding its effect, is not wholly void, but is voidable if, and only if, the disponee knew or had reasonable grounds to know of the disponor's lack of understanding and did not act in good faith".[2]

The case now came before the Hight Court, where a single judgment was delivered on behalf of all three judges.[3] The Court discussed the whole field of authority in this matter of mental incompetency, and stated that the appellant must fail unless the incapacity of the transferors rendered the instruments void. If it rendered them merely voidable, they could only be avoided by persons claiming through the mentally incompetent transferors. Mental incapacity as affecting a contracting party and a grantor of a power of attorney was discussed, together with incapacity on the part of a conveyor of land. Blackstone wrote that deeds of infants and insane persons were voidable,[4] and this view was followed in some nineteenth century cases, though an early case of *Thompson v. Leach*[5] had proposed the view that a conveyance by a mental incompetent was absolutely void.

In *McLaughlin v. Daily Telegraph*[6] the point was made by the High Court that a deed executed by a mental incompetent was void. It was submitted by the Court here, however, that this proposition was not supported by authority. The Court's decision on the point is, it is submitted, correct.

The final decision of the Court was that the instruments were not necessarily void but voidable only. The appeal therefore failed. The decision is, it seems, a correct expression of the law. The actual execution of the deed is not questioned: this would be a logical ground for applying a doctrine similar to that of *non est factum* – "it is not my deed" – and avoiding the deed. Instead, the question is,

[2] [1954] A.L.R. 385. [3] Dixon C.J., Kitto and Taylor JJ.
[4] 2 Bl. Comm. 291. [5] (1698) 3 Mod. 301. [6] (1904) 1 C.L.R. 243.

did the transferor, when executing the deed, know what he was doing? If he did not know and if there was no lack of *bona fides* on the part of the transferee, then it would seem that the transferor should not be allowed to avoid his deed. But be there good faith or not, the main contention is that the powers of avoidance lie in the hands of the transferor, and that the conveyance, or transfer, is not *ipso facto* void and a nullity.

PETER L. WALLER

PRIVATE INTERNATIONAL LAW—DIVORCE—STATUTORY RESTRICTION UPON RE-MARRIAGE—EXTRA TERRITORIAL EFFECT

The most important point at issue in *Miller v. Teale*[1] was whether an Act of South Australia should receive recognition extra-territorially in New South Wales. The Act in question was the Matrimon Causes Act (S.A.) 1929. Section 17 of the Act provides that parties to a marriage dissolved by decree may remarry after the expiration of three months from the order absolute or upon the dismissal of any appeal against that order.

In this case, the appellant sought a decree of nullity for a ceremony of marriage between himself and the respondent. The respondent, who had been divorced by a decree of a South Australian Court, had then participated in the ceremony of marriage in Grafton, New South Wales, on the day the decree of divorce was made absolute. She had therefore flouted the provisions of s. 17 of the Act.

Both Mr Miller and Mrs Teale were domiciled in New South Wales at the time of the marriage. Consequently New South Wales law was both the *lex domicilii* and the *lex loci celebrationis*. The question before the High Court[2] was whether s. 17 of the South Australian Act with its disabling provision should be recognized in New South Wales, with the subsequent result that the marriage ceremony between appellant and respondent would be a nullity.

The unanimous opinion of the Court was that the section of the South Australian Act should be recognized in New South Wales by the rules of private international law, and thus that the appeal should succeed and the marriage be declared a nullity. The provision, the Court held, was part of the mechanism of appeal allowed after pronunciation of a decree absolute. It was not a penalty upon one party of the marriage, which would prevent the section being granted extra-territorial recognition, in the terms of the decision in *Scott v. A-G.*,[3]

[1] [1954] A.L.R. 1109.
[2] Dixon C.J., McTiernan, Fullagar, Kitto, and Taylor, JJ.
[3] (1886) 11 P.D. 128.