

English Commorientes and Joint Tenancies – A Fresh Look at Section 184 of the Law of Property Act 1925

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The word 'commorientes' refers to the situation where two (or more) persons die in circumstances where it is uncertain which of them died last. Where there is uncertainty as to who was the last survivor, the effect of current English law is to prescribe artificially the sequence among consecutive deaths. Section 184 of the Law of Property Act 1925 provides a presumed order of succession based on seniority when the deaths have arisen in circumstances which render it uncertain which of two (or more) people survived the other(s). The presumption applies in cases of both testate and intestate deaths and in respect of property held on a joint tenancy where there is an automatic right of survivorship between the co-owners so that the last survivor of two (or more) tenants will become the sole owner of the property. The sequence of deaths is, therefore, particularly significant in determining the question of devolution where property is held on a joint tenancy.

The pre-1926 position

Before 1926, there was no statutory presumption as to the order of deaths or of simultaneous death where it was unclear which had survived the others. This meant that the onus was on the claimant to prove his case – if his claim depended on showing that A survived B, then the claimant had to establish that fact affirmatively or lose his claim. If two deceased had mutual claims to succeed to each other's respective estates and there was no evidence as to who died first, the court adopted the legal fiction that they died at the same time.

In the absence, therefore, of any statutory presumption of survivorship based on age or sex, the only way in which the respective estates of A and B could be administered was to

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⁵ See, for example, *Re Nightingale, Hargreaves v Smith* (1927) 71 Sol J 542.

⁶ See, *Bradshaw v Toulmin* (1784) Dick 633, per Lord Thurlow. This appears to be the only case concerning a commorientes

in respect of a joint tenancy under the pre-1926 law.

⁷ [1945] AC 304.

⁸ Lord Macmillan, Lord Porter and Lord Simonds; Viscount Simon LC and Lord Wright dissented.

9 *Ibid* , at 314.

10 *Ibid* , at 314.

conclude that none survived the other so that neither could take any interest under the will of the other. 5 Moreover, if the deceased were joint tenants, their estate remained in a joint tenancy in their respective heirs. 6 This meant that the normal right of survivorship would operate as between the various successors of the deceased, notwithstanding that they might be complete strangers to one another. Assume, for example, two joint tenants, A and B who died in circumstances where it was impossible to say which had died first. If A left one successor (a spouse) and B left nine successors (brothers and sisters), the position at common law was that all ten successors would hold the joint property between them upon a joint tenancy. If A's spouse then decided to sever the joint tenancy, she would become entitled to a 10 per cent share of the joint property. Needless to say, the common law response of implying a new joint tenancy arrangement between the (potentially) numerous respective successors of the deceased was not seen as satisfactory and, therefore, led to the enactment of the statutory presumption currently embodied in s 184 of the 1925 Act. The effect of the presumption, in the context of a joint tenancy, is to confer sole ownership of the property on the youngest victim and subsequently on his (or her) successors alone.

The interpretation of section 184

Successive and simultaneous deaths

The precise scope of s 184 has given rise to much judicial debate, particularly whether it applies where:

- (1) the order of death is unknown, but death is not simultaneous; or
- (2) the order of death is unknown, or death is practically simultaneous.

In *Hickman and Others v Peacey*, 7 five people (two of whom had made wills benefiting some of the others) were killed by a bomb during an air raid in circumstances where it was impossible to say whether any of them had survived the others. By a majority, 8 the House of Lords held that, in the absence of evidence as to who died first, the correct conclusion was that they had died in circumstances rendering it 'uncertain' which of them survived the other(s) within the meaning of s 184 of the 1925 Act. The upshot was that the younger of the deceased was deemed to have survived the older in determining the administration of their respective estates. According to Viscount Simon LC, 9 however, who gave a strong dissenting opinion, s 184 had no application

where (in the very rare case) it could be positively proven that two or more persons died absolutely simultaneously. According to his Lordship: 10

‘ The condition which must be fulfilled if the presumption is to apply at all is that there should be a survival of one person beyond the death of another, but that it should be uncertain which was the survivor. ’

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11 *Ibid* , at 316.

12 See, *Bradshaw v Toulmin* (1784) Dick 633 ; (1816) *Mason v Mason* 1 Mer 308, at 313 ; *Wing v Angrave* (1860) 8 HLC

183, at 213 ; *Underwood v Wing* (1855) 4 De G M & G 633, at 661 and *Drummond ’ s Judicial Factor v Lord Advocate* (1944)

SC 298 .

13 *Hickman and Others v Peacey* [1945] AC 304, at 318 .

14 *Ibid* , at 319.

15 *Ibid* , at 327 – 328, per Lord Wright. According to Lord Wright, the proper finding of fact was that all the persons died at the same moment.

16 *Ibid* , at 319.

17 *Ibid* , at 330.

18 *Ibid* , at 323. See also, Lord Porter, at 337: ‘ I am not sure that the occurrence of two deaths at exactly the same point

of time is possible, and still less am I inclined to accept the allegation that it can ever be proved. But quite apart from

theoretical questions of this kind, I think the section itself is so framed as to exclude the possibility of simultaneous death

from ever being recognised as a certainty and to include it amongst the uncertainties. ’

This, therefore, did not rule out the possibility of simultaneous deaths:

‘ a rule of racing which provided that, where the judge was uncertain which of two horses passed the winning post first, the younger horse should take the prize, would not prevent the sharing of the prize in a dead-heat. ’ 11

On this reasoning, if the deceased all died at the same time, there would be no uncertainty in relation to the order of their deaths and, hence, the distribution of their estates would not

be governed by any statutory presumption of seniority. The problem, however, is determining whether it is actually possible for two or more deaths to coincide precisely in time. Although, in one sense, time is 'infinitely divisible', the possibility of simultaneous deaths, as a matter of law, has not been ruled out. 12 Although expressed by Viscount Simon LC as being 'very unusual', 13 it did not, in his view, seem impossible for two people to die at the same time. 14 In any case, it would ultimately fall to the claimant to prove (as a pure question of fact) 15 that the deaths were simultaneous. Again, His Lordship gave an example: 16

'I recoil from the proposition that two soldiers standing shoulder to shoulder in the same trench when a high explosive shell drops between them and blows them to smithereens, cannot rightly be held by a court of law to be proved to die at exactly the same moment.'

This interpretation of s 184 is also echoed in the speech of Lord Wright 17 (also in the dissent) who recognised that the section introduced a 'new and very arbitrary presumption' to operate only in the case of the specific uncertainty where it is unclear from the facts which of two or more persons survived the other. Where there is no such uncertainty (because all the persons have died at the same time), the section, in his view, was irrelevant.

This approach, however, was not accepted by the majority. Lord Macmillan 'gravely doubted' 18 whether s 184 contemplated as a practical consideration the possibility of simultaneous deaths. If it did, then it was ironic that the statute had failed to meet this eventuality by providing an appropriate solution for cases where only persons had died consecutively. In the *Hickman* case, according to his Lordship, there was clearly an element of uncertainty as to which of the deceased survived the others, and that was enough to trigger the operation of s 184 so as to bring the presumption of seniority into play. This was also the view of Lord Porter and Lord Simonds. The latter was mindful of the fact that, if s 184 was construed so as not to apply to instantaneous deaths, the legislative purpose in providing a presumptive solution in cases of uncertainty would be defeated. In cases where the deceased all died at the same time,

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19 *Ibid*, at 344.

20 Lord Macmillan, Lord Porter and Lord Simonds.

21 [1942] Ch 377.

the absence of the statutory presumption would require the court to concede that there was a

lacuna in the drafting of s 184 and, therefore, to administer the deceased estates in accordance with the pre-1926 law, namely, on the footing that none could take any interest in the estate of the others. Lord Simonds also had difficulty in accepting that two or more people could die simultaneously. Like Viscount Simon LC, his Lordship used the example of a horse race: 19 ' A judge, with the limited power of discernment that nature has bestowed on him, may decide that two horses have passed the post at the same time. A high-speed camera will show that he was wrong and that one horse passed it in front of the other. And if that camera appeared to show that they passed at the same time, yet a finer instrument would show that that too was wrong. '

Given these uncertainties, the inescapable conclusion, in his Lordship's view, was that simultaneous death is not possible and that, if survivorship is not proved, the only alternative is uncertainty envisaged by s 184. On this interpretation, there is no lacuna in the statute and the section can be construed to cover every eventuality where it cannot be proved that one of two (or more) persons dying together survived the other(s). The upshot of the majority 20 view in *Hickman* , therefore, is that s 184 falls to be construed broadly so as to include not just cases where there is a problem in ascertaining which of two (or more) persons died first (ie where the order of death is unknown), but also where the deaths have occurred at the same time (ie where the order of death is unknown but death is practically simultaneous). According to the majority, therefore, the statutory presumption applies even if the deaths are simultaneous because proof of simultaneous death is impossible and, hence, if survivorship is not established, the only alternative is uncertainty.

The difficulty, however, with this approach, in the writers' view, is that the presumption of seniority is applied to *all* cases of uncertainty and, in the context of a joint tenancy, leads to the inevitable conclusion that, even where the death of two or more joint tenants is instantaneous, the younger will automatically receive the whole of the property by way of survivorship to the exclusion of all the other joint tenants. This is the inevitable conclusion, applying the majority in *Hickman* , even in cases where there is *certainty* that the deaths are simultaneous. If the court cannot say for certain which person died first, (because, they all died at exactly the same time), the statutory presumption is triggered and the result is devolution by seniority. The only alternative, according to the majority, was to accept that s 184 had left an obvious *lacuna* in failing to provide for the eventuality of simultaneous death. The only way of plugging this gap

(on the facts in *Hickman*) was to revert to the old law which required the respective estates to be administered on the basis that none survived the other so that none could take any interest in the estate of the other – a clearly undesirable result since it meant restoring (somewhat paradoxically) the fiction (under the pre-1926 law) that they all died together at the same time.

Rebutting the statutory presumption by contrary evidence

The reluctance of the English courts to accept the possibility of simultaneous deaths is vividly illustrated in the case of *Re Lindop, Lee-Barber v Reynolds*, 21 where the facts were not dissimilar
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22 [1942] Ch 377, at 383.

23 [1947] 2 All ER 418.

24 *Ibid*, at 421, per Jenkins J. The reference to a ‘defined and warranted conclusion’ originates with the judgment of

Viscount Simon LC in *Hickman v Peacey* [1945] AC 304, at 318. Lord Macmillan in *Hickman* also favoured a high

standard of proof requiring certainty in the order of deaths to be shown beyond a reasonable doubt: *ibid*, at 324 – 325.

The other judgments in *Hickman* appear to have adopted the civil standard of proof on a balance of probabilities: see

Lord Porter, at 340; Lord Simonds, at 345 – 346 and Lord Wright, at 326 – 327. J Mee points out that the civil standard

has also been accepted in the Australian, Canadian and Scottish case law: see J. Mee, ‘Commorientes, Joint Tenancies and

the Law of Succession’, (2005) NILQ 171, at 183.

from those in *Hickman*. A husband and wife were killed in an enemy air raid. Their house was struck by a bomb and demolished – their bodies were found on the ground floor underneath their bedroom. The evidence showed that they both must have been instantly killed by the explosion and two witnesses (who found and examined the bodies) expressed the opinion that the deaths must have been simultaneous. Despite this evidence, Bennett J held that it was impossible to say that both died at precisely the same moment in time and, therefore, the statutory presumption under s 184 applied. The consequence of this was that the wife (who was younger) was deemed to have survived her husband and, therefore, to inherit under his will. Bennett J openly acknowledged that time was infinitely divisible and strong proof was required

to establish the fact that two people died at exactly the same time. In his view, evidence to prove simultaneous death had to be looked at ' closely and critically ' – the key question being not whether *the fatal act took place* at the same moment, but whether the parties *died* at exactly the same time. Thus, ' two birds may be ... struck at exactly the same moment by a different pellet coming from the same cartridge [but] there may well be a considerable period of time between their deaths ' . 22

The case of *Re Bate (deceased), Chillingworth v Bate* 23 shows that the presumption will only be excluded if the actual sequence or order of deaths is a ' defi ned and warranted conclusion. ' 24 Here, a husband and wife were found dead in their kitchen, the cause of their deaths being carbon monoxide poisoning. There was no question of simultaneous deaths, the sole inquiry being whether the circumstances of their deaths were such as to render it uncertain as to which of them died fi rst so as to bring the presumption under s 184 into play. Jenkins J, having reviewed all the evidence, concluded that the facts were inconclusive as to who died fi rst and, consequently, applying the statutory presumption, the wife (being younger) was presumed to have survived her husband.

Both these cases demonstrate the court ' s reluctance to depart from the presumption of seniority. In both cases, had the presumption been rebutted, the court would have been faced with the prospect of concluding that neither husband nor wife had died fi rst so that the distribution of their respective estates would have been determined on the footing that they had both died at the same time. This, no doubt, would have led to an unsatisfactory result and, hence, was avoided by the court. In *Re Lindop* , the wife (as the younger) survived her husband by virtue of the statutory presumption and his residuary estate became her property for a brief moment and, therefore, passed under her will either to her mother or her brothers and sisters. If both the wife and husband were held to have died at exactly the same time, on the other hand, the husband ' s residuary estate would not have passed by his will in favour of his wife but would have devolved to his sister as his sole next of kin. Similarly, the wife ' s legacy to him under her will would have lapsed (in the absence of proof that he survived her) and would have passed for the benefi t of his residuary legatee. These set of consequences would, clearly, not have been readily anticipated by the parties themselves. In *Re Bate* , the husband had died

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25 See, in particular, *Re Lindop, Lee-Barber v Reynolds* [1942] Ch 377 and *Re Bate (deceased), Chillingworth v Bate* [1947]

2 All ER 418 .

26 [2019] EWHC 2224 (Ch).

27 The Act, which was first promulgated in 1940 and subsequently amended in 1953 and 1991, has been adopted in

most states, including California: see Cal Prob Code, s 296.2. As of 2010, 19 states have expressly adopted the Act in its

current version. A number of other states have indirectly adopted the Act as part of the Uniform Probate Code.

28 When, however, a will provides for this situation, the Act does not apply.

29 See, for example, *Janus v Tarasewicz* 482 NE 2d 418 , (Ill. App. Ct. 1985) and *Matter of Bucci* 57 Misc 2d 1001

(N Y Surr Ct 1968) .

leaving a will, whereas the wife ' s estate devolved under an intestacy. The application of the statutory presumption meant that the wife (who was younger) was presumed to have survived her husband with the consequence that she inherited under his will and her property then passed to those entitled on her intestacy. If, however, the presumption had been displaced, the court would have been bound to conclude that none survived the other so that neither would have been able to inherit any property from the estate of the other. Again, a conclusion which (presumably) would not have been favoured by the parties.

The standard of proof

Although the modern English cases, 25 as we have seen, have been reluctant to accept any evidence falling short of certainty as rebutting the statutory presumption under s 184, it is not entirely beyond the realms of possibility to envisage a case where the deaths are so contemporaneous as to warrant an actual finding of simultaneity. The difficulty, however, lies in the application of the correct standard of proof.

Most recently, HH Judge Kramer, in *Scarle v Scarle*, 26 has ruled that the appropriate standard is the civil standard of proof (ie the balance of probabilities). In this case, the husband, 79, and the wife, 69, both died of hypothermia. The wife had had limited mobility and the husband had been her carer. The husband ' s daughter was the claimant and the wife ' s daughter was the defendant. The husband was found in the lounge and the wife in the toilet area of their home. However, the wife ' s walking frame was found next to the husband ' s body. There was evidence

that the husband had been alive on the floor for some time before death. Both were in the early stages of decomposition, which appeared to be more advanced in the wife. Expert evidence was adduced as to the temperature and environmental conditions in the house because of their effect on the rate of decomposition, although it was agreed that decomposition alone was not determinative of the time of death. The claimant's expert took the view that there was no significant variation in the micro-climate within the house. The defendant's expert disagreed. The couple held joint assets (ie joint tenants of their bungalow and bank account) which passed by survivorship to the one who died last, and then to the beneficiaries of the latter's estate. In view of the uncertainties regarding the order of death, the presumption in s 184 was held to apply so that the wife was presumed to have survived her husband.

One solution to the difficulty of proving simultaneous death would be to abandon proof by reference to any civil (or criminal standard) altogether and to apply a simple rule that the parties would be deemed to die simultaneously unless one survived the other by a specified number of hours or days. This is the approach taken in the American Uniform Simultaneous Death Act, 27 which provides that, if two or more persons die within 120 hours of one another, each is considered to have predeceased the others. The effect of the Act is that their estates are divided equally among their next of kin. 28 The 120-hour period is intended to avoid the tendency of previous litigation 29 in which the representative of one of the deceased attempted

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30 228 Cal App 2d 169, (1964).

31 See, Conley, Presiding Justice, at 172 – 173.

32 Compare, for example, the old-style shipwreck with the tragedy of an airplane falling from the sky. The chances of

anyone surviving the latter, regardless of age, is largely negligible.

to prove that the one he or she represented survived the other by a fraction of time. The Californian case of *Re Estate of Meade* 30 provides a useful illustration of how the Act operates.

The husband and wife had died in an airplane crash. There was nothing to suggest that they died otherwise than simultaneously. Most of their property was held on a joint tenancy and each had died leaving a will. The District Court of Appeal held that one half of the joint property of the parties passed under her the husband's will and the other half devolved under

the wife's will pursuant to the Act. The purpose of the Act was explained 31 as supplanting ' the former arbitrary and complicated presumptions of survivorship with effective, workable, and equitable rules applicable to the ever-increasing number of cases where two or more persons have died ... simultaneously. '

Property held on a joint tenancy

The effect of a joint tenancy is, of course, to vest full ownership of the property in the survivor. Significantly, the property never becomes part of the estate of the first tenant to die. Under s 184, the legal presumption is (as we have seen) that, where there is uncertainty as to which of joint tenants survived the other, the older is deemed to have died first. This means, of course, that the younger becomes entitled to the whole indivisible estate even though (as a matter of pure fact) it is not clear who actually died first. The presumption operates particularly harshly since, as we have seen, it has been held to apply even in cases of simultaneous death (ie not only where the order of death is unknown but where death is practically instantaneous). If everyone in the common disaster is found to have died at the same time, why should the younger be afforded the privilege of obtaining the whole estate at the expense of the others? One rationale for this result is the notion that, in the ordinary way of things, the younger is more likely to survive in a situation of disaster than the older. It is submitted, however, that the relative ages of the parties has become far less significant today given the nature of common disasters which now take place in the modern world 32 and the robustness of even much older victims who remain active and in good health well beyond their retirement age.

The proponents of s 184 would, no doubt, argue that the section is inherently artificial and does not intend to make any judgment about the relative health and strength of the deceased persons. Admittedly, the decision to become joint tenants necessarily carries with it a deliberate intention to permanently exclude the other party's family or beneficiaries in favour of the surviving joint tenant. However, that decision is made on the assumption that the survivor will enjoy the property for a period of time on their own, for example, a surviving wife living in the family home after her husband's death. In the case of both joint tenants dying together, that presumed intention is clearly frustrated. In these circumstances, it is fair to assume that the joint tenants might have wanted to benefit both sets of next of kin equally. This, it is submitted, is a justified assumption because, not knowing who would be the survivor in ordinary circumstances, the joint tenants clearly contemplated two different sets of beneficiaries

as being both acceptable ultimate successors in title. It is submitted, therefore, that, where there is uncertainty surrounding the circumstances of joint or simultaneous death (ie so that it is not known who died first), a fairer and more just solution is to convert the joint tenancy into

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33 See, the speeches of Viscount Simon LC and Lord Wright.

34 See, for example, the Survivorship and Presumption of Death Act, (Revised Statutes of British Columbia 1996) and the

Succession Law Reform Act (Revised Statutes of Ontario 1990).

35 See, J Mee, 'Commorientes, Joint Tenancies and the Law of Succession', (2005) 56 NILQ 171, at 194.

a tenancy in common in equal shares so that each share then forms part of the estate of the deceased tenants.

A statutory presumption of simultaneous death in these circumstances has already been recognised in the Republic of Ireland legislation. Section 5 of the Succession Act 1965 provides:

'Where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for the purposes of the distribution of the estate of any of them, they shall all be deemed to have died simultaneously.'

The section on its own, however, did little to alter the common law since it meant that the parties in a commorientes situation were deemed to have died simultaneously and, therefore, neither party could be said to have survived the other. In the context of a joint tenancy, in particular, the question remained as to who was the last survivor. Significantly, s 5 of the 1965 Act was amended by s 68 of the Republic's Civil Law (Miscellaneous Provisions) Act 2008 to resolve this problem by adding two important subsections:

'(2) Where immediately prior to the death of two or more persons they held any property as joint tenants and they died, or under subsection (1) were deemed to have died, simultaneously, they shall be deemed to have held the property immediately prior to their deaths as tenants in common in equal shares.

(3) Property deemed under subsection (2) to have been held by persons as tenants in common shall form part of their respective shares.'

The advantage of this particular form of wording is that the statutory severance of the joint

tenancy applies not only in circumstances of uncertainty as to the order of death (envisaged under s 5(1) of the 1965 Act where the deceased are *deemed* to have died simultaneously), but also to cases where there is no uncertainty because the circumstances show that they did, in fact, all die simultaneously. This, of course, avoids the difficulties inherent in *Hickman* where, as we have seen, the possibility of simultaneous death was not entirely ruled out, at least by the minority 33 of their Lordships.

The importance of linking severance to cases of uncertainty and simultaneous deaths has already been recognised in other jurisdictions. In New Zealand, for example, s 3(1) of the Simultaneous Deaths Act 1958 deals with 'persons who have died in circumstances which give rise to a reasonable doubt as to which of them survived the other or others' and also 'two or more persons who have died at the same time.' There are similar provisions in several provinces 34 in Canada. This form of wording, however, does not, of course, discard the possibility of clear evidence as to the exact order of deaths, in which case the estates of the deceased would devolve without the need to resort to any statutory severance of the joint tenancy in equal shares.

The wording also does not cover the situation where say, only two of three joint tenants die in the common disaster. In these circumstances, it has been argued 35 that no severance should occur since the joint tenant who was not involved in the disaster should become the sole owner

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36 Northern Ireland Law Commission Report, 'Land Law', NILC 8, (2010). The Report, at para.7.15, endorses the view

of the Consultation Paper, Northern Ireland Law Commission, NILC 2 (2009), at para. 7.23, that 'commorientes should

be treated as an event which severs a joint tenancy, so that the deceased persons would be treated as holding their jointly

owned land as tenants in common.' The proposals remain unimplemented.

37 See, *Scarle v Scarle* [2019] EWHC 2224 (Ch).

38 See, for example, s 3(1) of the Simultaneous Death Act 1958 which governs in New Zealand.

of the property under the normal rule of survivorship. In other words, statutory severance is only triggered if *all* of the joint tenants die in the common calamity.

Significantly, the Northern Ireland Law Commission, in its Report on Land Law, 36

favoured a change in the law whereby commorientes is treated as an event which severs a joint

tenancy so that the deceased would be treated as holding their jointly owned property as tenants in common at the time of their death. The Commission acknowledged that there was 'almost unanimous support' for this proposal and, consequently, s 50(1) of their draft Land Law Reform Bill makes provision for severance of a joint tenancy in the cases where the joint tenants died in circumstances rendering it uncertain which of them survived the other(s). Section 50(2) makes clear that shares in property deemed to have been held as tenants in common form part of their respective estates. The outcome would, therefore, be that the deceased's respective successors would inherit their shares in the joint property.

Conclusion

A repeal of s 184 of the 1925 Act in relation to property held on a joint tenancy in favour of an automatic severance of the joint tenancy would, it is submitted, have at least two major advantages over the current law in England. First, no automatic right of survivorship would operate as between the various deceased favouring the youngest estate to the exclusion of all others. Secondly, all the respective successors would benefit equally in the estate thereby avoiding the current imbalance under s 184.

Any new enactment in this area (in place of s 184) should, however, cover the eventuality of both uncertainty in the order of death and simultaneous death. Statutory severance would not be triggered unless *all* of the joint tenants die in the same calamity. In cases of uncertainty, the burden of proof should be stated to be the civil standard on a balance of probabilities in line with the most recent 37 case law. Given also that, under the current law, the statutory presumption under s 184 may be excluded by a contrary testamentary provision, this exception should be retained in any new provision allowing for severance not to take place if a contrary intention is shown in the will of the deceased. 38 Additionally, the presumption of severance should be expressly extended to apply to the situation where the deaths all occur within a short interval of time. Here, as suggested earlier, the preferred solution in other jurisdictions is to regard neither party as having survived the other. Under the American Uniform Simultaneous Death Act, as we have seen, the relevant interval is 120 hours, but this may be fixed at a longer or shorter period of time. The benefits of minimising costly and acrimonious litigation amongst family members seeking to prove that one of the deceased survived the other is, it is submitted, a strong policy consideration which favours the solution of automatic severance enabling equal distribution of the joint property.

The potential unfairness of applying the statutory presumption under s 184 is not, however, limited to cases of joint tenancies. If both deceased had made wills in favour of each other prior to their deaths or died intestate, the effect of s 184 is that the younger is presumed to have survived the older and thus become solely entitled to inherit under his (or her) will or intestacy.

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Conversely, any legacy under the will of the younger in favour of the older lapses and falls into the younger person's residuary estate. Say, for example, an older brother and his younger sister die intestate in a common disaster where the order of deaths is uncertain. Let us also suppose that they both die without parents or issue owning separate property. Here, s 184 continues to apply so that the sister would inherit under her brother's intestacy. The brother's estate, on the other hand, would not take anything under his sister's intestacy as he is presumed to have died first. There is much, therefore, to be said for repealing s 184 altogether and replacing it with a statutory provision, along the lines of the American Uniform Simultaneous Death Act, which provides for the equal division of the deceased's estates in *all* cases of testate and intestate deaths (as well in respect of property held on a joint tenancy) unless the will of the deceased contains language otherwise dealing with the circumstance of simultaneous death.