SOUTH AUSTRALIA

EIGHTY-EIGHTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO PROBLEMS OF PROOF OF SURVIVORSHIP AS BETWEEN TWO OR MORE PERSONS DYING AT ABOUT THE SAME TIME IN ONE ACCIDENT

1985

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE WHITE, *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE LEGOE, *Deputy Chairman*

M. F. GRAY, Q.C., S.-G.

P. R. MORGAN.

D. F. WICKS.

A. L. C. LIGERTWOOD.

G. F. HISKEY, S.M.

The Secretary of the Committee is Mrs H. Lockwood, c/o Supreme Court, Victoria Square, Adelaide 5000.

EIGHTY-EIGHTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO PROBLEMS OF PROOF OF SURVIVORSHIP AS BETWEEN TWO OR MORE PERSONS DYING AT ABOUT THE SAME TIME IN ONE ACCIDENT

To:

The Honourable C. J. Sumner, M.L.C.,
Attorney-General for South Australia.

Sir,

You have referred to us for consideration the problems of proof which arise where two or more persons are killed in the same accident and nobody can establish by evidence acceptable to the Court who died first.

As difficulties arise not only in the case of common accidents such as car, boat, plane, fire or bomb accidents, but also where persons die in unrelated circumstances where the exact order of death cannot be ascertained, the Committee has gone somewhat beyond the actual words of your remit in order to deal with such contingencies.

Questions of survivorship arise quite frequently as is evidenced by the fact that one often hears of a whole family or a large proportion of a family being killed in a car accident. In such circumstances it is often either impossible or so difficult as to preclude any ffinding based on probability, to ascertain the order of deaths.

In dealing with the remit we have reached a similar conclusion to that expounded by Wigmore as early as 1934, namely that the problem of survivorship should not be dealt with by making a rule of evidence to cope with the uncertainties of proof but rather by making a rule or rules tending towards a fairer distribution of property and more in accord with the likely wishes of the testator. It should be noted that similar problems arise in relation to gifts over contained in trusts *inter vivos*.

Over the years the courts have adopted various approaches when dealing with questions of survivorship. In some of the earlier cases, the parties were treated as dying at the same instant, and property was not transmitted from one to the other, but rather to their respective heirs. For example, in *Bradshaw v. Toulmin (1784) 2 Dick 633; 21 E.R. 417* Lord Thurlow C. said that if two persons being joint tenants, perish by one blow, the estate will remain in joint tenancy in their respective heirs.

In *Wright v. Netherwood (1793) 161 E.R. 497* a family had been aboard a ship which was lost at sea. Thus the family members did not necessarily die at the same time by shipwreck, but may have survived for varying lengths of time either at sea or on an island. Sir William Wynne in the Prerogative Court said at page 502:–

> "With respect to the priority of death, it has always appeared to be more fair and reasonable in these unhappy cases to consider all the parties as dying at the same instant of time, than to resort to any fanciful supposition of survivorship on account of degrees of robustness."

and a note in *161 E.R. at page 1144* the same Judge was also reported to have said in that case:–

> "I always thought it the most rational presumption that all died together and that none could transmit rights to another, which seems the opinion of Zouch."

In *Taylor v. Diplock (1815) 161 E.R. 1137,* the husband and wife drowned when the ship they were on struck a rock. Sir John Nicholl held at page 1145:–

> "Upon the whole I am not satisfied that the proof is adduced that the wife survived: taking it to be that both died together the administration is due to the representatives of the husband. I assume that they both perished at the same moment and therefore I shall grant the administration to the representatives of the husband. I am not deciding that the husband survived his wife."

However, earlier in his judgment he had said:–

> "Looking to their comparative strength, there is nothing to take away the ordinary presumption that a man was likely to survive a woman in a struggle of this description; still less is there anything to prove the contrary."

This aspect of the judgment, dealing with the relative strength of the parties, was subsequently referred to in cases such as *Colvin v. H.M. Procurator-General (1827) 162 E.R. 518* and *Sillick v. Booth (1841) 62 E.R. 816.* In *Colvin's case* a man and his wife and child were drowned when a boat was overturned in the River Ganges. A creditor moved for a grant of administration. The Prerogative Court said that, while in strictness the representatives of the wife ought to have been cited as the prima facie presumption of law was that the husband survived, vide *Taylor v. Diplock 2 Phill. 267,* and as the property was small and the debt large, the decree might pass.

In *Sillick v. Booth (1841) 62 E.R. 816,* two brothers perished in a shipwreck. The Vice-Chancellor said at page 820:–

> "I am of opinion that, the two brothers having perished by shipwreck under circumstances of which there is no evidence, it is not necessarily to be taken that they died at the same instant. By the law of England, evidence of health, strength, age or other circumstances may be given in cases of this nature, tending to the judicial presumption that one party survived the other. Therefore, if the matter were open, I should hold with the Master that, having regard to the age and condition of the two brothers, it is to be presumed and decided that James survived Charles."

The relative strength of the persons concerned was also referred to in passing in *In the Goods of Henry Selwyn (1831) 162 E.R. 1331* where the husband and wife had perished on a voyage to Bangor. The Court said:–

> "Without going into the general presumption that the husband was stronger and therefore survived . . ."

It would appear that in these cases the Courts may have been influenced by the civil law which used detailed presumptions based on the comparative age and sex of the deceased persons (see *Halsbury's Laws of England 4th Edition Volume 17 paragraph 857 note 1).*

In *Mason v. Mason (1816) 35 E.R. 688* counsel actually cited the Code Napoleon and relied on the express terms of the rule of civil law which says that "where no evidence is to the contrary, a child shall be presumed to have outlived his parent." However in that case Sir William Grant, M.R., said at page 690:–

> "There are many instances in which principles of law have been adopted from the Civilians by our English Courts of Justice, but none that I know of in which they have adopted presumptions of the law from the Rules of Civil Law . . . In the present case, I do not see what presumption is to be raised and, since it is impossible you

should demonstrate, I think that, if it were sent to the issue, you must fail for want of proof."

In fact, this method of determining survivorship by presumptions as to the priority of deaths due to conclusions as to the relative strengths of the parties appears to have quite quickly lost favour with the Courts. For example in *Satterthwaite v. Powell (1838) 163 E.R. 246* where husband and wife drowned in the same accident, although counsel cited the judgment of Sir John Nicholls in *Taylor v. Diplock (supra)* where he spoke of the ordinary presumption that a man was likely to survive a woman, Sir Herbert Jenner held that the presumption is that they died at the same time. He said at page 246:–

> "It appeared to me that this point was settled; the principle has been frequently acted upon that where a party dies possessed of property that the right to that property passes to his next of kin, unless it be shewn to have passed to another by survivorship. Here the next of kin of the husband claims the property which was vested in his wife; that claim must be made out – it must be shewn that the husband survived. The property remains where it is found to be vested, unless there be evidence to shew that it has been divested. The parties in this case must be presumed to have died at the same time, and there is nothing to shew that the husband survived his wife, the administration must pass to her next of kin."

In *In the Goods of Murray (1837) 163 E.R. 209* it was the title to the deceased husband's property which was in question, and the Court reached a similar conclusion. The Court granted administration with the will annexed to the next of kin of the husband as a dead widower; there being nothing to show that the wife survived (and the next of kin of the wife consenting). Similar judgments were also handed down in two cases which arose as the result of a massacre.

In *In the Goods of Frederick Wainwright (1858) 164 E.R. 718* husband and wife died in a massacre. There being no evidence as to survivorship, the Court granted administration of the personal estate of Wainwright as having died a widower, to his mother, as his next of kin. The Court held that the administrator's oath instead of being in the usual form could state that there was no reason to believe that the wife survived the husband.

An order in almost identical terms was also given in *In the Goods of Lieutenant-Colonel Ewart (1859) 164 E.R. 718.*

It appears from these cases that the approach taken by the Courts to deal with problems of survivorship worked in a relatively satisfactory manner and generally resulted in seemingly just orders and judgments. Where A and B died at approximately the same time, the estate of A was administered on the footing that B did not survive and the estate of B upon the footing that A did not survive. If the representatives of one claimed that they were entitled through survivorship to the estate of the other then they must establish the fact of survivorship as a probability. This indeed seems a basically fair and sensible solution to a difficult question.

In the 1850's a case before the Court involved a problem where the will did not provide for the circumstances that parents and children would all perish at the one time in a shipwreck. The Court's application of the common law to those facts have raised a number of difficulties according to some commentators.

In *Underwood v. Wing (1854) 4 DeG. M. & G. 633 43 E.R. 655* the facts were that the testator and his wife along with their three children had

been drowned at sea on a voyage to Australia and there was no positive evidence to establish whether the testator or his wife died first. The testator had by his will bequeathed his personal estate to one Wing upon trust for the testator's wife absolutely, and if his wife should die in his lifetime he directed that the estate be held by Wing upon trust for the named children of their marriage (the sons to take at twenty-one and the daughter to take at twenty-one or on marriage under that age) if all the children died under twenty-one being sons or under twenty-one and unmarried being a daughter he bequeathed all his property to Wing absolutely.

The Court held in that case that the gift to Wing was dependent on the event of the testator surviving his wife, and that Wing did not become entitled from the mere fact of the gift to the wife failing to have practical operation. The Court also held that the onus of proof that the husband was the survivor was upon Wing; that it was necessary to produce positive evidence in order to enable the Court to pronounce in favour of survivorship and that no such evidence having been produced the next of kin, not Wing, were entitled to the estate.

> "The next of kin stands as to personality in the same position as the heir at law as to realty, and the person claiming against him must make out his entire title. In the absence of any effectual disposition of the beneficial interest in personality, the next of kin is entitled to it, and the person seeking to dispossess him of it is bound to prove a perfect title, and to rebut the prima facie case of the next of kin."

Per Mr. Justice Wightman (reading the joint opinion of Mr. Baron Martin and himself on those parts of the case on which the Lord Chancellor had requested their assistance) at page 656. See also per the Lord Chancellor (Lord Cranworth) at pages 658 and 659. The Lord Chancellor refused to find that the gift over to Wing was a substituted gift, i.e. that it took effect if from any cause whatever the prior gift failed (see at pages 662-664) and vide *Jones v. Westcombe* (Prec. Ch. 316) and *Avelyn v. Ward* (1 Ves. Sen. 420). The Lord Chancellor treated the matter as one of construction (at page 664).

The Lord Chancellor said at pages 664 and 665:–

> "The gift to Mr. Wing is in terms made dependent, and was evidently meant to be dependent, on the single event, setting aside the children, of the testator surviving his wife: if she should survive, he gives everything to her, if she dies in his lifetime he gives everything to Mr. Wing: it is impossible to say, that there is any third case, or class of cases, to which the language of the will could possibly be applicable. It may be that, if the extremely improbable event which did occur had presented itself to the testator's mind as a possible contingency, he would have wished Mr. Wing to take his property; but then he would have done this, not by relying on the words now found in the will as being sufficient for the purpose but by making express provision to accomplish his object. It is not sufficient to say that, if for any reason the gift to the wife fails to have practical operation, the testator must have intended to benefit Mr. Wing: the answer is, he has not said so, neither expressly nor impliedly; and, if I were to attempt to supply the omission, I feel that I should be making, not construing the testator's will. These considerations decide the question on the wife's will also."

A further case arising from the same shipwreck went to the House of Lords in the 1860's. In *Wing v. Angrave (1861) 8 H.L.C. 183,* the relevant question was the effect of these events upon the wife's will. The wife had under her father's will a power of appointment if her children failed to

take her father's estate. By her will she exercised this power in favour of her husband and if he died in her lifetime in favour of Wing.

The majority in that case (which included Lord Cranworth) also decided against Wing. It was conceded by their Lordships that the testatrix would almost certainly have exercised the power of appointment so as to provide that Wing be entitled to the property in the event that both she and her husband perished together, if that possibility had occurred to her. However, the majority expressed the view that her probable subjective intention was not relevant, unless it was clearly expressed within the words used in the will.

A different view was taken by the Lord Chancellor (Lord Campbell) who held that the gift over to Wing was a substituted gift to take effect on the failure of the prior estate. In dissenting from the majority he said at page 200:–

> "But there is a class of cases decided by very eminent judges, beginning with *Jones v. Wescomb* before Lord Chancellor Harcourt, and coming down to *Warren v. Ruddell* before Vice-Chancellor Page-Wood, which establishes the doctrine that where by a will property is given over, on the failure, in a particular manner, of a prior gift, and the will shows that it was the testator's clear and certain intention that the devisee or legatee over should take on failure of the prior gift howsoever that gift may fail, the devisee or legatee shall take on failure of the prior gift, although the prior gift fails in a manner different from that specified in the will."

The Lord Chancellor then went on to apply the principle (at page 201) and then at page 202 he said:–

> ". . . we are to give effect to the expressed, not the conjectural or probable, intention of testators. But looking at this will, does not the testatrix clearly express her intention, that if her husband did not take the property William Wing should take it? The lapse of the bequest to her husband by his predecease being substantially the only event upon which the bequest to him could fail, when she says, 'in case my said husband should die in my lifetime,' does she not, in substance, say, in case the bequest to my husband should fail, then William Wing is the object of my bounty, and all shall go to him."

> And then at page 204, the Lord Chancellor adopted another approach when he said:–

> "The Respondents must admit that *they* are not entitled, and that the Appellant is entitled, first, if the husand survived the wife, under the husband's will; secondly, if the wife survived the husband, under the appointment by the wife, or, thirdly, if the husband and wife died at the same point of time, there being then a clearly established failure of the gift to the husband. In the nature of things, one of these three events must have happened, and in no other way can it be suggested that the deaths of the husband and wife could have occurred. If one of those events must have happened, and on the happening of any one of them the Appellant is entitled, how can the parties put into possession of the property be entitled? Their *prima facie* title is to prevail till a better is shown. But does not the Appellant show a better when he proves that he is entitled on the happening of any one of three events, and that, with the certainty of fate itself, one of these three events must have happened?"

There appeared to be some precedent for the second approach which Lord Campbell took (see page 202), namely, of looking at *the intention* of the testatrix. For example, *In the Goods of Henry Selwyn (1831) 162 E.R.*

1331 in which no proof could be obtained as to the priority of the deaths, the Prerogative Court said at page 1331:

> "The only difficulty arises from the other clauses providing that the substitution of the executors and the devise over shall have effect in the event of her 'dying in his lifetime'. Without going into the general presumption that the husband was stronger and therefore survived, *the intention* is so clear that, whatever might be the strict construction of the words in other Courts, I shall decree probate to the substituted executors in common form."

In *In re Green's Settlement (1865) L.R. 1 Eq. 288* the question was whether the deceased or her infant son died first when a mutiny broke out in India.

Sir W. Page-Wood, V-C, said at pages 289-290:–

> "I think the rule which the Court should follow in this case is analogous to that laid down in *Underwood v. Wing*. The whole question is: On whom is the onus of proof thrown? The lady on the devolution of whose estate the question arises is shewn to have died on the 16th of November; her husband is shewn to have died before her; a number of persons claim as her relatives, and prove their kindred with a certain degree; and so far as now appears, there is no one nearer in kindred. On the other hand, the representative of another person (the infant son) claims the property also, and shews that the person through whom he claims was nearer of kin than the Petitioners, and would have been entitled, if he survived his mother; but a person claiming under such a title must go further and must shew not only that the person through whom he claims would have been entitled if he survived, but that he actually was entitled, or, in other words, that he did survive." This appears to us to be a reasonable result.

Likewise, the Court appears to have been able to deal fairly with the respective estates of husband and wife in *In the Goods of Alston (1892) P. 142*. In that case husband and wife were on a ship which was apparently lost at sea with all aboard. There was no evidence that either survived the other, and each had appointed the other their universal legatee. The President of the Probate Division held that a grant of administration with the will annexed of the estate of each, as in case of an intestacy, might be made to one of the next of kin of each. Of course if the next of kin of one had wished to establish a claim to the property of the other, he would have been required to prove survivorship, but this appears to us reasonable.

A similar order to that made in *Alston's case* was also made in *In the Goods of Beynon (1901) P. 141*. In that case Gorell Barnes J. following the precedent in *In the Goods of Ewart (1859) 164 E.R. 718* (discussed above), allowed the usual form of oaths to be varied so as to state that the husband and wife died on or since July 9, 1900, and that, after due enquiries, there was no reason to believe that either survived the other.

A number of jurisdictions decided that reform was called for. The relevant reforming legislation while partly aimed at ensuring that the unsatisfactory result in *Underwood's case* would be avoided, appears to have been principally aimed at doing away with the difficulties of proof of survivorship. Under the provisions introduced into a large number of common law jurisdictions (but not South Australia), a presumption was introduced that deaths occur in order of seniority.

Thus Section 107 (3) of the English Law of Property Act 1922 (which reappeared in Section 184 of the Law of Property Act 1925) provides:–

"In all cases 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, such deaths shall (subject to any order of the Court) for all purposes affecting the title to property be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the older."

This provision has been enacted in Victoria as Section 184 of the Property Law Act. While as long ago as 1858, the New South Wales legislature passed legislation to similar effect (22 Vict. No. 1 s. 26) with the exception that the proviso "subject to any order of the Court" did not appear. That section was re-enacted in the Conveyancing and Law of Property Act 1898 Section 119 and again in the Conveyancing Act 1919, Section 35.

A similar provision was also passed in Queensland (Section 26 of the Titles to Land Act 1858). A provision of identical terms to the Englih provision is now to be found in Section 65 of the Succession Act 1981 (Queensland).

A similar provision was also adopted in Tasmania and can be found in Section 2 of the Presumption of Survivorship Act, 1921.

In New Zealand, Section 184 of the English Law of Property Act was enacted in Section 6 of the Property Law Amendment Act, 1927, which was re-enacted as Section 27 of the Property Law Act, 1952. (This section was subsequently repealed and replaced by a substantially different provision which will be discussed later in this report).

The Effect of Section 184 of the English Act and like provisions

One matter which was for some time in dispute was whether or not Section 184 applied when the evidence suggested that the deaths occurred simultaneously.

In *In re Lindop (1942) 167 L.T. Rep. 235; (1942) 1 Ch. 377,* where a husband and wife were together in a house in Torquay when they were killed by a bomb which destroyed the house, it was suggested that the section did not apply where the deaths were simultaneous. However, Bennett J. held that the two deceased could not be presumed to have died simultaneously. He stated that as time was infinitely divisible, the fact of two persons dying at exactly the same moment of time was so highly improbable that the evidence relied upon to prove it must be looked upon closely and critically. In the result he held that Section 184 applied.

In *In re Grosvenor (1944) Ch. 138* Cohen J. at first instance followed Bennett J. in *In re Lindop (supra)* and held that the section applied. In that case, five people, including two brothers, who were sheltering in a basement, were killed by a bomb which exploded in the basement. The brothers in their respective wills had made gifts to each other.

Cohen J.'s judgment was however reversed on appeal. Lord Greene, M.R., said at page 146:–

"The words 'uncertain which of them survived the other or others' appear to me to be applicable only to the case where the proper inference from the facts is that the persons in question died consecutively and this will not be the case if the Court comes to the conclusion on the evidence that they died simultaneously."

The Court held that for all practical purposes the five people who were killed by the bomb blast in the air raid shelter should be deemed to have died simultaneously so as to exclude the operation of Section 184.

In re Grosvenor (supra) was applied in *In re Howard (1944) P. 39.* In that case the testator, his wife and his son were killed when as a result of enemy action their home was destroyed. Henn Collins J. held that on the facts, that the death of the testator and his wife were simultaneous, but that the son did not die simultaneously with them.

In *Re Mercer (1944) 1 All E.R. 759* however, where husband and wife were found badly burnt, after bombs had been dropped at the back and front of their home, Morton J. said at page 760:–

> "Of course I accept the decision of the majority of the Court of Appeal in *Re Grosvenor (1944) 1 Ch. 138,* but it seems to me that the cases where the Court can find as a fact that two or more persons have died simultaneously must occur very rarely. The circumstances of *Re Grosvenor,* where five persons were proved to have been in one small room actually penetrated by a high explosive bomb, were very exceptional circumstances, which may or may not occur again. In the present case I do not think that it would be right for me to draw the inference that Mr. Mercer and his wife died simultaneously."

However, in the following year, *In Re Grosvenor* was reversed by a majority of the House of Lords in *Hickman v. Peacey (1945) 61 T.L.R. 489; (1945) A.C. 304.* The majority of their Lordships (Lords Macmillan, Porter and Simonds) held that the circumstances of the deaths were such as to give rise to the operation of Section 184 because there was uncertainty which had not been displaced by evidence.

Lord Porter took the view that the section was framed so as to exclude the possibility of simultaneous deaths saying at page 337:–

> "Speaking for myself, I should be inclined to read the section, viz.: – (1.) an ability to show the order of death or (2.) uncertainty. Like Lord Cranworth, 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 that 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. It does not speak of uncertainty as to whether the persons concerned died at the same time, but seeks to determine which survived the other. It seems to be concerned with survivorship or no survivorship, and not to be concerned with some tertium quid which is neither the one nor the other."

While Lord Macmillan said at page 323:–

> "I prefer to read the enactment as meaning that where the circumstances are such that it is not possible to say with certainty that one of the victims survived the other there is then uncertainty as to which survived the other. Clearly you cannot say with certainty that one of the victims survived the other if your belief is that both died at the same time, if that be possible."

Thus it is clear that Section 184 applies even when an inference can be drawn that the deaths were simultaneous.

On the other hand, the presumption will not be invoked if evidence is adduced which in fact establishes the precise order of death, because in such a case the circumstances will not render it uncertain who survived the other or others. However it is not absolutely clear what standard of proof is required. Australian Courts appear to be satisfied that the circumstances are sufficiently certain when the order of death is established according to a clear preponderance or balance of probabilities.

For example, in *In re Plaister (1934) 34 N.S.W.L.R. 547* where it appeared that a man had shot his child and wife and thereafter committed suicide, Harvey C.J. said at page 551:–

> It has been suggested to me that I must hold that the facts render it uncertain in what order these people died, inasmuch as it has to be determined by circumstantial evidence, and circumstantial evidence of a non demonstratively conclusive character. In my opinion I ought not to hold that 'uncertain' means that it has not been demonstratively proved, not proved with scientific accuracy. I think that s. 35 of the Conveyancing Act really was meant to fill up a gap which existed previously in the law, where the Court was unable by a balance of testimony satisfactory to itself to come to a conclusion as to the order of the deaths."

In *In re Comfort (1947) V.L.R. 237* Herring C.J. applied *In re Plaister,* and held that having regard to the evidence, there was evidence on which he could properly decide that the female deceased died first.

On the other hand, the English Courts appear to require a higher standard of proof, before they will be convinced that the survivorship issue is not rendered uncertain by the circumstances. In *In re Bate (1947) 2 All E.R. 418* Jenkins J. in discussing the issue of the extent of proof necessary, said at page 421:–

> ". . . there was something less than unanimity amongst their Lordships (in *Hickman v. Peacey)* as to the degree of proof of survivorship which, in their view, was necessary to exclude the presumption enacted by Section 184, but I think all would have agreed that Lord Simon did not put it too high when he spoke of 'evidence leading to a defined and warranted conclusion'."

On the facts it was held that there was not sufficient evidence to show in which order the deaths occurred, and that the case came within the meaning of Section 184. In practice, therefore, the section is applicable whenever there is no proof that one of the deceased survived the other; but the actual standard of proof required is not absolutely clear.

Section 184 was enacted to deal with the difficulties of proof in survivorship cases, which at times had led to unsatisfactory results – for example, in *Underwood v. Wing* and *Wing v. Angrave (supra).* However, while Section 184 would undoubtedly have assisted the unfortunate Wing in *Wing v. Angrave* to give him the interest in the husband's and the wife's father's estate which the husband and wife had severally intended him to have, unfortunately the application of the presumption in Section 184 can also have the effect of defeating the intention of the deceased. For example, often the husband will leave all his property to his wife, who is frequently younger and thus, under Section 184, presumed to have died after her husband. As a result all of the husband's property passes through the wife and frequently to her family rather than his. It would seem that in the majority of cases, if the matter was taken into consideration at all, the intention and wish of the testator would be that his assets go to his side of the family if his wife should die at the same time and thus have no need of them. This of course would be especially so if his family had contributed in a substantial way to his financial status. Of course, it may also occur that the wife is the elder and has accumulated substantial assets, in which case Section 184 may likewise operate against what would have been her wishes.

Principally due to the fact that it was considered that the statutory presumption in Section 184 was capable of working an injustice in such circumstances, various common law jurisdictions have decided upon

alternative methods to deal with the problems presented when deaths occur at approximately the same time.

At this stage we will examine the methods chosen by those jurisdictions.

New Zealand:

As has already been mentioned, in 1927 New Zealand introduced a provision identical in terms to the English Section 184. However, over the years this section was criticised. Hamilton said of the section in an article entitled *Simultaneous Deaths and Statutory Substitutional Gifts Implied in Wills 1959 N.Z.L.J. 7 at page 7:–*

> "The provision worked satisfactorily and met normal expectations in cases involving parent and any child or remoter issue. It did not work well as between husband and wife in cases where there were no children or where, after the commencement of the Administation Amendment Act, 1944, all the children died under 21, perhaps in a common disaster. In these cases the property of the elder spouse, say the husband, would pass by virtue of the presumption to the estate of the wife (assuming she was the younger spouse); and her next-of-kin perhaps her parents or brothers and sisters would thus inherit the husband's property. In the case of inherited property or property given to him by his parents the result was manifestly unjust."

As a result of such difficulties, New Zealand re-examined the law of survivorship and in 1958 enacted the Simultaneous Deaths Act (see Appendix A). The opening words of the Simultaneous Deaths Act expand the corresponding former provision in Section 27 of the Property Law Act 1952 so as to state explicitly that the new code applies where the deaths occur at the same time, for example as in *Hickman v. Peacey (1945) A.C. 304.*

Paragraph (a) of subsection (1) of Section 3 of the Simultaneous Deaths Act, 1958 provides that in cases of simultaneous deaths:–

> "(a) the property of each person so dying shall devolve, and if he left a will it shall take effect unless a contrary intention is shown thereby, as if he had survived the other person or persons so dying and had died immediately afterwards."

This avoids the difficulties that previously arose in the husband and wife cases, and saves the imposition of a double death duty by avoiding the possibility of the same property devolving through two or more estates.

Special applications of the rule laid down in paragraph (a) are provided for in paragraphs (b) and (c). Paragraph (b) provides that a "donatio mortis causa made by any person so dying shall be void and of no effect". Such a case might arise where a husband, overtaken by sudden illness, made a donatio to his wife and then perished with her in a car accident while she was attempting to drive him to hospital.

Paragraph (c) covers the special case of the proceeds of an insurance policy where the devolution of the proceeds depends, not on any will or on the intestacy of any person, but on some other document, perhaps the terms of the policy itself. Unless a contrary intention is shown by the document, the proceeds are to be distributed as if the person insured had survived every other person so dying and died immediately afterwards.

Paragraph (d) of subsection (1) of Section 3 provides:–

> "any property owned jointly and exclusively by two or more of the

persons so dying shall be devolved as if it were owned by them when they died as tenants in common in equal shares."

Paragraph (e) covers in similar terms the special case where the persons dying at the same time are jointly and exclusively entitled to any property under an existing trust. The same problem of survivorship arises, and it is met by treating the beneficiaries as tenants in common in equal shares.

Paragraph (f) covers to similar effect the special case where a power of appointment could have been exercised in respect of any property by any of two or more persons in fact dying at the same time if any of them could be shown to have survived the other or others of them. In such a case the power may be exercised as if an equal share of the property had been set apart for appointment by each of those persons, and that share devolves in default of appointment in the manner in which the property would have devolved if the person entitled to appoint the share had been the survivor of those persons.

Paragraph (g) covers the further special case where by a will any property is devised or bequeathed or appointed to the survivor of two or more of the testator's children or other issue within the meaning of Section 16 of the New Zealand Wills Amendment Act 1955 and all or the last survivors of those children or issue die at the same time in the testator's lifetime. In such a case Section 16 is to apply as if the devise or bequest or appointment were in equal shares to those of them who so died and leave a child or children living at the death of the testator.

Western Australia:

Soon after the New Zealand legislation was enacted Western Australia enacted identical legislation in the form of the Simultaneous Deaths Act, 1960. Subsequently, the provisions from this Act have become Section 120 of the Western Australia Property Law Act.

Canada

In 1939, the Uniform Law Conference of Canada adopted a Uniform Commorientes Act which was based upon the earlier English legislation.

In 1960 the Uniform Law Conference revised and renamed their legislation the Uniform Survivorship Act. Whereas under the 1939 Act the presumption of sequence of deaths only applied to common disasters, the 1960 Act applied to other multiple deaths, so long as there was uncertainty as to their sequence.

In 1971, the Uniform Law Conference adopted a completely revised text for its survivorship legislation. The Uniform Commissioners elected to recommend a new rule of presumption of sequence of deaths and new rules were also made with respect to joint tenancies and insurance proceeds (see Appendix B).

The Uniform Law Conference in a number of respects followed the American Uniform Simultaneous Death Act (see Appendix C). The American Act was approved first in 1940 and then in a revised form in 1953 by the National Conference of Commissioners on Uniform State Laws. This Uniform legislation has been substantially adopted in nearly all States.

The Canadian Uniform Survivorship Act 1971 has been substantially implemented in Ontario (see Appendix D).

Reports on the topic of survivorship have been issued recently by the Law Reform Commission of Manitoba and British Columbia.

The Manitoba Law Reform Commission was critical of the English Section 184 equivalent which presently applies in Manitoba and recommended the adoption of a rule along the lines of that adopted by the Uniform Law Conference of Canada, and said at page 6:–

> "This Commission would prefer the enactment of a statutory presumption which more closely resembles the intentions of the decedents generally had they directed their minds to the issue of survivorship. The Ontario Law Reform Commission, the Uniform Law Conference of Canada and the National Conference of Commissioners on Uniform State Laws (America) have all proposed the same rule regarding presumption of sequence of deaths. They have adopted the presumption that where there is uncertainty as to the sequence of deaths, each decedent should be deemed to have survived all others.
>
> We favour the approach adopted by these organisations. In abolishing the presumption of survivorship of the decedent over another, the new rule allows for a more balanced manner of determining succession to property and one we feel which would more closely resemble the wishes of decedents generally."

Apart from recommending a general rule, whereby the property of each deceased is disposed of as if he had survived the other, the Manitoba Law Reform Commission made a number of other recommendations concerning survivorship. The Commission recommended that the proposed Act provide for instances where the will provides for a substituted disposition in the event of the beneficiaries dying at approximately the same time. The Commission recommended that the substituted disposition should take effect. A similar provision was recommended with respect to substituted personal representatives.

The Commission also recommended that unless a contrary intention appears, where all the joint tenants or holders of joint accounts die at the same time, or in an unknown order, then each person be deemed to have held as a tenant-in-common. Also it was recommended that the Insurance Act be amended to make it clear that the insured would be deemed to have survived the benficiary.

The Commission recommended a provision along the following lines to deal with powers of appointment:–

> "Unless a contrary intention appears, where a donee exercised a power of appointment by will and he and the donor die at the same time or in circumstances rendering it uncertain which of them survived the other, the property which is subject to the power of appointment shall be disposed of as if the donee had survived the donor."

(The complete draft Act prepared by the Commission is reproduced in Appendix E).

British Columbia:

The British Columbia Law Reform Commission likewise recommended the adoption of the approach taken by the Uniform Law Conference, saying at page 17:–

> "(The presumption) that a testator survives his beneficiary permits the testator's estate to devolve subject to contingent provisions in his will or pursuant to intestate succession. In either case the result is more likely to satisfy the testator's intention than permitting the gift to be shared by the deceased beneficiaries' successors. If a testator intends to benefit the estate of the beneficiary he is at liberty to make

the provisions expressly in his will. The effect of the current survivorship presumption is to benefit that individual's estate and through him the relatives of the beneficiary, who may have little, if any, connection with the testator. The result may be to give an interest in his estate to complete strangers."

In addition to recommending the enactment of a section comparable to Section 1 (1) of the Canadian Uniform Survivorship Act, the Commission recommended that the Survivorship Act deal with the situation where there is a question of survivorship between two possible donees. It was recommended that if the testator provides for the disposition of his estate or a part thereof if one donee should predecease another, then if they die simultaneously, or so as to render it uncertain which survived the other, the substituted disposition should take effect.

The Commission further recommended that where the testator has not provided for a substituted disposition, then a gift to two or more beneficiaries or their survivor, who die at the same time or in circumstances rendering it uncertain which of them survived the other or others, should be divided equally between the estates of those beneficiaries.

The Commission recommended that a section comparable to Section 1 (2) of the Canadian Survivorship Act be enacted so that where all of the joint tenants perish in circumstances which render the order of their deaths uncertain, the joint tenancy would be converted into a tenancy in common, and the estate of each joint tenant would be entitled to a share in the property which presumably would be an equal share.

British Columbia already has a provision dealing with the situation where the testator has designated alternative executors to serve should his first appointment predecease him and the executor and testator die simultaneously or in circumstances rendering it uncertain which of them survived the other. It was recommended that this provision be retained and thus effect given to the direction of the testator.

Also the Commission recommended that a section be added to the Act providing that any person who fails to survive the deceased by five days is deemed to have predeceased the deceased; and that if there is insufficient evidence to establish that the person survived the deceased by five days, it be deemed that the person failed to survive by the required period.

Finally the Commission recommended that the provision in the current Act dealing with insurance should be deleted and that the new Act should be expressed to be subject to their Insurance Act which in Section 203 provides:–

"Unless a contract or a declaration otherwise provides, where a person insured or group person insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survived the other, the insurance money is payable in acccordance with Section 198 (1) as if the beneficiary had predeceased the person insured or group person insured."

We assume that this last amendment would have to be made, if at all, by Commonwealth law in this country.

Is reform to the law of survivorship desirable in this State? If so what form should it take?

Presently no statutory presumption as to survivorship exists in this State and thus the common law operates. It appears to this Committee that in many instances the common law may provide a more satisfactory solution to the survivorship problem than Section 184 of the English Law

of Property Act and its equivalents. Under the common law, in simultaneous death situations the next-of-kin of the testator would usually win over the representatives of the deceased beneficiary, purely and simply because it was not possible to prove that the beneficiary died after the testator. However, under a provision whereby the elder is assumed to predecease the younger it will quite often be the case that the testator's estate will end up in the hands of the beneficiaries' next-of-kin rather than with the testator's next-of-kin.

As has been pointed out by the Law Reform Commissions of Manitoba and British Columbia, it is unlikely that the testator, if he had thought the matter over, would have intended the beneficiary's next-of-kin to benefit rather than his own. Thus it is not recommended that we enact a provision along the lines of Section 184.

However, the Committee is of the view that some form of statutory reform is desirable to ensure that the situation in *Underwood v. Wing* and *Wing v. Angrave* will not be repeated. *Underwood v. Wing* and *Wing v. Angrave* warrant careful analysis. While no doubt often the strict conditions of a gift over must be adhered to, the Court will at times expand the conditions of a gift over by inference to provide for a *casus omissus* (vide *Wing v. Angrave* per Lord Campbell at page 200 and *Underwood v. Wing* per Lord Cranworth at pp. 661-663). In *Wing v. Angrave* and *Underwood v. Wing* the Court declined to expand the conditions by inference and the problem in this class of case is that, if the gift over is not expanded, one cannot say whether or not the condition is fulfilled – and no one will ever know. Yet in truth the condition either is or is not fulfilled, subject to the philosophical difficulty that the persons concerned may have died at exactly the same point of time. The Courts have found a way out of the problem by saying that the donee whose title depends on survivorship does not take if he cannot prove survivorship and that (assuming that there is no effective substituted gift) the next-of-kin of the testator have a prima facie title (in *Wing v. Angrave* the prima facie title lay in the persons claiming in default of appointment). In substance, however, such a person has no better right since unknown to all the gift over may have taken effect. Furthermore, while the primary gift fails for lack of proof of survivorship, that lack of proof is not carried into the gift over to make it operate.

The difficulties inherent in the decisions in *Underwood v. Wing* and *Wing v. Angrave* may be illustrated by making the point that, had Catherine Underwood (a daughter of the testator's) who, the evidence showed, survived for a short period in fact survived to attain 21 years or marry under that age, she would not have taken under the will of her father because she would not have been able to prove that her mother predeceased her father.

We mention here that the difficulties inherent in the decisions in *Underwood v. Wing* and *Wing v. Angrave* are compounded in South Australia by the provisions of Part IIIA of our Administration and Probate Act, 1919 as amended. Distribution on intestacy under that Part depends on "survival". It may well be that a person claiming under that Part will have difficulty in arguing the concept of *prima facie* title.

The Committee considered eight options or alternative approaches to reform of the law.

Option 1

The North American Approach

The following option has appealed to several jurisdictions in North America. It provides that questions of survivorship be resolved by

distributing the estate of each deceased as if he had survived the other. Section 1 (1) of the Canadian Survivorship Act provides:–

> "1 (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others."

Section 1 of the United States Simultaneous Death Act provides:–

> "1. No Sufficient Evidence of Survivorship.
>
> Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this Act."

Similar provisions have been enacted in New Zealand and Western Australia.

A provision along these lines has a number of advantages. It is relatively simple, as it is merely deemed that the person whose estate is being administered survived all persons who died at the same time as him or in circumstances rendering it uncertain whether or not they did survive him.

The rule would retain the traditional and desirable common law position that for a beneficiary (and the persons claiming through the beneficiary) to take, it must be shown that such beneficiary survived the testator. The rule does, however, alter the common law so as to assist beneficiaries entitled under a gift over conditional upon principal beneficiaries predeceasing the testator or donor. The rule will effectively wipe off the slate all persons who die at the same time as the testator (by presuming that they predeceased him) and thereby ensure that another beneficiary entitled under a gift over can take.

Although the rule appears to be both simple and effective, it has one unfortunate defect which was brought to light in the reports on Survivorship by the British Columbia and Manitoba Law Reform Commissions (other jurisdictions appearing to have ignored or not to have perceived the difficulty). The defect is that it will not be of assistance in those situations where the persons whose property is being disposed of *is not one of the commorientes*. For example, a testator or donor could leave a life estate to A, with remainder to B if B should survive A, otherwise to C. If A and B should die in a common accident or in circumstances rendering it uncertain which one of them survived, then it becomes unclear whether C will take. Common sense would seem to indicate that, since C can show he (C) survived A and since the representatives of B are unable to show that B survived A, that C should therefore take. However, if *Underwood v. Wing* were to be applied, then for C to take he (C) must prove that B predeceased the life tenant A – which C could not do.

The general rule does not assist since the rule itself assumes that the testator was a commoriens; as it provides that property of each person shall be disposed of as if he had survived the others.

It does not help to say that the property of A and B shall be disposed of as if each survived the other, because the assumptions (that A survived B and B survived A) will not help C, since neither A nor B were actually

capable of *disposing* of the property; rather, it was the testator who had (perhaps decades earlier) disposed of the property by specifying in his will or a deed the events upon which the disposal of his property depended. It was this specific difficulty with the general rule which led the British Columbia and Manitoba Law Reform Commissions to recommend the following special rule *in addition to* the general rule:–

> "Unless a contrary intention appears, where a will contains a provision for the disposition of property operative in any one or more of the following cases, namely, where a person designated in the will–
> (a) dies before another person;
> (b) dies at the same time as another person; or
> (c) dies in circumstances rendering it uncertain which of them survived the other,
> and the designated person dies at the same time as the other person or in circumstances rendering it uncertrain which of them survived the other, then, for the purpose of that disposition, the case for which the will provides is deemed to have occurred."

This Committee is, however, of the view that an additional provision in this form is not entirely satisfactory because some confusion and difficulty could arise between the general rule and the specific rule where both applied to the one fact situation. The two rules can "overlap". The general provision above would ensure that the *Underwood v. Wing* problem did not arise again with the exception of instances where there is a life estate with a series of gift over. But, the special rule (adopted to deal with the specific deficiency in the general rule) can overlap with the general rule since it may also be utilised to prevent the recurrence of an *Underwood v. Wing* situation in the special case where the testator *is one of the commorientes.*

One way to avoid such potential for overlap would be to provide specifically against it; for example, by expressly stating that the second or special rule will only operate whenever the first rule does not cover the situation.

Other minor difficulties with the special British Columbia provision arise from its actual wording. For example, as already noted, its operation is restricted to *wills*. The word "will" would have to be deleted and the word "instrument" substituted, thus embracing gifts by donors as well as by testators. Further difficulties with the British Columbia special rule arise out of the expressions "designated person" and "the case for which the will provides". "Designated person" is somewhat ambiguous. And the word "case" is not a happy one in the context. It is undoubtedly intended to refer to the *condition* upon which the gift over is dependent. The very fact that some members of the Committee had difficulty about the word "case" indicates the desirability of using the word "condition".

One member of the Committee, Mr. Morgan, was particularly concerned that the special rule could operate so as to reverse the common law rule that a claimant, in order to succeed, must prove his own survivorship. His point may be illustrated by an example: X makes a will in which he gives his whole estate to his wife for life with remainder to his son A if he is living at her death; or remainder to his son B if son A predeceases her and B is living at her death; or remainder to his son C if sons A and B predecease her and C is living at her death; finally, remainder to son D if sons A, B and C all predecease her and D is living at her death. Let it be assumed that the wife and sons A, B and C die together or in circumstances where the order of deaths is uncertain, but, in any event, some years after the death of the testator. If the proposed rule is assumed not to

be intended to override the common law requirement as to a claimant's proof of his own survivorship (that is, in order to take at all a claimant must prove his own survival), all is well. There is no difficulty. If that is assumed (or alternatively, if it is so specifically provided in an amendment) then D who has survived and can prove his own survivorship will be able to argue successfully in court – "I can prove that I was living at my mother's death, and, since the condition which my father specified in his will in order for me to take (namely the deaths of my brothers A, B and C prior to my mother's death) is deemed to have occurred, I am entitled to take".

If, however, the above assumption is *not* made (or alternatively, is not covered specifically by an amendment), problems can arise. In the above example, the representatives of A could come to court and argue that the first "case" or "condition" upon which the disposition is dependent is that A be living at the death of his wife, that is to say, that the wife predeceased A. Since, pursuant to the section, this condition is deemed to have occurred, A would be entitled to take notwithstanding the fact that he is not shown to have survived the wife.

It could be expected, of course, that a court presented with such an argument would answer: "That is a superficially attractive argument but if we look further at the instrument and the circumstances of the case, there are also other conditions set out in it which can be deemed to have occurred. Although pursuant to the section it may be presumed that the wife predeceased son A, the testator has also provided for the circumstance of son A predeceasing the wife, and if this is also deemed the gift goes elsewhere." In this way, the court could, in theory, eliminate all of the sons who died in the common accident by first saying that the wife was "deemed" to have predeceased the son and then that the son was "deemed" to have predeceased the wife. The court could, in theory, keep repeating this artificial exercise until it came upon someone (in this instance D) who actually did survive, and thus could not be deemed by virtue of the section to have predeceased the wife.

Despite the fact that it is possible and even probable that a court would not interpret the section so as to abolish the requirement that for a person to take he must prove his own survivorship, it is not at all desirable to pass new legislation which would put the court to such exercises or jeopardise the long-established and just common law rule.

In an attempt to deal with these and other difficulties which may arise from adoption of the British Columbia and Manitoba drafts in their present form, the Committee considered an alternative provision in the following form:–

Option 2

General rule relating to commorientes

Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others, except as provided otherwise in this Act.

Effect of commorientes on life estates with gifts over etc.

(1) This section shall only apply to gifts over not coming within the terms of the previous section, and is not intended to affect the common law requirement of proof by a claimant of his own survivorship.

(2) Unless a contrary intention appears, where an *instrument* contains a provision for the disposition of property dependent upon any one or more of the following *conditions;* namely a person *named in the disposition–*

(a) dying before another person;

(b) dying at the same time as another person or

(c) dying in circumstances rendering it uncertain which of them survived the other,

and that *named person* dies at the same time as another person mentioned in paragraphs (a)–(c) or in circumstances rendering it uncertain which of them survived the other, then for the purposes of that disposition, the condition upon which the disposition is dependent is deemed to be satisfied.

This provision is of course drawn upon the assumption that the general rule (whereby it is assumed that the commorientes predeceased the testator, donor or intestate) will deal with the majority of situations while this special rule will deal only with the effect of commorientes upon those cases involving a life estate with a series of gifts over.

Option 3

A further possibility which was considered by the Committee was to have no general rule at all but rather to rely solely on a wider "special" provision (along the lines of those put forward by Manitoba and British Columbia) which would cover not only life estates with a series of gift over but also all gifts over.

Thus it was envisaged that a provision could be enacted along the following lines:–

Effect of commorientes on gifts over

(1) This section is not intended to affect the common law requirement of proof by a claimant of his own survivorship.

(2) Unless a contrary intention appears, where an *instrument* contains a provision for the disposition of property dependent upon any one or more of the following *conditions;* namely *a person named in the disposition–*

(a) dying before another person;

(b) dying at the same time as another person; or

(c) dying in circumstances rendering it uncertain which of them survived the other,

and that named person dies at the same time as another person mentioned in paragraphs (a)–(c) or in circumstances rendering it uncertain which of them survived the other, then for the purposes of that disposition, the condition upon which the disposition is dependent is deemed to be satisfied.

To do away with the general rule would however, do away with its simple and obvious application to most cases and, in addition, leave unsolved the problem of survival in relation to intestacy. Retention of the general rule, on the other hand, solves the problem as to intestacy as will be seen later and provides a ready and easily discernible solution to most problems.

Option 4

A rather different approach was put forward by one member of the

Committee. It was suggested by Mr. Morgan that the Law of Property Act should be amended to provide:–

> "Where under any instrument a disposition of property depending upon a person surviving another fails for lack of proof that that person survived the other, a gift over conditional on that person not surviving the other shall be deemed to be conditional on the disposition failing for lack of proof of the survival of that person."

The provision, in effect, says that in place of the original condition of the gift over (namely the lack of survivorship of the person or persons entitled under the earlier gift) there is deemed to exist the less onerous condition of "lack of proof" of the relevant survivorship. That is to say, the mere "lack of proof" or difficulty of proof of survivorship is deemed to be enough to satisfy a condition which in its terms indicates that survivorship ought to have been proved.

It was, however, suggested by the Chairman that the provision would not adequately deal with those situations where the instrument stipulated some kind of conditions, for example, survival for a certain length of time, or surviving other persons dying in a given order.

Option 5

The Chairman put forward a provision along the following lines:–

> "Where under any instrument a disposition of property depends upon the person or persons named in the disposition surviving another person or persons or surviving by a stipulated period of time another person or persons or surviving other persons dying in a given succession of time then, subject to any express direction in the instrument, excluding the operation of this section, the disposition shall nevertheless take effect if it is impossible to prove survival or survival for the stipulated period or in what order the persons died who are referred to in the disposition."

Option 6

Subsequently further drafts were put before the Committee, which attempted to combine the two approaches set out above. One option which found favour with some members of the Committee provided:–

Subject to any express direction in the instrument to the contrary, where under any instrument there is a disposition conditional upon–

(a) a person surviving another person or persons; or

(b) a person surviving by a stipulated period of time another person or persons; or

(c) a person surviving other persons dying in a given temporal order of succession,

AND that disposition has failed due to lack of proof of the survivorship required by conditions (a) (b) or (c) THEN a gift over conditional upon there being a failure of the aforesaid survivorship shall be deemed to be a gift over conditional upon there being a failure of proof of the aforesaid survivorship.

Option 7

A further option which was put forward for consideration differed only slightly from the last option. The only difference being that rather than substituting the actual condition of the gift over for a less onerous condition; the original condition of the gift over is *deemed* to be satisfied. Thus the option provides:–

Subject to any express direction in the instrument to the contrary, where under any instrument there is a disposition conditional upon –

(a) a person surviving another person or persons; or

(b) a person surviving by a stipulated period of time another person or persons; or

(c) a person surviving other persons dying in a given temporal order of succession,

AND that disposition has failed due to lack of proof of the survivorship required by conditions (a) (b) or (c) THEN, where there is a gift over conditional upon there being failure of the aforesaid survivorship, that condition shall be deemed to have been satisfied.

Option 8

Three members of the Committee were of the opinion that it was unnecessary to expand the basic provision in such a manner. They were of the opinion that a more succinct provision was preferable.

The starting point of this option is the proposition that the law should be altered no further than is necessary to overcome the difficulty illustrated by the decisions in *Underwood v. Wing (supra)* and *Wing v. Angrave (supra).*

Those cases demonstrate the common law principle that a person whose claim depends upon one person surviving another cannot succeed unless he can prove the survivorship upon which his claim depends. Option 8 says that that principle is sound and should be preserved with one qualification, namely that where under an instrument a disposition of property depending upon a person surviving another fails for lack of proof that that person survived the other and there is a gift over conditional on that person not surviving the other, that condition of the gift over should be deemed to be satisfied. In other words the gift over will operate as a substituted gift.

Some elaboration of the wording of the proposal might be required for a Bill to amend the law e.g. it might be thought appropriate to make it clear that the qualification applies where a gift over is expressly dependent upon survival for a period of time (such as 30 days).

Because the rules for distribution of intestate estates under Part IIIA of the Administration and Probate Act depend upon proof of survival or non-survival, the same qualification should apply to the devolution of property under Part IIIA of the Administration and Probate Act.

The abovementioned proposal is of no assistance in relation to joint property and option 8 contemplates that when the order of death cannot be established joint property should devolve along the lines recommended by the Manitoba Law Reform Commission (see below) but so that an equitable tenancy in common would not be affected.

Option 8 does not necessitate alteration of the law relating to the exercise of powers of appointment or the survivorship of executors and no alteration to the law on these topics is put forward.

That concludes the discussion of the options. In the absence of agreement, no firm recommendation can be made.

Joint-Tenancy

One of the main features of a joint tenancy is that the last surviving joint tenant receives the whole of the jointly held property. Difficulties

will arise however where both or all of the joint tenants are commorientes; that is to say, if there is no way of knowing the order in which the deaths took place. None of the eight options for reform set out above will be of assistance in such a situation. The Committee therefore recommends that a further provision be enacted to deal specifically with the manner of division of property where it is not possible to show the order of deaths of joint tenants.

Both the Canadian and United States Uniform Acts have provisions along the following lines:–

> "Unless a contrary intention appears where two or more persons hold legal title to property as joint tenants, or with respect to a joint account with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is for the purposes of subsection (1), deemed to have an equal share with the other or with each of the others in that property."

To similar effect is section 3 (1) (d) of the New Zealand *Simultaneous Deaths Act (1958).*

A provision such as this has the effect of changing a joint tenancy into a tenancy in common in equal shares and ensuring that the estate of each of the joint tenants is entitled to an equal share of the property. If however one joint tenant should actually survive, he would take the entire property by operation of the law of survivorship. The Manitoba Law Reform Commission recommended that the Ontario provision be followed so that the section applies to persons who hold legal "or equitable" title to property. This would make it absolutely certain that the subsection applied to a joint tenancy arising in equity. The Committee is of the view that a similar provision is desirable in this State.

Finally on this topic, the Committee is also of the view that where the joint tenants are in equity tenants-in-common in *unequal* shares (as in *Lake v. Gibson (1729) 1 Eq. Ca. Abr. 290, 21 E.R. 1052; Bull v. Bull (1955) 1 Q.B. 234; Akers v. Akers (1976) N.S.W. C.A. unreported; Needham v. West Australian Trustee Executor and Agency Co. Ltd. (1978) W.A. F.C. (unreported); Williams and Glyn's Bank v. Boland (1979) 2 W.L.R. 550)* then the property of commorientes should be distributed in those same unequal proportions even though the legal title will flow equally in accordance with the abovementioned Canadian and United States recommendation.

Difficulties arising from the requirement of non-survival in the Administration and Probate Act 1919

It appears that the difficulties which occurred in *Underwood v. Wing,* could also occur under Part IIIA of the *Administration and Probate Act 1919.*

The problem of uncertainty arising from contemporaneous deaths has been partly dealt with in relation to intestacy by a 1975 amendment to s.72e of the *Administration and Probate Act 1919* which provides:–

> "Where an intestate and his *spouse* die within twenty-eight days of each other this Part applies as if the spouse had not survived the intestate."

However, that reform was confined to deaths of *spouses.* Problems still remain where the contemporaneous deaths are those of parents and children, brothers and sisters, other relatives, and so on.

Several sections in Part IIIA of the Act refer to "non-survival" in a way which could attract the difficulties presented by the decision in *Underwood v. Wing* where actual proof of survivorship was required.

For example section 72j (b) of the Act provides:–

> "Where an intestate is *not survived* by a relative of the first degree but is survived by a relative of the second degree or issue of any such relative then–"

(the section then sets out alternative distributions for example (i) provides):–

> "(i) if the intestate *is survived* by one relative of the second degree, and by no issue of any such relative who predeceased him, the surviving relative is entitled to the whole of the intestate estate."

It might be argued that the *Underwood v. Wing* reasoning is to be applied in the interpretation of the section so as to require a person or persons claiming as a relative or relatives of the second degree to prove that the intestate was *not survived* by any relative of the first degree. Proof of this kind may be impossible if the intestate died along with a relative or relatives of the first degree in a common accident and the order of their deaths was in doubt.

If the Act does indeed require proof of the order of deaths, the consequences could be most unjust as is evidenced by the following example.

Let it be assumed that the intestate X has no spouse or issue, and that his only "relatives" (as defined under Part IIIA of the *Administration and Probate Act)* are his mother, father and brother. Let it be further assumed that X dies interstate in a common accident with his parents so that it is unclear in what order the deaths occurred.

The personal representatives of the parents of X will not be able to prove whether either or both of the parents survived and became entitled to X's estate pursuant to section 72j (a). However, X's brother who did in fact survive and is the only living "relative" would also be unable to prove that his parents did not survive X, so his claim under Part IIIA would also be in doubt. If that argument succeeded the estate thus appears to remain unclaimed and remain in limbo, as it were. Further, the Crown could not prove its eligibility to take under Section 72g (e) because the Crown would be in a similar difficulty. That section provides that the intestate estate vests in the Crown "if the intestate is *not survived* by a person *entitled* to the intestate estate under the foregoing provisions of this section."

The doubt about the Crown's claim is increased by section 72g (d) which provides:–

> "If the intestate is *not survived* by a spouse or by issue but *is survived* by a relative, relatives, or issue of a relative or relatives – the relative, relatives or issue of a relative or relatives are entitled to the whole of the intestate estate."

Under this provision X's brother (as he has in fact survived) should be entitled to the intestate estate, a fact which would cut across the Crown's claim to take.

Returning now to the position of X's brother and the undesirable consequence that X's brother might not take on X's intestacy, a court would most probably, if at all possible, strain to read the provision so as not to require X's brother to prove his parents' non-survival. The court

could use section 72g (d) set out above for that purpose because that section provides in effect that a relative who survives can take. The Court could therefore refuse to read the later provision (section 72j (b)) so as to negative the obvious intention of the earlier provision (section 72g (d)).

However, it is still theoretically possible to interpret section 72j (b) as requiring proof of non-survivorship, an interpretation which would lead to the undesirable results already adverted to. For this reason, it seems necessary to put the matter beyond doubt. This could be done by amending section 72j (b) by deleting the sentence "where an intestate is not survived by a relative of the first degree" and substituting the sentence "where it cannot be shown that the intestate is survived by a relative of the first degree . . ." That would be sufficient solution if it were not for the fact that many other provisions are also drafted in terms of non-survivorship.

Similar amendments would also be required to sections 72g (d), 72g (e), 72j (b) (iv), 72j (c), 72j (d), 72j (d) (iv). It is also possible that a similar problem could arise in relation to other sections, e.g. section 72i (a) which provides:–

> "if the intestate is survived by a child and by no other issue (apart from the issue of that child) that child is entitled to the whole, or that part (as the case may be) of the intestate estate."

See also 72g (a), 72i (a) – (d), 72j (b) (i) and (ii), 72j (d) (i) and (ii) where the problem of proving non-survival could also arise.

Since the same difficulty may occur in numerous provisions of Part IIIA of the *Administration and Probate Act*, it seems desirable to have one general provision applicable to that Act and that part only should be enacted.

The problem is either non-existent or less acute in those jurisdictions where there is a presumption that the youngest of the commorientes survives the eldest. *Mellows*, for example, suggests in *The Law of Succession* (4th ed. at p. 157):–

> "*Commorientes*
> The general rule that in the case where a husband and wife die in circumstances which make it uncertain which survived the other the younger is deemed to have survived the elder does not apply to the estates of intestate spouses. Irrespective of ages, it is presumed that each spouse predeceased the other. This rule applies only in the case of husband and wife, and the general rule under Law of Property Act, 1925, s.184, applies in the case of other intestacies. So, if father and son die virtually simultaneously, the son will be deemed to have survived the father, and will take under his estate."

If that is correct reasoning, there would be no problem of proof, since under England's s.184 of the Law of Property Act (and its equivalents), the older person will be deemed to predecease the younger.

In the case of husband and wife being commorientes, section 46 (3) of the English Administration of Estates Act, 1925 (as amended) provides that the distribution on intestacy shall take effect as if neither the husband nor wife had survived the other spouse (where that other spouse is an intestate).

As pointed out previously the position with respect to *spouses* is already clear in this State as a result of section 72e of the *Administration and Probate Act.*

Queensland has a provision which requires *any claimant* on intestacy to outlive the intestate by at least 30 days (see section 35 (z) of the Queensland Succession Act of 1981). A similar requirement is also provided in instances of testate succession.

While the Queensland solution is one way of dealing with the problems raised by commorientes in instances of intestacy, the better solution would appear to be merely to provide that, where a person who is otherwise entitled under the provisions of the Act, cannot positively prove that all relatives of a closer degree to the intestate predeceased the intestate, he shall nevertheless take.

One way of achieving this result would be to adopt the provision which throughout this report has been referred to the general rule from Manitoba and British Columbia and which is once more set out here for convenience:–

General rule

Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property (under this Act), the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others, except as provided otherwise in this Act.

Under such a provision, it is assumed that those persons dying contemporaneously with the intestate predeceased him. This appears to be a desirable result and it is the situation in both New Zealand and Western Australia. See *Hardingham, Neave and Ford* in *Wills and Intestacy* (p. 489):–

> "The foregoing provisions only apply as between an intestate and his spouse. New Zealand and Western Australia, however, have a more generally worded provision. It covers both testate and intestate succession.
>
> In any case where . . . two or more persons have died at the same time or in circumstances which give rise to a reasonable doubt as to which of them survived the other or others – (a) the property of each person so dying shall devolve, and if he left a will it shall take effect unless a contrary intention is shown thereby, as if he had survived the other person or persons so dying and had died immediately afterwards."

The above passage is the author's comment on *Simultaneous Deaths Act, 1958 (N.Z.) s.3 (1) (a); Property Law Act 1969-70 (W.A.) s.120 (a).*

Alternatively, if a decision is made against adopting the abovementioned rule, then the statutory formula which is chosen should be capable of being adapted so as to cover potential problems arising from the wording of Part IIIA of the *Administration and Probate Act.* This could be done, for example, by adding the word *statute* to the following draft provision so as to provide:–

> "Where under any instrument *or statute* a disposition of property depending upon a person surviving another fails for lack of proof that that person survived the other and there is a gift over conditional upon that person not surviving the other the condition shall be deemed to be satisfied."

CONCLUSION

While all members agreed that reform is desirable so as to ensure that the unsatisfactory results in *Wing v. Angrave* are not repeated in this State, the Committee was not unanimous as to the form it should take.

Three members of the Committee recommended that the British Columbia and Manitoba approach, appropriately modified, be adopted. These members were of the view that legislation roughly along the following lines should be introduced in this State:–

General rule

Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others, except as provided otherwise in this Act.

(This is the same rule as in Option 1 and no difficulty is felt about it).

Adapted special rule applying in cases of life estates with gifts over and the effects of commorientes thereon

(1) This section shall only apply to gifts over not falling within the terms of the previous section (i.e. the general rule) and is not intended to affect the common law requirement of proof of the claimant's own survivorship.

(2) Unless a contrary intention appears, where an *instrument* contains a provision for the disposition of property dependent upon any one or more of the following *conditions*; namely a person named in the disposition–

(a) dying before another person;

(b) dying at the same time as another person; or

(c) dying in circumstances rendering it uncertain which of them survived the other,

and that named person dies at the same time as the person specified in paragraphs (a) – (c) or in circumstances rendering it uncertain which of them survived the other, then for the purpose of that disposition the condition upon which the disposition is dependent is deemed to be satisfied.

Three other members of the Committee preferred the adoption of a more succinctly worded provision. These members recommended that a rule be enacted in the following form:–

> "Where under any instrument a disposition of property depending upon a person surviving another fails for lack of proof that that person survived the other and there is a gift over conditional upon that person not surviving the other the condition shall be deemed to be satisfied."

It was also recommended that this provision be expressed to be subject to the terms of the instrument. The remaining two members of the Committee, although preferring this approach to that based on the British Columbia and Manitoba drafts, were of the view that in order to avoid any confusion the section should be set out more fully. Thus it was recommended that the provision expressly include instances where there is a disposition conditional upon a person surviving by a stipulated period, or a person surviving other persons dying in a given temporal

order of succession. A provision basically upon the following lines was recommended:–

Subject to any express direction in the instrument to the contrary, where under any instrument there is a disposition conditional upon–

(a) a person surviving another person or persons; or

(b) a person surviving by a stipulated period of time another person or persons; or

(c) a person surviving other persons dying in a given temporal order of succession

AND that disposition has failed due to lack of proof of the survivorship required by conditions (a) (b) or (c) THEN a gift over conditional upon there being a failure of the aforesaid survivorship shall be deemed to be a gift over conditional upon there being a failure of proof of the aforesaid survivorship.

There has been a prolonged debate over which approach should be taken, and it appears that further debate is unlikely to result in unanimity. As a result the Committee has decided to report to you in this form, so that you can select the approach which you believe to be most suitable for Parliamentary Counsel to adopt when drawing up reforming legislation.

The Committee members were however in agreement that whichever approach was finally selected that it should be worded in such a way so as to cover instances where the deceased died intestate. In other words, it should be made clear that a person who is otherwise entitled to take under Part IIIA of the *Administration and Probate Act, 1919* shall not be prevented from doing so merely because he cannot prove that all persons who were relatives of a closer degree to the intestate did in fact predecease the intestate.

The wording of the general Manitoba and British Columbia rule will do this; while the addition of the word "statute" after instrument in the other approach should cover such a situation. Thus for example:–

> "Where under any instrument *or statute* a disposition of property depending upon a person surviving another fails for lack of proof that that person survived the other and there is a gift over conditional upon that person not surviving the other the condition shall be deemed to be satisfied."

The members of the Committee are also in agreement that the effect of commorientes on joint tenancies ought to be specifically dealt with.

It is recommended that a provision be enacted ensuring that in such circumstances the estate of each of the joint tenants is entitled to an equal share of the property.

We have the honour to be:–

HOWARD ZELLING
J. M. WHITE
CHRISTOPHER J. LEGOE
M. F. GRAY
P. R. MORGAN
D. F. WICKS
A. L. C. LIGERTWOOD
G. HISKEY

Law Reform Committee of South Australia.

BIBLIOGRAPHY — ARTICLES

Conway and Bertsche: New York Simultaneous Death Law: 13 Fordham L.R. 17 : Report of Committee on Uniform Property Acts Section Named to Investigate and Report Upon the Advisability of Framing and Considering a Presumption of Death Statute 12 Texas L.R. 58.

McCall: Presumptions of Survivorship Among Commorientes (1938) 12 Tulane L.R. 623 : Commorientes (Report of the Ontario Commissioners on Uniformity of Legislation) 16 Can. B.R. 43 : Statutory Solutions to the Problem of Survival in Common Disaster (1936) 50 Harv. L.R. 344.

Tracy & Adams: Evidence of Survivorship in Common Disaster Cases (1940) 38 Mich. L.R. 801.

Kennedy: Commorientes: Insurance: Conflict of Statutes (1946) 24 Can. B.R. 720 : Commorientes: Survivorship: Presumptions (1936) 14 Can. B.R.

Tsai: Construction, Application and Effect of Uniform Simultaneous Death Act 39 A.L.R. 3rd 1332.

Bodkin: Commorientes 9 Conveyancer 169.

Benas: Commorientes 6 M.L.R. 88.

Note: Commorientes — Evidence of Survivorship — Scope of the Statutory Presumption 19 A.L.J. 213 : Commorientes: Presumption of Survivorship 21 N.Z.L.J. 239 : Deaths in the Same Calamity 17 N.Z.L.J. 121 : Commorientes 88 Sol.J. 116, 307 : Commorientes 197 L.T. 63 : Commorientes 199 L.T. 211 : Commorientes 89 Sol.J. 573.

Hamilton: Simultaneous Deaths and Statutory Substitutional Gifts Implied in Wills 1959 N.Z.L.J. 7.

O'Driscoll: The Problem of Commorientes 3 A.L.J. 148 : Commorientes Resurgent 221 L.T. 160 : Commorientes 224 L.T. 205, 236.

REPORTS

Manitoba Law Reform Commission: Report on "The Survivorship Act" 1982.

Law Reform Commission of British Columbia: Report on Presumptions of Survivorship 1982.

California Law Revision Commission: Tentative Recommendation relating to Simultaneous Death and Survival 1983.

APPENDIX A

ANALYSIS

Title
1. Short Title
2. Interpretation
3. Devolution of property in cases of simultaneous deaths
4. Application of Act
5. Repeal

1958, No. 37

An Act to make better provision in respect of the devolution of property in cases of simultaneous deaths

[25 September 1958]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Simultaneous Deaths Act 1958.

2. Interpretation—In this Act, unless the context otherwise requires, the term "property" includes any real and personal property, and any estate or interest in any property, and any debt, and any thing in action, and any other right or interest.

3. Devolution of property in cases of simultaneous deaths—

(1) In any case where, after the commencement of this Act, two or more persons have died at the same time of in circumstances which give rise to reasonable doubt as to which of them survived the other or others—

(a) The property of each person so dying shall devolve, and if he left a will it shall take effect unless a contrary intention is shown thereby, as if he had survived the other person or persons so dying and had died immediately afterwards:

(b) Every *donatio mortis causa* made by any person so dying to any other person so dying shall be void and of no effect:

(c) If the life of any of the persons so dying is insured under any policy of life or accident insurance, and any other person or persons so dying would be entitled (otherwise than under any will or on the intestacy of any person) to the proceeds of the policy or any part thereof if he or they survived the person insured, the said proceeds shall, unless a contrary intention is shown by the instrument governing the distribution of the proceeds, be distributed as if the person insured had survived every other person so dying and died immediately afterwards:

(d) Any property owned jointly and exclusively by two or more of the persons so dying shall devolve as if it were owned by them when they died as tenants in common in equal shares:

(e) In any case where under any will or trust or other disposition any property would have passed (whether in consequence of section thirty-three of the Wills Act 1837 of the United Kingdom Parliament or otherwise) to any of two or more possible beneficiaries (being persons who have so died) if any of them could be shown to have survived the other or

others of them, then, unless a contrary intention is shown by the will, trust, or disposition, it shall take effect as if the property were given to those possible beneficiaries as tenants in common in equal shares, and the property shall devolve accordingly:

Provided that this paragraph shall not apply in any case to which paragraph (c) or paragraph (f) of this subsection applies:

(f) In any case where a power of appointment could have been exercised in respect of any property by any of two or more persons so dying if any of them could be shown to have survived the other or others of them, unless a contrary intention is shown by the instrument creating the power, the power may be exercised as if an equal share of that property had been set apart for appointment by each of those persons, and as if each of those persons had the power of appointment in respect of the share of that property so set apart for appointment by him, and that share shall devolve in default of appointment by him in the manner in which the property would have devolved in default of appointment by him if he had been the survivor of those persons:

Provided that this paragraph shall not apply in any case to which paragraph (c) of this subsection applies:

(g) In any case where, by any will or other testamentary instrument, any property is devised or bequeathed or appointed to the survivor of two or more of the testator's children or other issue within the meaning of section sixteen of the Wills Amendment Act 1955 (as enacted by section three of the Wills Amendment Act 1958), and all or the last survivors of those children or issue are persons so dying, section sixteen of the Wills Amendment Act 1955 (where it applies) shall take effect as if the devise or bequest or appointment were in equal shares to those of them who so die and leave a child or children living at the death of the testator:

(h) Where the persons so dying include a testator and one or more of his issue, however remote, then, for the purposes of section thirty-three of the said Wills Act 1837 where that section applies, the testator shall be deemed to have survived all his issue so dying and to have died immediately afterwards; and accordingly, unless a contrary intention is shown by the will, a devise or bequest by the testator to any of his issue who so dies or has already died in the testator's lifetime shall—

(i) Lapse unless any of the donee's issue (other than the persons so dying) is living at the time of the death of the testator:

(ii) Take effect in accordance with the provisions of the said section thirty-three if any such other issue of the donee is living at that time:

(i) For all other purposes affecting the title to property or the appointment of trustees, the deaths of the persons so

dying shall be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

(2) Nothing in this section shall affect section seven of the Joint Family Homes Act 1950.

4. Application of Act—

(1) This act shall apply in respect of—

(a) All property of any person that devolves according to the law of New Zealand:

(b) All appointments of trustees where the appointments have to be made according to the law of New Zealand.

(2) This Act shall so apply whether the deaths occurred in New Zealand or elsewhere.

5. Repeal—Section twenty-seven of the Property Law Act 1952 is hereby consequentially repealed.

APPENDIX B

Uniform Survivorship Act

(1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others.

(2) Unless a contrary intention appears, where two or more persons hold legal title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purpose of subsection (1), deemed to have an equal share with the other or with each of the others in that property.

(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will

(a) dies before the testator; or

(b) dies at the same time as the testator; or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

APPENDIX C

U.S. Uniform Simultaneous Death Act

§ 1. No sufficient Evidence of Survivorship

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this act.

§ 2. Survival of Beneficiaries

If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

§ 3. Joint Tenants or Tenants by the Entirety

Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

The term "joint tenants" includes owners of property held under circumstances which entitled one or more to the whole of the property on the death of the other or others.

§ 4. Community Property

Where a husband and wife have died, leaving community property, and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall pass as if the husband had survived [and as if said one-half were his separate property,] and the other one-half thereof shall pass as if the wife had survived [and as if said other one-half were her separate property.]

§ 5. Insurance Policies

Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary, [except if the policy is community property of the insured and his spouse, and there is no alternative beneficiary except the estate or personal representatives of the insured, the proceeds shall be distributed as community property under Section 4.]

§ 6. Act Does Not Apply If Decedent Provides Otherwise

This act shall not apply in the case of wills, living trusts, deeds, or contracts of insurance, or any other situation where provision is made for distribution of property different from the provisions of this act, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

§ 7. Uniformity of Interpretation

This act shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it.

§ 9. Repeal

All laws or parts of laws inconsistent with the provisions of this act are hereby repealed.

§ 10. Severability

If any of the provisions of this act or the application thereof to any persons or circumstances is held invalid such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are declared to be severable.

§ 11. Time of Taking Effect

This act shall take effect . . .

APPENDIX D

Ontario Succession Law Reform Act

Part IV Survivorship

61. (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others.

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection 1, to have held as tenant in common with the other or with each of the others in that property.

(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will.

(a) dies before the testator;

(b) dies at the same time as the testator; or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides shall be deemed to have occurred. *New.*

(4) The proceeds of a policy of insurance shall be paid in accordance with sections 190 and 268 of *The Insurance Act* and thereafter this Part applies to their disposition. R.S.O. 1970, c. 454, s. 1 (2); 1972, c. 43, s. 1, *amended.*

62. (1) *The Survivorship Act*, being chapter 454 of the Revised Statutes of Ontario, 1970, and *The Survivorship Amendment Act, 1972*, being chapter 43, are repealed.

(2) The enactments repealed by subsection 1 continue in force as if unrepealed in respect of deaths occurring before the 31st day of March, 1978.

63. This part applies in respect of deaths occurring on or after the 31st day of March, 1978.

APPENDIX E

An Act Respecting Survivorship

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Short title

1. This Act may be cited as: "The Survivorship Act".

General rule

2. Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others, except as provided otherwise in this Act.

Substitute gifts

3. (1) Unless a contrary intention appears, where a will contains a provision for the disposition of property operative in any one or more of the following cases, namely, where a person designated in the will

(a) dies before another person;

(b) dies at the same time as another person; or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the will provides is deemed to have occurred.

Substitute personal representatives

3. (2) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will

(a) dies before the testator; or

(b) dies at the same time as the testator; or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

Joint tenancy

4. Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purpose of section 2, to have held as tenant in common with the other or with each of the others in that property.

Insurance

5. Where a person whose life is insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them

survived the other, the proceeds of the policy of insurance shall be paid in accordance with sections 193 and 230 of The Insurance Act and thereafter this Act applies to their disposition.

Powers of appointment

6. Unless a contrary intention appears, where a donee exercises a power of appointment by will and he and the donor die at the same time or in circumstances rendering it uncertain which of them survived the other, the property which is subject to the power of appointment shall be disposed of as if the donee had survived the donor.

Application of The Dower Act

7. Where a husband and wife die at the same time or in circumstances rendering it uncertain which of them survived the other, The Dower Act applies to each of their respective estates.

Transition

8. In respect of the deaths of persons who died before this Act comes into force, survivorship shall be determined as though this Act had not been enacted.

Repeal of prior Act

9. The Survivorship Act, being chapter S250 of the Revised Statutes, is repealed.

Commencement of Act

10. This Act comes into force on the day it receives the royal assent.

D. J. WOOLMAN, GOVERNMENT PRINTER, SOUTH AUSTRALIA