COMMORIENTES, JOINT TENANCIES AND THE LAW OF SUCCESSION

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Introduction

The Latin term *commorientes* refers to two or more people who die, often in a common disaster, in circumstances where there is uncertainty as to the order of their deaths. By extension, the term is also used to refer to the phenomenon of people dying in the relevant circumstances.[1] The cases are a catalogue of shared tragedy, with unfortunate victims succumbing to car accidents,[2] fire,[3] murder,[4] massacre,[5] shipwreck,[6] exploding bombs,[7] gas poisoning[8] and, in one case, strawberries and cream laced with arsenic.[9] The difficulty in determining the order of death in such cases causes legal problems of various sorts. Issues arise in relation to the interpretation of dispositions in the wills of the *commorientes* or concerning the operation of the rules of intestacy. For example, if X has left property to Y, it is crucial to know which of the two survived the longer because the gift to Y would lapse if Y died first. Similarly, X may have left her property to Y, with a proviso that the property should pass to Z if Y dies during X's lifetime. Furthermore, where the parties hold property under a joint tenancy, the right of survivorship applies and the property should pass to the estate of the last

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[1] The legal issues discussed in this article can arise even where there has been no common calamity. In *Wing* v *Angrave* (1860) 8 H.L.C. 183 at 208-209, Lord Campbell L.C. referred to the hypothetical case where a husband's ship was lost at an unknown point in its voyage and his wife died at home at around the same time. Note the similar remarks of Lord Wensleydale *ibid.*, at 218 and see also *Hickman* v *Peacey* [1945] A.C. 304 at 314-315 *per* Viscount Simon L.C. *Cf. Re Albert* [1967] V.R. 875; *Re Lay Estates* (1961) 32 D.L.R. (2d) 156.

[2] *E.g. Re Kennedy* [2000] 2 I.R. 571.

[3] *E.g. In Re Smith* [1955] N.Z.L.R. 1122; [1956] N.Z.L.R. 992; *Lamb* v *Lord Advocate* 1976 S.C. 110.

[4] *E.g. Re Pechar* [1969] N.Z.L.R. 574.

[5] *E.g. Re Benyon* [1901] P. 141.

[6] *E.g. Elliot* v *Smith* (1882) 22 Ch. D. 236; *Re Alston* [1892] P. 142; *Re Rowland* [1963] Ch. 1. As an example of the heart-breaking nature of the facts underlying many *commorientes* cases, see *Underwood* v *Wing* (1855) 4 De G.M. & G. 633 at 654, where Wightman J. (giving the joint opinion of himself and Martin B.) summarised the evidence of a sailor named Joseph Reed, the only survivor of the shipwreck in question, in relation to the death of a family: "they were all standing together on the side of the ship, the husband with his wife in his arms, and the two boys clinging to their mother, all clasped together; . . . whilst in this position a sea swept them right off, and he saw them no more, and his belief was that they all four went down together, instantly, in a whirlpool or eddy caused by the beating of the sea against the ship, and never rose again."

[7] *E.g. Hickman* v *Peacey* [1945] A.C. 304. See also the cases listed in n.71 below.

[8] *E.g. Re Bate* [1947] 2 All E.R. 418; *Re Trenaman* [1962] S.A.S.R. 95.

[9] *Re Comfort* [1947] V.L.R. 237.

surviving joint tenant. In cases of *commorientes* the problem is, of course, that one cannot determine which joint tenant was the last survivor.

The issues surrounding *commorientes* were addressed in detail by the Northern Ireland Land Law Working Group.[10] However, its recommendations for reform have not yet been implemented.[11] In the Republic of Ireland, there has already been some legislative intervention.[12] However, the relevant provision is limited in its scope and clearly does not solve all the problems. In 2003, the Republic of Ireland's Law Reform Commission (the "L.R.C.") made a new proposal in respect of "Commorientes and Joint Tenancies" in a report entitled *Land Law and Conveyancing Law (7): Positive Covenants Over Freehold Land and Other Proposals*.[13] In a more recent Consultation Paper on the *Reform and Modernisation of Land Law and Conveyancing Law* (October 2004),[14] the L.R.C. has provisionally recommended the enactment of the proposals in its series of earlier reports on land law[15] including its recommendation in respect of *commorientes* and joint tenancies.[16] This article discusses the law on *commorientes* and attempts to clarify the existing legal position in Northern Ireland and in the Republic of Ireland. This will involve *inter alia* offering a critique of *Re Kennedy*,[17] an important recent decision of the Republic of Ireland's High Court, and a reassessment of the old case of *Bradshaw* v *Toulmin*,[18] the leading case in both jurisdictions in relation to *commorientes* and joint tenancies. The article will then move on to examine the law reform options for both jurisdictions.

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[10] Land Law Working Group, *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983) Ch. 7; *Final Report* (1990), Vol.1, paras.2.14.3-2.14.6. See also Land Law Working Party, *Survey of the Land Law of Northern Ireland* (1971), paras.406-407.

[11] With the exception of one comparatively minor recommendation enacted in the Wills and Administration Proceedings (NI) Order 1994, Art.30 (see text following n.149 below).

[12] See Succession Act 1965, s.5 (discussed in more detail in the text following n.34 below).

[13] LRC 70-2003 (March 2003), Ch.3.

[14] LRC 34-2004. This Consultation Paper follows the inception in late 2003 of a joint project, between the Department of Justice, Equality and Law Reform and the L.R.C., for the major reform and modernisation of land law and conveyancing law. The "ultimate goal . . . is the introduction of an e-conveyancing system similar to those being developed in other jurisdictions." See p.vii of the Consultation Paper. There is therefore considerable momentum behind the law reform process relating to land law and a real prospect of the prompt enactment of legislation to implement extensive reform.

[15] See *Report on the Rule against Perpetuities and Cognate Rules* (LRC 62-2000) (December 2000); *Report on the Acquisition of Easements and Profits à Prendre by Prescription* (LRC 66-2002) (December 2002); *Report on Title by Adverse Possession of Land* (LRC 67-2002) (December 2002). See also *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28-2003) (December 2003); *Consultation Paper on Judgment Mortgages* (LRC CP 30-2004) (March 2004).

[16] n.14 above, p.84.

[17] [2000] 2 I.R. 571.

[18] (1784) Dick. 633.

The Current Law on Commorientes in Northern Ireland

In the absence of legislative intervention, the common law position (established in the English case law) still applies in Northern Ireland.[19] The current Northern Irish position has been summed up as follows: "when the order in which two persons died cannot be satisfactorily determined, neither is deemed to have survived the other, with the result that their estates cannot benefit from each other."[20] In the early cases, the courts rejected the approach of the Napoleonic Code in France[21] which, in the absence of any guidance from the facts themselves, relied on a series of presumptions based on considerations such as the age or sex of the parties[22] to try to reach the most probable result in terms of the order of death.[23] As was explained in *Re Phené's Trusts*,[24] the rule which became established in English law was that "those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence". It appears that the burden of proof which must be discharged is the normal civil standard of proof on the balance of probabilities.[25]

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[19] Note, however, two relevant legislative provisions: Wills and Administration Proceedings (NI) Order 1994, Art.30 (see text following n.149 below) and Succession (NI) Order 1996, Art.3 (see text to and following n.170 below).

[20] Grattan, *Succession Law in Northern Ireland* (SLS Legal Publications, Belfast, 1996), p.157. *Cf.* the discussion in Maxwell (ed.) *Miller's Irish Probate Practice 1900* (Professional Books, Oxford, 1984), pp.391-393.

[21] As well as finding favour in European civil law systems, presumptions based on the Napoleonic Code were also adopted, for example, in Louisiana (for full text, see Law Reform Commission of British Columbia *Report on Presumptions of Survivorship* LRC-56 (October 1982) pp.23-24), California, Puerto Rico and the Philippines. See Wigmore *Evidence in Trials at Common Law (Chadbourn Revision)* (Little, Brown & Co, Boston, 1981), Vol.9, p.620.

[22] The relevant presumptions are elaborate. For example, they regard the youngest person as surviving where all the deceased were over 60 years of age but the eldest when all were under 15 years of age. Where the deceased were all aged between 15 and 59, the male is presumed to survive the female (although in Louisiana the age of the parties was determinative unless there was less than one year of difference in the ages). Wigmore (n.21 above, p.621) dismissed a "rule of the continental sort" as "grotesquely false to human nature as we observe it" suggesting that "[s]ome monkish jurist of the Middle Ages must have been its composer". See also n.64 below. The tendency in modern times has been to discard the presumptions. This occurred in Louisiana as late as 1997 (see Samuel, "The 1997 Successions and Donations Revision – A Critique in Honor of AN Yiannopoulos" (1999) 71 *Tulane Law Review* 1041 at p.1043).

[23] See *Wright* v *Netherwood* (1793) 2 Salk. 593 at 593 *per* Sir William Wynne, rejecting the idea of having "resort to any fanciful supposition of survivorship on account of the degrees of robustness". Some earlier cases had shown more sympathy with the civil law approach. See, *e.g. Sillick* v *Booth* (1841) 1 Y. & C.C.C. 117, cited in Land Law Working Group, *Discussion Document No.4: Conveyancing and Miscellaneous Matters* (1983), p.125.

[24] (1870) 5 Ch. App. 139 at 152 *per* Sir GM Giffard L.J.

[25] The reference in *Re Phené's Trusts* to establishing the proposition "affirmatively by evidence" was intended to emphasise, in the context of the dispute in that case, that there is no presumption that a person who has disappeared less than seven years ago is still alive. See also *Wing* v *Angrave* (1860) 8 H.L.C. 183 at 221, where Lord Chelmsford noted that the uncertainty surrounding the parties' deaths "leaves no greater weight on one side or another to incline the balance of evidence

The relevant rule is illustrated clearly by the leading authorities of *Underwood* v *Wing*[26] and *Wing* v *Angrave*.[27] These cases were concerned with a husband and wife who had been swept off a sinking ship by the same wave and never seen again.[28] The husband had left his property to his wife and, in the event that his wife died in his lifetime, the property was to pass (given the deaths of other potential beneficiaries) to one Wing. Similarly, Wing was to benefit under the wife's will if the husband were to die in her lifetime. However, because of the circumstances in which the spouses had died, it was impossible for Wing to prove affirmatively either that the wife had died during the husband's lifetime or that the husband had died during the wife's lifetime. Therefore, he was unable to benefit under either spouse's will.

It was emphasised in *Underwood* v *Wing*[29] that (notwithstanding the fact that, in the absence of proof, the law will not accept that either party survived the other) the law does not assume that the parties have died at the same time.[30] This was confirmed in the unusual case of *Re Rowland*,[31] where a husband and wife had made similar wills leaving all their property to each other but providing for gifts over in the event of the other spouse's death "preceding or coinciding with" his or her own. The spouses subsequently perished in a shipping accident in the South Pacific. There was no evidence as to the precise time and circumstances of the loss of the ship in question. As Lord Denning M.R. cheerfully observed, "[d]eath in these waters does not normally occur from cold or exposure but from being eaten by fish."[32] In the circumstances, it could not be determined whether the husband had survived the wife or vice versa. The Court of Appeal held[33] that, furthermore, it could not be proven that the spouses' deaths had "coincided" within the terms of their wills, since it was quite possible that one had survived the other by some period of time. Therefore, the bequests in the wills were of no effect.[34]

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either way". At one point in his dissenting judgment in *Wing* (*ibid.*, at 199), Lord Campbell L.C. referred to "a clear preponderance of evidence", the use of the word "clear" appearing at first sight to indicate some augmented version of the normal civil standard of proof. However, Lord Campbell L.C. was speaking about whether he would "take upon myself to say, that Master of the Rolls and the [former] Lord Chancellor were wrong" in their decision on the facts at earlier stages of the litigation. He felt (*ibid.*) that "by no means" could he do so since "I myself should probably have come to the same conclusion". He had previously stated that it "was an issue of fact for their determination" (*ibid.*, at 197).

26 (1855) 4 De G.M. & G. 633.

27 (1860) 8 H.L.C. 183.

28 See n.6 above.

29 (1855) 4 De G.M. & G. 633.

30 *ibid.*, at 660-661 per Lord Cranworth L.C. In the later case of *Wing* v *Angrave* (1860) 8 H.L.C. 183 at 213, Lord Wensleydale commented that the evidence left it "in total uncertainty whether the husband died before or after the wife, or whether they both died at the same instant. Whoever has to maintain any one of these propositions, must certainly fail."

31 [1963] Ch.1.

32 *ibid.*, at 4 (in the recital of facts, taken from the judgment of Lord Denning M.R.).

33 Lord Denning M.R. dissenting.

34 As a result, the case had to be resolved by the application of the Law of Property Act 1925, s.184 (see the discussion of this provision in the text to and following

The Current Law in the Republic of Ireland

Section 5 of the Succession Act 1965

Unlike in Northern Ireland, there has been (limited) legislative reform in the Republic of Ireland. Section 5 of the Succession Act 1965 provides that where "two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for the purposes of the distribution of the estate of any of them, they shall all be deemed to have died simultaneously."[35] The Northern Ireland Land Law Working Group has commented in respect of this provision that:

> "A statutory presumption along these lines is a distinct advance on the common law position, because the common law, by leaving the possible sequence of deaths open to argument, practically invites litigation. A presumption gives a firm starting point and can be displaced only by positive evidence."[36]

Notwithstanding this comment, it seems that section 5 makes a relatively modest alteration to the common law. For example, the provision would lead to the same result on the facts of *Underwood* v *Wing*[37] and *Wing* v *Angrave*.[38] The parties would be deemed to have died simultaneously and therefore, as under the common law, neither party could be said to have survived the other. There is, however, one clear advantage of section 5 as compared with the common law. This lies in dealing with facts similar to those in *Re Rowland*.[39] As has already been seen, this case involved a gift over which would be triggered in the event of a beneficiary's death "preceding or coinciding with" that of the testator. If section 5 were to have applied in *Re Rowland*, the gifts in question would not have failed, since the parties would be deemed to have died simultaneously. It may be that cases such as *Re Rowland* will arise relatively infrequently. However, presumably the case (reported in 1963) would have been fresh in the legislators' minds in 1965 when enacting the Succession Act.[40] This supports the hypothesis that the enactment of section 5 was partly motivated by a desire to avoid the unsatisfactory result which had arisen in *Re Rowland*.

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n.60 below). Contrast *Re Pringle* [1946] Ch. 124 where the testatrix had used the phrase "simultaneous death" and Cohen J. held that the circumstances of the deaths (in an air raid) were such that an ordinary person would infer that the deaths were simultaneous.

35 This provision was derived from the Art.20 of the German Civil Code as amended in 1951. See Brady, *Succession Law* (2nd ed., Butterworths, Dublin, 1995), p.183 (citing p.2 of the Explanatory Memorandum to the Succession Act). *Cf. Re Cohn* [1945] Ch.5, applying German law in a *commorientes* context in respect of the movable property of a German national killed in an air-raid in London.

36 *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), p.130.

37 (1855) 4 De G.M. & G. 633.

38 (1860) 8 H.L.C. 183.

39 [1963] Ch. 1.

40 The case attracted some attention at the time. See Stone, (1963) 26 *M.L.R.* 87; Albery, (1963) 26 *M.L.R.* 353.

Section 5 applies only "for the purposes of the distribution of the estate of any of [the *commorientes*]". By contrast, the relevant English legislation[41] "applies for all purposes affecting the title to property". Presumably, the fact that the Irish provision is included in an Act codifying the law on succession explains why its application is limited to the succession context. Thus, for example, it would appear that the Irish provision would not apply in the case of a transfer "to A and B for their joint lives, remainder to the survivor in fee simple" (assuming the death of A and B in a *commorientes* situation) because the joint tenancy given to them was limited to determine on the death of either.[42] While this is true, it is also the case that the application of the section would make no difference in the scenario under discussion. At common law, the property would be dealt with on the basis that neither person survived the other, giving the same result as if the statutory presumption had applied. It would only be in very limited circumstances that the limitation on the scope of section 5 could have practical significance. At a stretch one can imagine a relevant example: a gift "to A and B for their joint lives, remainder to the survivor in fee simple but if A and B should die simultaneously then to C in fee simple". Given that section 5 would not apply to this gift, the gift over to C would be liable to fail on the basis of the logic applied in *Re Rowland*.[43] However, the gift to C would be triggered if section 5 applied, since the parties would be deemed to have died simultaneously. Thus, it would be desirable for section 5 to be extended to apply "for all purposes affecting the title to property". However, since the practical impact of this change would be minimal, it would only be worth the effort in the context of the implementation of more radical legislative reform.

Re Kennedy and the Burden of Proof

Until recently, there was no reported case on the interpretation of section 5.[44] However, in 2000 the section was applied in the High Court in *Re Kennedy*.[45] The case involved a married couple who had been killed when, in bad driving conditions, they had driven off a pier into Lough Derg. The

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41 Law of Property Act 1925, s.184 (discussed in the text to and following n.60 below).

42 See Spierin, *The Succession Act 1965 and Related Legislation: A Commentary* (3rd ed., Butterworths, Dublin, 2003), p.27 ("only by a very bold construction" could the provision be applied in this situation). See further text following n.158 below, discussing possible law reform to deal with this type of conveyance. Another circumstance in which s.5 would have no application is in relation to insurance issues (*e.g.* if a husband and wife died together and had insurance policies in each other's favour).

43 [1963] Ch.1. See the discussion in the previous paragraph of text.

44 *cf. In the Goods of Murphy* (1973) 107 I.L.T. & S.J. 267 (cited by Spierin n.42 above, p.25). In this case, reported very briefly, a husband and wife had been killed in a collision between a car and a train. There was "evidence that both had died contemporaneously". Two of the next of kin were applying for a grant of administration to the estate of the husband and sought a declaration that they be entitled to state that the parties had died simultaneously. Finlay J. held that, rather than grounding the grant of administration on s.5 of the Succession Act 1965, it would be more expedient to base the grant on s.27(4) of the Act (which empowers the court to grant administration to such person as it thinks fit where "special circumstances" exist).

45 [2000] 2 I.R. 571.

consultant pathologist who had performed an autopsy on the bodies was unable to state for certain which of the parties had died first. On the facts, Kearns J. concluded that the statutory rule applied and that the parties had to be deemed to have died simultaneously. The main interest of the case lies in Kearns J's discussion of the burden of proof under section 5. The learned judge took the view that under the section "the onus of establishing that one deceased survived another remains on the party so asserting."[46] He went on to explain that "where clear and cogent evidence can be produced to establish and prove positively the order of death then, even if the time interval between deaths is a matter of only seconds, there is no scope for the section to apply."[47] Interestingly, he continued as follows:

> "However, where the evidence adduced falls short of eliminating an element of uncertainty, then the presumption in the section must apply. This may seem equivalent to or stricter than the 'proof beyond reasonable doubt' test appropriate to criminal standards of proof, but in reality it is nothing more than the onus of proof necessarily to be derived from the wording of the section. 'Uncertainty', it seems to me can only be displaced by 'certainty'."[48]

Kearns J's strict view on the burden of proof was strictly speaking *obiter*. According to the judge, the evidence in the case established "more than an element of uncertainty".[49] On the facts, it was "quite impossible to state, even on the balance of probabilities, which spouse survived the other."[50]

There are obvious difficulties with Kearns J's opinion that "uncertainty can only be displaced by certainty". If the matter is regarded strictly, one can never really have complete certainty about any fact, given that facts must be established on the basis of evidence gathered and interpreted by fallible humans. For the practical purposes of the law, the opposite of "uncertainty" is not absolute certainty but rather the absence of uncertainty. In the Scottish case of *Lamb* v *Advocate General*,[51] Lord Leechman explained (in respect of a comparable statutory provision)[52] that the use of the word "uncertainty" was "adequately explained by its aptness to describe the factual situation arrived at where, assuming a judicial process, and assuming that the normal standard of proof has been applied thereto, the evidence is yet evenly balanced upon which, if either, of two persons has survived the other."[53] Similarly, in the Canadian case of *Adare* v *Fairplay*,[54] Roach JA explained that "there is uncertainty only when the Court is unable to say that one [of the *commorientes*] survived the other."[55] Even in criminal cases, where in the past a conviction might have cost a defendant his or her life, absolute

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[46] *ibid.*, at 575.
[47] *ibid.*
[48] *ibid.*
[49] *ibid.*, at 576.
[50] *ibid.*
[51] 1976 S.C. 110.
[52] Succession (Scotland) Act 1964, s.31.
[53] 1976 SC 110 at 120.
[54] (1956) 2 D.L.R. (2d) 67.
[55] *ibid.*, at 68.

certainty has never been required.[56] The suggestion by Kearns J. that the standard of proof could be "stricter than" the criminal standard must be dismissed as lacking precedent in the legal system. Furthermore, it would amount to an invitation to the parties to litigate in the hope of establishing a fanciful doubt which would eliminate absolute certainty and bring the section into play in their favour. This is ironic given Kearns J's view that his interpretation of the section was "harmonious and not socially divisive"[57] and his comment that "[a]n interpretation of the section which produces an outcome where a husband's family are at loggerheads with the family of his wife in circumstances where both perished in the same tragedy, would be highly undesirable."[58]

Although, as has just been concluded, there is no merit in the suggestion that section 5 will apply unless there is absolute certainty as to the order of death, it is somewhat more plausible to suggest a requirement of proof beyond a reasonable doubt. There is limited support for this view in the one authority relied upon by Kearns J. to justify his position. This was the decision of the House of Lords in *Hickman* v *Peacey*,[59] the leading case on the legislation applicable to *commorientes* cases in England. In order to assess the value of *Hickman* as an aid to interpreting section 5 of the Succession Act, it will be necessary to consider the case in some detail (taking the opportunity in the process to give an account of the current English legal position). It will also be useful to consider the approach which has been taken in other Commonwealth jurisdictions. It will be seen that the weight of opinion in other jurisdictions is in favour of the normal civil standard of proof on the balance of probabilities.

The Burden of Proof under English and Commonwealth Commorientes Provisions

The legislative provision considered in *Hickman* v *Peacey* was section 184 of the English Law of Property Act 1925,[60] which provides that:

> "[Where] 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),[61] 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 elder."

This provision makes a far more dramatic change to the common law than does section 5 of the Succession Act. Section 184 provides a clean (albeit arbitrary) solution to the problem of determining the order of death of

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[56] See, *e.g. Miller* v *Minister of Pensions* [1947] 2 All E.R. 372 at 373 *per* Denning J.
[57] [2000] 2 I.R. 571 at 576.
[58] *ibid.*
[59] [1945] A.C. 304.
[60] This provision first appeared in the Law of Property Act 1922, s.107(3) and was re-enacted in identical terms in the Law of Property Act 1925, s.184.
[61] For discussion of the words in parenthesis, see n.66 below.

commorientes, allowing one to presume that the younger survived the elder.[62] It was because of the arbitrary nature of this rule that, notwithstanding the "certainty and clarity" it offers, the Law Reform Commission recently rejected it as a basis for law reform in the Republic of Ireland.[63] One might try to argue that the English presumption has an objective basis in that the young tend to be more robust than the old and, in a situation of disaster, the younger person would on average survive longer. However, this statistical generalisation does not apply if, for example, the younger person was a vulnerable infant and the elder was a healthy adult. Furthermore, if one were genuinely concerned with statistical probabilities, one would be willing to entertain evidence of the general health and physical conditions of the parties and this is not considered relevant under the English regime.[64] On the whole, one must conclude that the presumption in section 184 is essentially one of convenience, with no firm basis in probability.

Whatever about the basis for the English statutory rule, the significant point for present purposes is that it applies in exactly the same circumstances as its Irish counterpart (arising in cases where "two or more persons have died in circumstances rendering it uncertain which of them survived the other or others"). Following this identical beginning, a slight difference may be detected in the phrasing of the two provisions. Under the English section, the parties are "presumed" to die in a certain order while the Irish section makes no reference to a presumption. However, this difference appears to be without significance. In the English provision, the reference to a presumption is qualified by the subsequent statement that "accordingly, the younger is deemed to survive the elder". Thus, the parties are "deemed" to die in a certain order, just as they are "deemed" to die simultaneously under the Irish provision. While it might loosely be said that the English presumption can be "rebutted",[65] this can only be accomplished by evidence showing that it was not applicable in the first place.[66] Given, then, that the

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[62] Note also the effect of the Law Reform (Succession) Act 1995, s.1 (spouse not entitled to take on intestacy unless he or she survives the other spouse by 28 days). See further text to and following n.170 below. *Cf.* an older provision, Administration of Estates Act 1925, s.46(3).

[63] See n.13 above, p.35, where the L.R.C. argued that the English rule has the potential to operate unfairly in that, "without any evidential basis for doing so", it prefers certain beneficiaries above others (for example, if the *commorientes* held property as joint tenants, all the relevant property would go to the successors of the youngest of the joint tenants at the expense of the successors of the other joint tenants). Note also Kearns J.'s apparent lack of enthusiasm in *Re Kennedy* [2000] 2 I.R. 571 at 575 for the English approach ("approaching the problem in such an artificial way").

[64] *cf.* n.22 above, discussing the presumptions based on the age and sex of the parties originating in the Napoleonic Code. A difficulty with even the complex presumptions traditionally favoured by the civil law is that the relative robustness of the parties would be of more significance in a more "old-fashioned" tragedy such as a shipwreck than in a case where the parties were killed, say, when a plane crashes into a mountain-side. *Cf.* Wigmore n.21 above, p.621.

[65] *Re Lindop* [1942] Ch.377 at 382 *per* Bennett J.

[66] See on this point, *Stewart* v *Police* [1970] N.Z.L.R. 560 at 576 *per* Turner J: "it is more correct to say that this presumption never arises at all except upon the condition created by the statute; and that, once it arises, it is irrebuttable." Note that the words "subject to any order of the court" which appear in parenthesis in

two sections are set up in essentially the same way, one would expect the burden of proof to be the same in each case.

The issue which arose in *Hickman*, and which led to consideration *inter alia* of the burden of proof applicable under section 184, was a fascinating one. In 1940, a high-explosive bomb had landed on a small house in Chelsea, reducing it to "a heap of ruins" and killing all five people in a shelter in the basement. A number of the deceased had made bequests in their wills which would take effect only if the beneficiaries, also amongst the deceased, were to survive them. On the face of it, this was a prime case for the application of section 184, leading to a presumption that the parties had died in order of seniority. However, it was argued in *Hickman* that there was no uncertainty within the terms of the statute, since it was clear that the parties had died simultaneously, and therefore the statutory presumption could have no application. This argument exposed a weakness in the drafting of section 184. It seems that the drafters rashly assumed on the basis of certain *dicta* in the nineteenth century cases that, given that "time . . . is said to be infinitely divisible",[67] it "cannot be assumed to be proved, or probable, or possible that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination".[68] However, the assumption that two people can never die at exactly the same time strays dangerously into metaphysics.[69] Furthermore, it seemed more open to question by 1945, given that "the march of civilisation"[70] had led to new "methods of wholesale instantaneous destruction".[71] Notwithstanding the flawed drafting of the section, it would have been an unexpected result if the House of Lords had found section 184 inapplicable on the facts of *Hickman*. Lord Simonds argued persuasively that it could not "have been deliberately intended [by the legislature] to supply a remedy by way of presumption where the estates of A and B had to be administered as if they had died at the same time because the

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s.184 "appear to be meaningless" and "certainly give the court no discretion to disregard the statutory presumption on the ground that it would be unfair or unjust to act upon it" (Kerridge, *Parry & Clark: The Law of Succession* (11th ed., Sweet and Maxwell, London, 2002), p.305; see also *Re Brush* [1962] V.R. 596). For a compilation of unconvincing judicial attempts to find some explanation for the relevant words, see Kerridge above, p.305 n.51.

67 *Wing* v *Angrave* (1860) 8 H.L.C. 183 at 199 *per* Lord Campbell L.C.

68 *Underwood* v *Wing* (1855) 4 De G.M. & G. 633 at 660 *per* Lord Cranworth L.C.

69 In the Court of Appeal in *Hickman* v *Peacey* (sub nom. *Re Grosvenor* [1944] Ch. 138 at 144) Lord Greene M.R. described the proposition that time is infinitely divisible as "a metaphysical conception". He went on to comment that "[n]o doubt, when a bevy of angels is performing saltatory exercises on the point of a needle it is always possible to find room for one more, but propositions of this character appear to me to be ill suited for adoption by the law of this country which proceeds on principles of practical common sense."

70 *Re Grosvenor* [1944] Ch. 138 at 145 *per* Lord Greene M.R. (presumably intending this ironically).

71 *Hickman* v *Peacey* [1945] A.C. 304 at 318 *per* Viscount Simon L.C. Other *commorientes* cases involving "wholesale instantaneous destruction" caused by bombing include *Re Lindop* [1942] Ch. 377; *Re Howard* [1944] P. 44; *Re Cohn* [1945] Ch. 5; *Re Pringle* [1946] Ch. 124. A curious aspect of another of the cases in this series, *Re Mercer* (1944) 60 T.L.R. 487 at 488, was the court's consideration, for the purposes of compensation under the War Damage Act 1943, of whether one of the deceased had survived his furniture.

order of death was uncertain, but to supply no remedy where the same estates had to be administered upon that footing because they, in fact, died at the same time."[72] By a three to two majority, the House of Lords found that section 184 was applicable.

It is not an easy task to summarise "the differing, varying, qualified and non-committal views"[73] expressed by the Law Lords in *Hickman* in relation to the burden of proof under section 184. One of the judges in the majority, Lord Macmillan, took the view that the statutory presumption would apply unless there was certainty, beyond a reasonable element of doubt, as to the order of death.[74] On this view, the standard of proof would be equivalent to the criminal standard of proof. When one refers back to the mischief which the section was designed to address, Lord Macmillan's view is difficult to defend. The common law position, prior to the enactment of the section, had allowed affirmative proof that one person had survived another. The deficiency in the law which section 184 sought to remedy was that, where affirmative proof was not available, the common law threw up its hands and proceeded as if neither party had survived the other (while not assuming either that the parties had died simultaneously). Lord Macmillan's view on the burden of proof would require section 184 to impact on cases which had been free of doubt before the statute. Where it could be proven, but not beyond all reasonable doubt, that an older person had survived a younger person, the arbitrary presumption of the section would displace the proven fact and the property would be distributed as if the younger had survived. In trying to understand why Lord Macmillan would have contemplated this counter-intuitive result, it should also be remembered that the facts of *Hickman* involved an ingenious attempt to find a loophole in section 184. It may be that, in his attempts to seal the loophole, Lord Macmillan advocated a higher standard of proof than he would have in a standard case (such as *Re Kennedy*) where what was at issue was simply whether or not one party had survived the other.

In *Re Kennedy*,[75] Kearns J. quoted briefly from Lord Macmillan's speech and clearly regarded it as representing the position of the House of Lords. However, on a fair reading of the case, it is doubtful whether any of the other Law Lords shared Lord Macmillan's opinion on the matter in question. Lord Porter, also in the majority, noted that some of the other Law Lords took the view that proof on the balance of probabilities was sufficient. He, however, was "not sure whether it is or not, and would leave the point open".[76] Lord Simonds, the last of the judges in the majority, regarded it as impossible for two persons to die simultaneously.[77] However, he stated that it would be necessary to examine the facts more closely "if the alternative view prevails and the operation of the section is excluded where upon a preponderance of probability the proper inference is that the deaths in question are simultaneous".[78] His view was that, "according to the ordinary standards of

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[72] [1945] A.C. 304 at 343.
[73] *Lamb* v *Lord Advocate* 1976 S.C. 110 at 115 *per* Lord Justice-Clerk Wheatley.
[74] [1945] A.C. 304 at 324-325.
[75] [2000] 2 I.R. 571 at 575.
[76] [1945] A.C. 304 at 340.
[77] *ibid.*, at 345.
[78] *ibid.*, at 346.

proof",[79] it could not be inferred that the parties had died at the same time. It seems from his language that Lord Simonds regarded the ordinary civil standard as applicable to section 184, *i.e.* proof "upon a balance or preponderance of probability".[80] Lord Wright, one of the judges dissenting from the result reached by the majority, felt that the question of whether the parties had died at the same time was "a fact . . . to be ascertained by the verdict of a jury or the decision of a judge of fact in the same way and by the same rules as to proof as any other disputed issue of fact."[81] He could not "see why any special and peculiar rule of evidence should be demanded in these cases or why the ordinary requirement of evidence reasonably sufficient to satisfy a jury should not be applicable."[82] Finally, Viscount Simon L.C. (again dissenting in the result) felt that the uncertainty referred to in the section was "uncertainty which is not removed by evidence leading to a defined and warranted conclusion".[83] In one subsequent lower court case, *Re Bate*,[84] it appears to have been felt that his reference to "a defined and warranted conclusion" indicated a stricter requirement than proof on a simple balance of probabilities.[85] It would not be unknown for a standard of proof to apply in a civil case which is stricter than the normal "balance of probabilities" test but which falls short of the criminal standard of proof.[86] However, the phrase used by Viscount Simon L.C. is rather opaque[87] and

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79 *ibid.*

80 *ibid.*, at 345.

81 *ibid.*, at 326.

82 *ibid.*, at 327.

83 *ibid.*, at 318.

84 [1947] 2 All E.R. 418. In this case, Jenkins J. reviewed the differing views of the Law Lords in *Hickman* and opined that "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'" (*ibid.,* at 421). The judgment of Jenkins J. is somewhat confusing because, notwithstanding his adoption of Viscount Simon's formulation, at a later point he appeared to state the burden of proof as effectively requiring proof beyond a reasonable doubt (*ibid.,* at 421B-C). Moreover, in one report of his judgment ([1947] L.J.R. 1409 at 1411), he referred in his conclusion to not being satisfied on "the balance of probabilities". See the discussion of the difference between the two reports in *Lamb* v *Lord Advocate* 1976 S.C. 110 at 113-114, 118-119.

85 Note also Lord Wright's invocation at one point in his speech of the standard of proof at common law as laid down by Lord Campbell L.C. in *Wing* v *Angrave* (1860) 8 H.L.C. 183 at 199 ("a clear preponderance of evidence"). See, however, n.25 above, for an explanation of the context of Lord Campbell's remarks.

86 See generally Dennis, *The Law of Evidence* (2nd ed., Sweet and Maxwell, London, 2002), pp.394-399, noting that while some courts have recognised the possibility of "more or less infinite degrees of proof between a bare preponderance of probabilities and beyond reasonable doubt" (p.396), others have argued that the normal balance of probabilities is generally applicable but that in some circumstances greater evidence is required to tip the balance. See also Fennell, *The Law of Evidence in Ireland* (2nd ed., LexisNexis Butterworths, Dublin, 2003), pp 96-103.

87 Viscount Simon L.C.'s reference to a "warranted" conclusion may echo a remark in the seminal case of *Wing* v *Angrave* (1860) 8 H.L.C. 183 at 206 where, with no indication that he was not applying the normal civil standard of proof, Lord Cranworth stated that "there is no evidence warranting any conclusion" as to which of the parties had survived. The reference to a "defined" conclusion

appears to have been clarified by his subsequent quotation, with approval, of the view of Goddard LJ at the Court of Appeal stage of the litigation[88] that "it is undoubted law that in civil proceedings a finding can, and may be, rested on the probabilities of the case".[89]

Reviewing the various speeches of the Lords in *Hickman*, it appears that the standard of proof which was most heavily supported was the civil standard of proof on the balance of probabilities. Only Lord Macmillan favoured applying the criminal standard of proof beyond a reasonable doubt, Lord Porter expressly reserved his position, and the remaining three Law Lords seemed to favour the civil standard of proof on the balance of probabilities. The argument that the applicable standard is simply proof on the balance of probabilities receives unequivocal support from the Australian case law (notably *Re Plaister*[90] and *Re Comfort*)[91] dealing with provisions based on section 184.[92] Similarly, it has been concluded in the Canadian context that "the accepted view is that uncertainty need only be rebutted on the usual civil standard, the balance of probabilities."[93] In *Adare* v *Fairplay*,[94] Roach JA concluded after a detailed consideration of the *dicta* in *Hickman* v *Peacey*, "that the totality of judicial opinion expressed by their Lordships supports the view that the instant case being a civil case, the standard of proof in civil cases and not that in criminal cases applies."[95] Similarly, in the Scottish case of *Lamb* v *Advocate General*[96] it was unanimously held by the three judges of the Inner House of the Court of Session, after consideration of the English and Commonwealth authorities, that the normal civil standard of proof applies. It is only in New Zealand that a different conclusion has been reached and this is explicable on the basis of the different wording of the applicable legislation. The relevant New Zealand provision applies where the parties "have died at the same time or in circumstances which give rise to reasonable doubt as to which of them survived".[97] Logically, under this provision, the presumption can only be overridden if there is no "reasonable

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appears close to meaningless when considered on its own. It may simply mean that one must be able to reach a specific conclusion on the evidence.

88 Sub nom. *Re Grosvenor* [1944] Ch. 138 at 153.

89 [1945] A.C. 304 at 319.

90 (1934) 34 S.R. (N.S.W.) 547.

91 [1947] V.L.R. 237.

92 See also *Re Zapullo* [1966] V.R. 390; *Re Brush* [1962] V.R. 596; *Re Albert* [1967] V.R. 875; MacCallum and Moore, *Australian Real Property Law* (2nd ed., L.B.C. Information Services, Sydney, 1997), p.10-4; Atherton and Vines, *Australian Succession Law Commentary and Materials: Families, Property and Death* (Butterworths, Sydney, 1996), pp.189-198.

93 Law Reform Commission of British Columbia *Report on Presumptions of Survivorship* LRC-56 (October 1982), p.23. See also Institute of Law Research and Reform, Alberta *Survivorship* Report No.47 (1986), p.9 (taking the same view).

94 (1956) 2 D.L.R. (2d) 67 (Ontario Court of Appeal). See also *Re MacLauchlan and MacLauchlan* (1968) 68 D.L.R. (2d) 556 (British Columbia Supreme Court).

95 (1956) 2 D.L.R. (2d) 67 at 73.

96 1976 S.C. 110.

97 Simultaneous Deaths Act 1958, s.3(1).

doubt" as to the order of death, thus leading to a requirement of proof beyond reasonable doubt.[98]

Conclusion on the Burden of Proof

It has emerged from the preceding discussion that the English and Commonwealth authorities do not support the idea of applying the criminal standard of proof beyond a reasonable doubt (and *a fortiori* do not support a requirement of absolute certainty). Having assessed these authorities, as well as the arguments put forward by the learned judge in *Re Kennedy*,[99] it may be concluded Kearns J. did not take the appropriate approach in *Re Kennedy* to the question of the burden of proof applicable under section 5. The proper test, it has been argued, is the civil balance of probabilities test. This allocates section 5 a logical place in the law, giving it application in cases where the common law was unable to reach a conclusion as to the order of death. The significance of Kearns J's approach to section 5 is that it increases the number of cases in which parties will be deemed to die simultaneously, thus increasing the problems which can arise in the *commorientes* context.[100] In the context of possible reform of the law on *commorientes*, it would be advisable to clarify the position in relation to the burden of proof (especially given the suggestion by Kearns J. that the test could be stricter than the criminal standard, requiring absolute certainty). It would be necessary to make clear that the statutory presumption will apply

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[98] *Re Pechar* [1969] N.Z.L.R. 574. In this case, Hardie Boys J. expressed the *obiter* view that the same test would have applied under the older version of the New Zealand legislation, s.27 of the Property Law Act 1952, which had copied the English wording. In *In re Smith (deceased), Huzziff* v *Public Trustee* [1956] N.Z.L.R. 992 at 995 *per* Shortland J, New Zealand's Court of Appeal had expressly declined to express a view on the burden of proof under the older provision. See also the judgment of Barraclough CJ at first instance, [1955] N.Z.L.R. 1122 at 1123, finding it "unnecessary to resolve this double dubeity – this uncertainty as to what is meant by uncertainty".

[99] It will be recalled that Kearns J. stressed the importance of an interpretation "which is harmonious and not socially divisive". It has already been pointed out that this objective would by no means by promoted by a requirement of absolute certainty. Even in relation to a modified version of Kearns J.'s position, where only proof beyond a reasonable doubt is required, it is not entirely clear that this would be more effective in discouraging litigation than a standard of proof on the balance of probabilities. On both tests, the parties would be tempted to litigate if it was questionable whether the relevant test (whatever it was) was satisfied. Also, it could be argued that additional bitterness would be felt by parties who lost their claim to property because they could prove their case only on the balance of probabilities but not beyond a reasonable doubt. See further n.100 below.

[100] The approach of requiring proof beyond a reasonable doubt would, in fact, be less objectionable (or, possibly, unobjectionable) in the context of comprehensive legislative reform which would *inter alia* clarify the position in relation to joint tenancies and address the problem exemplified by *Wing* v *Angrave* (1860) 8 H.L.C. 183. See text following n.141 below for discussion of the question of reform. *Cf.* text to and following n.164 below, discussing a possible rule that the parties would be deemed to die simultaneously unless one survived the other by a specified number of days (probably a more efficient method of taking account of Kearns J.'s understandable desire to avoid divisive litigation than the imposition of a requirement of proof beyond a reasonable doubt).

only where it is not possible to prove, on the applicable standard of proof, that one person has survived the other.[101]

Commorientes and Joint Tenancies

As has been discussed, in cases of *commorientes*, the approach of the common law was that neither of the *commorientes* could be deemed to have survived the other. Section 5 of the Succession Act, however it is interpreted, does nothing to clarify matters in relation to the joint tenancy problem. If all the parties are deemed to have died simultaneously,[102] then which joint tenant is deemed to be the last survivor? The only guidance in the case law comes from *Bradshaw* v *Toulmin* (1784),[103] where Lord Thurlow stated that "if two persons, being joint tenants, perish by one blow, the estate will remain in joint tenancy in their respective heirs".[104] This memorable formulation is invariably cited in the Irish textbooks[105] yet its import is by no means clear. Wylie stays close to Lord Thurlow's words in stating that the common law position is "that there could be no survivorship and so the heirs of the deceased joint tenant succeeded to the property as joint tenants."[106] Expanding slightly on this, in its recent discussion of the issue, the Irish Law Reform Commission explained that there will be "a joint tenancy between the (possibly numerous) respective successors of the deceased persons".[107] Similarly, the Northern Ireland Land Law Working Group has stated that there will be "a new joint tenancy between the residuary legatees or next-of-kin of the deceased joint tenants".[108] This, then, is the conventional understanding of the position established by *Bradshaw* as

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[101] See n.144 below.

[102] The Land Law Working Group took the view that s.5 would not apply "as between joint owners". (*Final Report* (1990), p.186). However, this does not appear to be the case. Unless one assumes that the interests of both joint tenants are extinguished by the *commorientes* event, in which case there would be nothing to pass under the will or intestacy of either party, it appears that s.5 must apply. See n.112 below. In defence of the view of the Land Law Working Group, it might be argued that the effect of *Bradshaw* v *Toulmin* (1784) Dick. 633 (discussed in detail in the text following this footnote) is that the old joint tenancy comes to an end and is (by some unexplained process) replaced by a completely new co-ownership arrangement involving the successors of the respective parties. However, the very fact that the new co-owners are the parties' successors (as determined by the operation of the rules of succession) suggests that the transmission of the property to them has been an aspect of "the distribution of the estate of any of [the *commorientes*]" for the purposes of s.5.

[103] (1784) Dick. 633.

[104] *ibid.*, at 633.

[105] See Wylie, *Irish Land Law* (3rd ed., Butterworths, Dublin, 1997), p.429; Coughlan, *Property Law* (2nd ed., Gill & McMillan, Dublin, 1998), p.135; Brady n.35 above, p.183; Keating, *Keating on Probate* (Round Hall Sweet and Maxwell, Dublin, 2002), p.237.

[106] Wylie n.105 above, p.429.

[107] n.13 above, p.33. See also Coughlan n.105 above, p.135 ("the persons entitled to the estates of the respective deceased joint tenants take their places as joint tenants in respect of the property which was so held.")

[108] See *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), p.130.

it applies both in Northern Ireland and in the Republic of Ireland.[109] In this Part of the article, it will be argued that this conventional understanding is incorrect and that certain basic points have been overlooked. In fact, it will be suggested, the law on the relevant point is more sensible than is generally realised.

An Alternative Reading of Bradshaw v *Toulmin*

To begin the argument, one may point out that rather curious results follow from the conventional understanding of the law. Imagine if one joint tenant had left all of his property to his four children and the other had left all of his property to his spouse. On the conventional view, in the event of uncertainty as to the order of death of the joint tenants, there would be a joint tenancy between these five successors. This would be a strange result, which would randomly confer a decisive benefit on the successors of one joint tenant at the expense of the successors of the other. The four children could sever the joint tenancy, securing for themselves eighty per cent of the ownership in the property.[110] And what if, as will frequently happen, the successors of one joint tenant are to take in different proportions? Imagine that one of the joint tenants has died intestate, being survived by one child and by the four children of a second deceased child (with no surviving spouse). Under the applicable legislation in both Northern Ireland and the Republic of Ireland, the surviving issue will take *per stirpes*. This means that the surviving child will be entitled to one-half of the deceased's estate, while the four grandchildren will be able to represent their deceased parent, and will be entitled to a one-eighth share each.[111] In either jurisdiction, it would be entirely inconsistent with the applicable legislation to regard the husband and the children as joint tenants along with the successors of the other deceased joint tenant.[112] It is in the nature of a joint tenancy that all joint tenants are

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[109] The case ceased to have relevance in England and Wales with the advent of legislative reform in 1922, re-enacted as Law of Property Act 1925, s.184. See text to and following n.60 above. The author has been unable to find analysis of *Bradshaw* in either pre-1925 or modern English texts.

[110] Note also that, in *Re Kennedy* [2000] 2 I.R. 571, the deceased husband and wife had held all of their property as joint tenants. This property fell to be distributed under the rules of intestacy. It appears from the report that the deceased husband was survived by a sister and the deceased wife by seven siblings and by the ten children of a deceased sibling. The judgment of Kearns J. was concerned solely with the applicability of the Succession Act, s.5 and the report does not reveal how the property was ultimately distributed. The conventional view would suggest that there would be a joint tenancy, with the husband's sister left as only one of eighteen joint tenants!

[111] See Administration of Estates (Northern Ireland) Act 1955, s.8; Succession Act 1965, s.67(4).

[112] It seems clear that the legislation must apply in the situation under discussion. See Administration of Estates (Northern Ireland) Act 1955, s.6 ("All estate to which a deceased person was entitled for an estate or interest not ceasing on his death and as to which he dies intestate . . . shall . . . be distributed in accordance with this Part") and s.44(d) (which provides that "the estate or interest of a deceased person under a joint tenancy where any tenant survives the deceased person shall be deemed to be an estate or interest ceasing on his death", thus making clear that where no joint tenant survives the deceased person, as in a *commorientes* situation, the interest of the deceased joint tenant is one "not ceasing on his

equal in all respects; one joint tenant cannot be entitled to a greater share than the others. Thus, one must conclude that some form of severance of the joint tenancy would have to occur in cases where one joint tenant's estate was to be split up in unequal proportions (whether because of the application of the rules of intestacy or simply because one or more of the joint tenants provided for an unequal division by will). However, consistent with the logic of the conventional view it is not easy to suggest what form the severance would take.[113]

One is left with a feeling that all this is rather peculiar. Why would the judge in *Bradshaw* v *Toulmin* have created such a perverse solution to the problem which faced him? One should resist the temptation to assume that the lawyers of the past were somehow more foolish than us. Although not without his flaws as a lawyer and a politician, Lord Thurlow L.C. (nicknamed "the Tiger")[114] was regarded with awe by his contemporaries.[115] It is difficult to see why he would have been tempted to set up a rule which required a division on the basis of the number of successors of the deceased joint tenants, leading to obviously arbitrary results. If one wishes to reassess *Bradshaw* v *Toulmin*, the obvious starting point is a consideration of the report of the decision. Significantly, the report[116] is only one sentence long: "Lord Thurlow, C, said, if two persons being joint tenants, perish by one blow, the estate will remain in joint tenantcy (*sic*) in their respective heirs."[117] Thus, we learn nothing directly about the precise circumstances of

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death" and therefore, under s.6, is to be distributed according to the rules on intestacy set out in the Act). The legislative provisions are similar in the Republic of Ireland. See Succession Act 1965, s.66 and s.4(c).

113 In Northern Ireland, particular problems are created by the complex rules applicable where an intestate person is survived by a spouse along with issue or parents or siblings or issue of deceased siblings. In such cases, the spouse will not be entitled to the entire estate but will take the personal chattels as well as a statutory legacy of a specified sum and a fraction of the remainder, if any, of the estate (with the details varying according to which relatives have survived along with the spouse). See generally Wylie n.105 above, p.858; Grattan n.20 above, pp.129 *et seq*. If the estate of one of the *commorientes* is to be distributed according to these rules, how is one to apply the conventional view of *Bradshaw* v *Toulmin*?

114 See Holdsworth, *A History of English Law* (Methuen, London, 1938), Vol.12, p.321.

115 "His commanding appearance, his air of infinite wisdom, his powers of invective and sarcasm, and his very considerable legal and political ability, hypnotised his contemporaries – 'he impressed his audience with awe before he opened his lips'; for, as Fox said, he looked wiser than any man ever was": *ibid.* at p.318. Posterity has, however, been relatively harsh in its judgment of Lord Thurlow. Holdsworth concludes on him (*ibid*., at p.327) that "though his intellectual and physical qualities gave him the opportunity of becoming the very great man that many of his contemporaries imagined him to be, his moral shortcomings prevented him from taking that opportunity."

116 (1784) Dick. 633.

117 *ibid.* at 633. The only other information in the report is a heading, presumably in the words of the reporter, which states that "If two persons perish by one blow, the estate will remain as it was." Interestingly, in his discussion of the career of Lord Thurlow, Holdsworth remarks (n.114 above, p.327) that, while "his strong sense and his legal abilities generally led him to the right conclusion, . . . often he did not trouble to discuss at length the legal problems which had been argued by

the case and the nature of the judge's reasoning from the single sentence which has come down to us. However, some insight can be gained if one reflects on the brief report of the case.

Lord Thurlow was said to have required that "the estate will remain in joint tenantcy in the respective heirs", referring to "*heirs*" not "legatees" or "devisees" (or some similar term). It must be remembered that "heir" is a technical term, referring to the person who, under the law prevailing at the time of the decision, would have been entitled to inherit a deceased person's real property on intestacy. Normally the heir would have been the eldest son and, significantly, there would normally be only one person who would qualify as a person's "heir".[118] The modern significance of the old rules of heirship is minimal, with their application being restricted to fee tails, and there is a tendency nowadays to refer loosely to a person's "heirs" when one means those who are entitled under that person's will or intestacy. However, when Lord Thurlow gave judgment in 1784, the rules of heirship were central to a legal system which gave heavy emphasis to the law of real property. It seems unlikely that he would have used the word "heirs" other than with its proper connotation in mind. Thus, it is submitted that the facts of *Bradshaw* (not stated in the report) happened to involve joint tenants who had died intestate.[119]

Considered on the basis that Lord Thurlow was dealing with two (or more) joint tenants who had died intestate, his approach makes a fair degree of sense. The estate of each deceased joint tenant would have passed automatically at the instant of death to his heir[120] (normally the eldest son) and it would have been plausible to regard the surviving eldest sons as joint tenants. On one view, there would be no disruption of the four unities which would require a severance. Each of the new co-owners could be said to owe his title to the same event as the others (*i.e.* the simultaneous death of the parties), so that arguably there would be no disruption to the unity of title.[121] Given that the other unities would undoubtedly remain intact, Lord Thurlow L.C. might have seen no reason to conclude that a tenancy in common should

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the opposing counsel. Lengthy and elaborate arguments are followed by very short judgments." It is impossible to tell, more than two hundred years after the case was decided, whether the very brief report of *Bradshaw* v *Toulmin* is a reflection of a brief judgment given by Lord Thurlow.

118 There would, however, be an exception where a person had no male heir and was survived by more than one female descendant. In that instance all the eligible females would collectively constitute the heir and would take under a special form of co-ownership called coparcenary. On coparcenary, see Wylie n.105 above, pp.446-448.

119 This argument is supported by the fact that it had been possible since the Statute of Wills 1540 to devise real property by will. If one of the deceased joint tenants in *Bradshaw* had exercised his power to leave his property by will to someone other than his heir, there would have been no justification for setting up a joint tenancy giving an interest to the heir (to whom the law would have given no claim except upon intestacy).

120 See paragraph of text accompanying n.122 below.

121 According to Wylie n.105 above, p.431 unity of title requires that "all the joint tenants should have acquired their interests in the land by the same title, whether that source of title lay in a particular document of title or the act of another party or, indeed, the joint tenants' own act of adverse possession" (footnotes omitted).

result from the simultaneous deaths of the parties. Thus, assuming the parties to have died intestate with their eldest sons as heirs, Lord Thurlow's approach makes sense in terms of the standard principles of co-ownership (with the only tricky step in the argument being the conclusion that unity of title is not shattered when the parties have gained their titles by intestate inheritance following a *commorientes* event).

The Significance of Devolution to Personal Representatives

The above interpretation of *Bradshaw* v *Toulmin* does not necessarily require that Lord Thurlow's solution be restricted to (what have been inferred to have been) the facts of that case. It might be thought that his solution could also be applied in cases where the deceased joint tenants had left their property to the same number of successors. If each had left all his property to his or her spouse or if each had left it to (say) two children, there would be no imbalance as between the different sets of successors in making them all joint tenants over the property. Furthermore, if one were willing to accept a degree of imbalance, one could extend it to all cases besides the troublesome ones involving an unequal division amongst the successors of one of the joint tenants.

At this point, one must introduce the final link in the argument against the conventional understanding of the law on *commorientes* and joint tenancies. This is the fact, central to the modern law of succession, that one's property does not pass directly to one's successors. Instead, it first devolves on one's personal representatives, who must administer the estate and ultimately pass on the property to those properly entitled to it. This process would not have occurred in the case of intestate succession back in 1784. At that time, the land of a deceased intestate would have vested automatically in his heir, with no intermediate devolution to personal representatives. Under English law, prior to the Land Transfer Act 1897, the deceased's realty did not vest in his personal representatives (so-called because they were responsible for *personal* property) but instead passed directly to his heir on intestacy or to a devisee under his will. Under the modern law, represented in Northern Ireland by section 1 of the Administration of Estates (Northern Ireland) and in the Republic of Ireland by section 10 of the Succession Act 1965, all property of a deceased person to which he was "entitled for an estate or interest not ceasing on his death" devolves on his personal representatives.[122]

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[122] In the *commorientes* situation, the interest of each deceased joint tenant is clearly one to which he was "entitled for an estate or interest not ceasing on his death". If it was not, there would be nothing to pass to any of the successors of the deceased joint tenants. This is confirmed by s.44(d) of the Administration of Estates (Northern Ireland) Act and s.4(3) of the Republic's Succession Act 1965, both of which state that "the estate or interest of a deceased person under a joint tenancy where any tenant survives the deceased person shall be deemed to be an estate or interest ceasing on his death". Since in a *commorientes* situation no joint tenant survives the deceased person, the interest of each deceased joint tenant falls outside s.44(d) and s.4(3) and, by clear implication, constitutes an estate or interest which *does* survive each of the deceased joint tenants.

When one considers the matter, it becomes clear that the process of devolution must inevitably sever a joint tenancy in a case of *commorientes*.[123] Consider the permutations, for simplicity focusing on a case where there were originally only two joint tenants. Where both joint tenants die testate, each set of executors will owe their title to the will which appointed them. This will shatter unity of title, severing the joint tenancy. This is fortunate, since it would be unworkable for the different sets of executors to be joint tenants. The death of a sole executor in the course of the administration would lead to the termination of the claims of the successors of the deceased person who had appointed the sole executor. Similarly, there could not be a joint tenancy involving the personal representatives if one of the joint tenants died testate and the other died intestate (or died testate but without appointing executor/s who survived him). There would again be a shattering of the unity of title. The respective titles would depend on different documents, in one instance the relevant will and in the other a grant of administration. In fact, in this instance, there would also be a shattering of unity of time,[124] since one share in the former joint tenancy property would vest in the executors upon the death of the testator in question, whereas the other share in the joint tenancy would vest initially in the Probate Judge (under Northern Irish law)[125] or in the President of the High Court (under the law of the Republic of Ireland)[126] and subsequently in the administrators upon the subsequent grant of administration.[127] Where both joint tenants died intestate, the shares of each would vest initially in the Probate Judge or the President of the High Court, thus temporarily putting an end to the co-ownership over the property. Even if, contrary to what has been argued thus far, the joint tenancy could somehow survive the vesting of the shares in the former joint tenancy in the various personal representatives, there is no way that it could survive the subsequent transfer of the shares to the successors of the deceased joint tenants. Some of the successors will owe their title to an assent from the personal representative/s of one of the deceased joint tenants and others will owe their title to an assent from the personal representative/s of the other deceased joint tenant. Thus, there can be no unity of title between the ultimate co-owners and therefore no joint tenancy between all of them.

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[123] *Contra* Lyall, *Land Law in Ireland* (2nd ed., Round Hall Sweet and Maxwell, Dublin, 2000), p.425, commenting, without further discussion, that "It may be the case that while the personal representatives hold the legal estate as joint tenants, the equitable interest is held by those entitled to it as tenants in common, so that simultaneous death causes a severance in equity".

[124] It is well established that unity of time is not applicable to dispositions by will. See Wylie n.105 above, p.431. However, it does not seem that the case under discussion falls within this exception, since one is dealing with the devolution of property to different sets of personal representatives under one party's will and the other party's intestacy.

[125] See Administration of Estates (Northern Ireland) Act 1955, s.3 (and see also Interpretation Act 1954 s.42(3), defining "probate judge").

[126] Succession Act 1965, s.13.

[127] See Wylie n.105, pp.875-876. It does not appear that the conclusion just reached would be affected by the limited doctrine of "relation back" in respect of a grant of administration. See Wylie *ibid.* at p.876.

The effect of the foregoing argument is clear. The devolution of the property to the respective personal representatives of the deceased creates a severance of the joint tenancy which had existed during the lifetimes of the joint tenants. If there had been two joint tenants, then an undivided one-half share under a tenancy in common will pass to each set of personal representatives.[128] When the relevant estate has been administered, the personal representatives will be in a position to pass on the one-half share which they have held (or what remains of it after the payment of the deceased's debts etc) to the successors of the relevant deceased joint tenant. The manner in which these successors will, as between themselves, take their share will depend on the terms of the deceased person's will or upon the rules of intestacy.

It is submitted, then, that the position which has just been outlined represents the current legal position in Northern Ireland and the Republic of Ireland. The discussion turns now to the different question of what law reform might be desirable in this area. This will first involve a consideration of the Law Reform Commission's proposal in respect of joint tenancies and *commorientes*. Once this has been accomplished, the author will outline a set of proposals covering this and other aspects of the *commorientes* problem.

The Law Reform Commission's Recommendation on Commorientes and Joint Tenancies

The L.R.C.'s Approach

In its treatment of the problem of *commorientes* and joint tenancies, the Irish Law Reform Commission explained the response of the courts by reference to *Bradshaw* v *Toulmin*[129] where, as has already been discussed in detail, Lord Thurlow L.C. stated that "if two persons, being joint tenants, perish by one blow, the estate will remain in joint tenancy in their respective heirs".[130] The L.R.C. went on to argue as follows:

> "This response of implying a joint tenancy between the (possibly numerous) respective successors of the deceased persons is not without its difficulties. The normal right of survivorship will operate as between these successors, even though they may have little or nothing to do with each other, and despite the fact that the testator may have intended them to take an absolute interest. It is this burdensome persistence of a joint tenancy after commorientes which forms the subject matter of our current proposal."[131]

This is a somewhat unexpected way of characterising the problem. The L.R.C. did not mention the difficulties discussed in the previous part of this article, namely, the unbalanced nature of the *Bradshaw* v *Toulmin* solution (as the L.R.C. understood it) as well as the difficulties in implementing it in

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[128] Each set of personal representatives will hold the undivided one-half share as joint tenants *inter se*.
[129] (1784) Dick. 633.
[130] *ibid*., at 633, quoted in the L.R.C. Report n.13 above, p.34.
[131] L.R.C. Report n.13 above, p.34.

cases where the successors are entitled in different proportions. Instead, the L.R.C. drew attention to apparently more minor issues such as the fact that the parties under the new joint tenancy "may have little or nothing to do with each other". In any event, having identified the problem in the manner just discussed, the L.R.C. proceeded to consider a possible solution along the lines of section 184 of the English Law of Property Act 1925. However, as has been mentioned, the L.R.C. rejected this option on the basis of the arbitrary nature of the English provision.[132] Instead, the L.R.C. proposed to "to treat commorientes as an event that severs a joint tenancy, creating instead a tenancy in common", with the result that "the respective successors will inherit the estate – either on intestacy or under the terms of the will – as if it had been held under a tenancy in common."[133] Thus, one would avoid "the inconvenience of a joint tenancy" and also ensure that "the respective successors will continue to take equal shares in the estate, thereby avoiding the imbalance inherent in the English approach".[134] The L.R.C. proposed to phrase the relevant legislation as follows: "any property held by [the *commorientes*] in a joint tenancy shall be deemed to have been so held under a tenancy in common and shall pass to their respective heirs under a tenancy in common."[135] Thus, the L.R.C.'s recommendation would reach the same result which, it has been argued in the previous part of this article, already applies in Irish law. However, even if one accepts that the L.R.C.'s proposal would make no difference to the legal position, it could obviously have value in terms of clarifying the law.[136]

Problems of Drafting in the L.R.C.'s Proposal

If the value of legislative intervention is to clarify the law, it is essential that the relevant provision be accurately drafted. However, an examination of the L.R.C.'s draft suggests that it would create unnecessary problems. On the positive side, however, once the problems have been highlighted it seems there are no real obstacles to drafting a satisfactory provision. The L.R.C.'s draft provision, section 7(b) of the Draft Bill,[137] requires section 5 of the Succession Act 1965 to be amended by the insertion of additional words. If the L.R.C.'s proposal were implemented, the amended section 5 would read as follows (with the amending words being indicated in italics):

> "Where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for the

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132 See n.63 above and accompanying text.
133 L.R.C. Report n.13 above, p.35.
134 *ibid.*
135 *ibid.*, at p.36.
136 It is noteworthy that s.13 of the L.R.C.'s Draft Bill (L.R.C. Report n.13 above, p.98) states that the L.R.C. Report "may be considered by any court when interpreting any provision of this Act and shall be given such weight as the court considers appropriate in the circumstances." Such a provision would give some degree of legislative weight to the L.R.C.'s discussion of the law. However, if one accepts the arguments advanced earlier in this article, the L.R.C.'s discussion omits to consider many of the important issues which arise. Therefore, the desirability of the draft s.13, insofar as it applies to the *commorientes* issue, is questionable.
137 L.R.C. Report n.13 above, p.95.

> purposes of the distribution of the estate of any of them, they shall all be deemed to have died simultaneously *and any property held by any or all of them in a joint tenancy shall be deemed to have been so held under a tenancy in common and shall pass to their respective heirs under a tenancy in common*."

One minor problem may be noted immediately, in respect of the reference to the property passing to "their respective heirs" towards the end of this amended section. As has been mentioned already, "heir" is a technical term, applicable in rare cases when one is applying the old rules of heirship. The appropriate word in this context, which is in fact used in the relevant discussion in the Report, is "successors". This is apt to cover those entitled under a will or intestacy.

There are, however, more major difficulties with the L.R.C. wording. These arise from the approach taken by the L.R.C. of appending the reforming provision to the existing section 5 of the Succession Act rather than creating a new subsection in which to state the new rule. The beginning of section 5 states that it applies where "two or more persons have died in circumstances rendering it uncertain which of them survived the other or others". This leads first of all to the difficulty that the severance rule being added by the L.R.C. will only apply in such circumstances of uncertainty. As it is drafted, it could not apply to a situation where there was no uncertainty and the evidence clearly established that the parties *had* died simultaneously. This is the problem which led to the litigation in *Hickman* v *Peacey*.[138] While the argument based on simultaneous death was unsuccessful in *Hickman*, a majority of the House of Lords appeared to regard simultaneous death as a possibility.[139] It would clearly be best to follow the example of legislatures in a number of jurisdictions and rephrase the provision in relation to joint tenancies so that it applies to cases of simultaneous death as well as to cases where there is uncertainty as to the order of death.[140]

Other difficulties flow from the decision to link the new provision with the existing part of section 5. The proposed new section 5 begins by referring to a case where "two or more persons have died in circumstances rendering it uncertain which of them survived the other or others" and then goes on to state that a severance will be deemed to have occurred in relation to "any property held by *any or all of them* in a joint tenancy" (emphasis supplied). The problems arise from the use of the words "any or all of them". These words are presumably designed to cover a case where, *e.g.* H, W and X have

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[138] [1945] A.C. 304. Any argument that simultaneous death is impossible is somewhat undercut by the fact that the existing part of s.5 operates by deeming people to have died simultaneously.

[139] Viscount Simon L.C. and Lord Wright felt simultaneous death was possible. Lord Macmillan agreed that it was possible but felt it was covered by the wording of the Law of Property Act, s.184. Lord Porter was unsure if it was possible and even less inclined to believe that it could be proven in practice. Only Lord Simonds was convinced that simultaneous death was impossible in principle.

[140] See, for example, Survivorship and Presumption of Death Act (Revised Statutes of British Columbia 1996, c.444), s.2(1); Succession Law Reform Act (Revised Statutes of Ontario 1990, c.S-26), s.55(1); Simultaneous Deaths Act 1958 (New Zealand), s.3(1).

been killed in a plane crash and property had been held by H and W as joint tenants. The relevant property would not be held by "all" of those who died but would have been held by "any" of them and so a severance would occur, although even here the case might more comfortably have been covered by the phrase "some or all" rather than "any or all". Consider however two further examples, which might be caught by the L.R.C. wording but where as a matter of principle it is obvious that no severance should occur. The first example involves the death of H and W in a plane crash, where property had been held on a joint tenancy by H, W and X. Since X (who was not on the plane) has survived, he clearly should become the sole owner of the property in question and there should be no question of a severance. Yet, it could be argued that the property in question had been held "by . . . all of [the *commorientes*] in a joint tenancy", so that the draft provision would require a severance. The second example involves a case where H and W are killed in a plane crash and where H had held property on a joint tenancy with X. Again there should be no severance of this joint tenancy since X is clearly the surviving joint tenant. Unfortunately, this scenario could be caught by the L.R.C. wording on the basis that this is a case where "any" of the *commorientes* held the property on a joint tenancy.

The way around these potential difficulties appears to be simply to avoid linking the new provision to the existing sentence in section 5. One should instead state expressly the key circumstance which triggers the severance, *i.e.* the simultaneous death of *all* of a number of joint tenants. Along these lines, the following draft may be advanced for consideration (without the pretence that the author is a draftsman) which builds upon the existing L.R.C. formulation insofar as this is possible:

> "For the avoidance of doubt it is hereby provided that, where property is held in a joint tenancy and all of the joint tenants die simultaneously or in circumstances rendering it uncertain which of them survived the other or others, the property held in the joint tenancy shall be deemed to have been held by the parties under a tenancy in common and shall pass to their successors under a tenancy in common."[141]

What Form Should Law Reform Take?

In this Part, an attempt is made to sketch out a possible way forward in terms of law reform in Northern Ireland and in the Republic of Ireland. It will be seen that the scheme which is put forward draws on the proposals made by both the Northern Ireland Land Law Working Group and the Republic of Ireland's Law Reform Commission (as well as those made by the Law Reform Commission of British Columbia in 1982,[142] which in turn drew on the US Uniform Simultaneous Death Act).[143]

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[141] For one example of a provision along these lines, see Succession Law Reform Act (Revised Statutes of Ontario 1990, c.S-26), s.55(2).

[142] *Report on Presumptions of Survivorship* LRC-56 (October 1982).

[143] This was first promulgated in 1940 (and amended in 1953) and adopted in virtually all the states of the USA. A revised version was promulgated in 1991 (with minor technical amendments in 1993). For the 1991 version, see <*www.law.upenn.edu/bll/ulc/usda/1991FinalAct.htm*>.

The author recommends the adoption of the Land Law Working Group's proposal of a general rule that "where two or more persons die in circumstances rendering it uncertain[144] which of them survived the other or others, for all purposes affecting the title to property they are deemed to have died simultaneously".[145] This provision is more or less identical to section 5 of the Republic of Ireland's Succession Act 1965, with the difference that it applies "for all purposes affecting the title to property" rather than merely "for the purposes of the distribution of the estate of any of them". The author also favours the adoption of the Land Law Working Group's proposal that an exception should apply in relation to "dispositions expressed to take effect in the event of one person dying before, or simultaneously with, another". Where the parties subsequently die simultaneously[146] or in circumstances rendering the order of death uncertain, "the event contemplated by the disposition should be deemed to have occurred."[147] A provision of this nature would deal satisfactorily with the type of problem that arose in *Underwood* v *Wing*[148] and *Wing* v *Angrave*.[149] The Land Law Working Group also recommended the enactment of a similar provision in relation to cases where the testator has provided for an alternative executor in the event that the first choice has died before or simultaneously with the testator.[150] This has already been enacted in Northern Ireland[151] and, in the author's view, should also be adopted in the Republic of Ireland.

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144 It was concluded earlier in this article (see text to n.101 above) that it would be desirable for reforming legislation to clarify the position in relation to the burden of proof. This could be done by inserting an additional sub-section stating that the civil standard of proof on the balance of probabilities would apply in respect of a finding of uncertainty. *Cf.* n.100 above.

145 *Final Report* (1990), Vol.2, p.960 (Art.239 of the draft Property Order). This proposal differs from the approach of the Land Law Working Party, *Survey of the Land Law of Northern Ireland* (1971) which had envisaged the adoption of a version of s.184 of the Law of Property Act 1925 (with a presumption that the younger had survived the elder). See the *ibid.* at p.163 and cl.267 of the draft Property Bill (*ibid.* at pp.358-359).

146 The Land Law Working Group's wording (*Final Report*, Vol.2, p.960) fails to mention this possibility, referring only to the parties dying "in circumstances rendering it uncertain which of them survived the other or others". This is unfortunate since it ignores the lessons of *Hickman* v *Peacey* (see text to and following n.138 above). The *Survey of the Land Law of Northern Ireland* (1971), p.163 had sensibly included a reference to simultaneous death "to settle a doubt". See also Land Law Working Group, *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), p.127. The omission of a reference to "simultaneous death" also weakens Art.239(3) of the Land Law Working Group's proposals *Final Report* (1990), p.960 (in relation to joint tenancies and gifts limited to the survivor of two or more persons).

147 *Final Report*, p.187. The wording of the proposed provision is contained in Art.239(2) of the draft Property Order, p.960. For completeness, it might be advisable to phrase the provision so that it would also apply where the disposition is expressed to take effect in the event of uncertainty as to which person died first. See the wording of the Survivorship and Presumption of Death Act (Revised Statutes of British Columbia 1996, c.444), s.2(3).

148 (1855) 4 De G.M. & G. 633.

149 (1860) 8 H.L.C. 183.

150 *Final Report*, Vol.1, p.187; Art.30 of the draft Succession Order, Vol.3, p.1595.

151 See Wills and Administration Proceedings (NI) Order 1994, Art.30.

In relation to cases where the parties hold the property on joint tenancy, it is the author's recommendation that one should follow the approach suggested by the Law Reform Commission (already discussed in detail in this article).[152] This would mean providing for a severance of the joint tenancy and a distribution of an equal share in the ownership of the property to the estates of each of the deceased joint tenants. This is also the approach advocated by the American Uniform Simultaneous Deaths Act.[153] In its Final Report, the Land Law Working Group preferred an English-style presumption that the younger person survived the elder. It is submitted that the reasons advanced by the Land Law Working Group are not sufficiently convincing to justify this further exception to its proposed general rule that the parties are deemed to have died simultaneously. The Land Law Working Group argued that "[i]n the case of joint interests of this kind, we think the parties can reasonably be taken to have anticipated that the elder will predecease the younger".[154] However, this is not persuasive. The most one can assume is that a person who has set up a joint tenancy expects that the right of survivorship will operate (unless the parties have severed the joint tenancy in the meantime). If the parties are close in age, it is unlikely that the settlor will have assumed that the slightly younger person will necessarily survive the elder.[155] It is also possible that the settlor will have been aware that the younger person was in poor health and was unlikely to survive the older but healthier joint tenant. Speculation as to the likely intentions of the settlor, based crudely on age alone, carries little more weight than the general argument in favour of the English-style presumption that "in the course of nature" the younger will survive the elder. In its 1983 Discussion Document,[156] the Land Law Working Group mentioned a second justification for the recommendation ultimately contained in its Final Report. This was that in relation to land a presumption of simultaneous death could have the effect of increasing the number of co-owners and "[t]his is undesirable because it would serve to complicate titles".[157] Given the comparative rarity of *commorientes* cases, this consideration is of little significance. Overall, it is preferable to avoid the arbitrariness involved in a rule favouring the younger over the elder. A rule of sharing the property between the successors of the deceased joint tenants on the basis that a severance took place at the time of death reflects the reality that no joint tenant can be proven to have survived and provides a solution which can be defended in principle. It is also arguable that it is calculated to minimise the possibility of rancour and dispute between the respective successors of the parties (thus addressing a concern expressed by Kearns J. in *Re Kennedy*).[158]

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[152] See text following n.132 above.
[153] s.4. See n.143 above.
[154] *Final Report* (1990), Vol.1, p.187.
[155] *cf.* Institute of Law Research and Reform, Alberta *Survivorship* Report No.47 (1986), p.20 (pointing out that, even where a woman is older than a man, the actuarial probabilities may be that she will be the survivor).
[156] *Discussion Document No.4 (Conveyancing and Miscellaneous Matters).*
[157] *ibid.*, at p.131.
[158] [2000] 2 I.R. 571 at 576. See text to and following n.57 above and also n.99 above.

The Land Law Working Group also recommended[159] applying the English-style presumption in relation to cases where "property has been disposed of in such a way that a person would be entitled to it if he survived another or others".[160] An example would be a conveyance to "X and Y for their joint lives, remainder to the survivor in fee simple". In this instance, a presumption of simultaneous death would mean that neither X nor Y could claim to be the survivor and the remainder interest would revert to the original grantor or fall back into the estate of that person. It has already been argued that the arbitrary English-style presumption should not be applied to any other aspect of the law of *commorientes* and it would be curious to apply it only to deal with this minor problem. A better solution to the problem would be to divide the relevant property equally between the estates of the deceased persons.[161] In the example given above, the estates of X and Y would share the remainder interest equally (resulting in a tenancy in common over the property).

A final point of importance relates to the question of deaths which occur within a short period of time. In such cases, the parties are not really *commorientes* since it is possible to prove the order of death. However, legislation in some jurisdictions provides that, where the parties have died within a short period of time, neither is to be regarded as having survived the other.[162] This approach has been said to represent a 'third generation' of legislative reform.[163] The influential US Uniform Simultaneous Death Act[164] sets the relevant period at 120 hours but somewhat longer periods have been favoured elsewhere, *e.g.* 30 days in Queensland.[165] One argument in favour of extending the notion of simultaneous death in this manner is that the deceased would have preferred to benefit his own successors rather than those of the beneficiary if the beneficiary were to die shortly after the

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159 *Final Report* (1990), Vol.1, p.187; Vol.2, p.960.

160 This is the wording used in Art.239(3)(b) of the draft Property Order, *Final Report*, Vol.2, p.960.

161 The Land Law Working Group originally appeared to be leaning towards this conclusion: see *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), p.130 where it was suggested that it would probably accord with the settlor's intentions. This solution was favoured in the original version of the US Uniform Simultaneous Death Act, s.2 and carried forward to the 1991 version in the differently worded s.4 (see <*www.law.upenn.edu/bll/ulc/usda/1991 FinalAct.htm*>). See also Law Reform Commission of British Columbia, *Report on Presumptions of Survivorship* LRC-56 (October 1982), p.33, recommending the approach in question.

162 See the discussion in Land Law Working Group, *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), pp.127-128.

163 Institute of Law Research and Reform, Alberta n.155 above, p.7 *et seq.* 'First generation' reforms, typified by the English Law of Property Act 1925, s.184 create a statutory presumption that, in cases of uncertainty, the younger survived the elder. 'Second generation' reforms, such as the Republic of Ireland's Succession Act 1965, s.5, deal with uncertainty by means of a presumption of simultaneous death (or take the equivalent approach of regarding none of the *commorientes* as having survived the others).

164 See n.143 above.

165 Succession Act 1981, s.32(1) (wills) and s.35(2) (intestate succession).

testator.[166] There would also be the advantage of "reducing transactional costs associated with succession of property because the decedent's property is probated once rather than two or three times."[167] A final advantage, as pointed out by the drafters of the US Uniform Simultaneous Death Act 1991, is the avoidance of "unfortunate litigation in which the representative of one of the individuals attempts, through the use of gruesome medical evidence, to prove that the one he or she represents survived the other by an instant or two".[168] This chimes generally with the concern of Kearns J. in *Re Kennedy*[169] to reduce the likelihood of divisive litigation in the wake of a family tragedy. In the intestacy context, Northern Ireland already has legislation giving limited effect to the approach under discussion. Under Article 3 of the Succession (NI) Order 1996,[170] for the purposes of intestate distribution, one spouse is deemed not to have survived the other if he or she dies within 28 days of the first spouse.[171] Consideration should be given in the Republic of Ireland to adopting this kind of provision and, in both Irish jurisdictions, to the possibility of adopting a general rule which would regard those dying within a defined period of each other as having died simultaneously. No definitive view is offered here on the reform option considered in this paragraph, which does not strictly speaking involve *commorientes*, but it has clear attractions.

Conclusion

This article has examined a number of issues relating to the law governing the property of *commorientes*. An attempt has been made to clarify the existing law in both Northern Ireland and the Republic of Ireland, in particular by a close examination of two cases, *Bradshaw* v *Toulmin*[172] and *Re Kennedy*,[173] and by a consideration of the impact of modern rules on devolution to personal representatives. In Northern Ireland, the position is essentially the same as it was in the mid-nineteenth century when the classic cases of *Underwood* v *Wing*[174] and *Wing* v *Angrave*[175] were decided. In the Republic of Ireland, there has been limited reform in the shape of section 5 of the Succession Act 1964. However, this provision does little more than codify the common law position, although it is of some value in a limited set

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166 Gifts in professionally drafted wills, particularly gifts between husband and wife, are commonly subject to a clause stipulating that the gift will not take effect unless the beneficiary survives the testator by more than 28 days (or some similar period).

167 Institute of Law Research and Reform, Alberta n.155 above, p.22.

168 See Prefatory Note to the US Uniform Simultaneous Death Act 1991 (available at <*www.law.upenn.edu/bll/ulc/usda/1991FinalAct.htm*>).

169 [2000] 2 I.R. 571 at 576. See text to and following n.57 above and also n.99 above.

170 Which inserted a new s.6A into the Administration of Estates (Northern Ireland) Act 1955.

171 See the similar provision in the English Law Reform (Succession) Act 1995, s.1(1). *Cf.* Law Commission *Family Law: Distribution on Intestacy* Law Com No.187 (1989) p.14.

172 (1784) Dick. 633.

173 [2000] 2 I.R. 571.

174 (1855) 4 De G.M. & G. 633.

175 (1860) 8 H.L.C. 183.

of situations. There is clearly a need for reform in both jurisdictions. Useful proposals have been made by the Northern Ireland Land Law Working Group in 1990 and by the Law Reform Commission in 2003. Drawing on these proposals and other sources, this article has set out another possible reform scheme. It remains to be seen whether, in either jurisdiction, a legislative solution will be forthcoming to the intriguing legal problems which arise in *commorientes* situations.