theory were upheld the court would be in the curious position of having abolished an estate which it considered objectionable and of having replaced it with an estate generally regarded as objectionable. For, if A and B were joint tenants the conveyance by A to C would have converted the joint tenancy into a tenancy in common, and C would be the owner of an undivided one half interest. If A and B were tenants in common with right of survivorship annexed, the deed from A to C would not destroy B's right of survivorship whether this right is in the form of a contingent remainder or of an executory interest.

Whether or not the grantees in a survivorship deed are husband and wife, the important question is whether a court will impose upon the grantees an indestructible right of survivorship in the form of a remainder or executory interest when the deed does not clearly indicate an attempt to do so. Such a restraint on alienation seems unjustifiable in view of the fact that the desired result—the right of survivorship—could be attained without this restraint, if the court would clarify the law by stating that joint tenancies or tenancies by the entirety are created when the intent to create them is properly manifested.

G. Vernon Owen, Jr.

Simultaneous Deaths of Joint Owners

Upon death of one owner, property held jointly by two persons with the right of survivorship passes entirely to the survivor. But what happens when there is no survivor—where no evidence exists to show that the joint holders died otherwise than simultaneously? This contingency gives rise to serious problems. Application of arbitrary rules of law may be necessary to reach a solution.

Presumptions

When two or more persons died in a common disaster and there was no evidence as to the order of death, the civil law employed certain presumptions...
tions of survivorship based upon age and sex. The common law rule in most states is that there is no presumption that either party survived, or that all died simultaneously. Some foreign jurisdictions follow a third rule that in the case of death in a common disaster, there is a presumption that the deaths were simultaneous. Apparently none of the states in the United States has adopted this view. In 1925 England abrogated the common law principle by enacting a statute which creates a presumption of survivorship based upon the seniority of the deceased persons. Under this statute, the younger is presumed to have survived the elder. All other factors are disregarded. Evidence of actual survivorship, however, is not excluded.

In cases where rights depend on survivorship, the result of the common law rule that no presumption whatever exists is, in legal effect, the same as a presumption in favor of simultaneous death. In either instance, the claim—


* Moslem India, Germany, Italy. See 13 FORD. L. REV. 17, 19, notes 18-21 (1944).

* In Ohio, the rule that there was to be no presumption whatever in the case of death in a common disaster, Ware v. Kinch, 35 Ohio C. Dec. 547, (1919), was apparently changed by a statement of the court in In re Francis, 15 Ohio Supp. 20, 21 [60 N.E. Reporter 2d] (P.C. 1940). "It being impossible to determine that either Helen V. Francis or Charles Francis survived the other, the presumption must be that their deaths were simultaneous and that neither one survived the other." OHIO GEN. CODE § 10503-18 now governs. The section does not establish a presumption as to the order of death. It merely defines the right to property of those who die within the time and under the circumstances therein described. Ostrander v. Preece, 129 Ohio St. 625, 196 N.E. 670, appeal dismissed, 296 U.S. 543, 56 Sup. Ct. 151 (1935).


* The Act provides that where the order of death is shown to be uncertain "... such deaths shall subject to any order of the court ... be presumed to have occurred in order of seniority ..." (italics supplied). It would seem that the italicized words serve to provide flexibility to the Act by vesting an amount of discretion in the court. But in the case of In re Lindop, 1942] Ch. 377, the statute was not so construed. See 86 SOL. J. 263 (1942). The effect of the decision—that the court could act only when enough evidence existed to displace the statutory presumption—deprives the statute of elasticity which might prove helpful. This might lead to ridiculous consequences. Thus, the court would have no discretion where a week-old baby and a man in his physical prime are drowned in a shipwreck; the baby...
ant asserting title through survivorship of one of the parties has the burden of proving survivorship. If he is unable to do this his claim fails.

The lack of any presumption of survivorship works in devolution by descent in the following manner: where it is impossible to determine the order of death of two persons, one of whom would normally inherit from the other, the property of each descends as though the other had never existed. This is based on the theory that the property of one person cannot vest in another when vesting is dependent on survivorship, and survivorship cannot be proved. The same result would obtain if the property were to pass by will.

would be presumed to have survived. Neither does the statute solve the problem of simultaneous death of twins where it cannot be proved which is the elder. In such a case it would seem the court would have to hold that they died simultaneously.


In re Evans' Estate, 228 Iowa 908, 291 N.W. 460 (1940); McKinney v. Depoy, 213 Ind. 361, 12 N.E. 2d 250 (1938); Carpenter v. Severin, 201 Iowa 969, 204 N.W. 448 (1925).


In re Evans' Estate, 228 Iowa 908, 291 N.W. 460 (1940); In re Sweeney's Estate, 78 Pa. Super. Ct. 417 (1922) (property of a co-deceased father never vested in his deceased daughter, nor hers in him); McComas v. Wiley, 134 Md. 572, 108 Atl. 196 (1919) (parties involved were husband and wife).

Carpenter v. Severin, 201 Iowa 969, 204 N.W.448 (1925) (held, since there was no presumption of survivorship in a common disaster, the burden of proof was on the party alleging survivorship). In the Carpenter case, the court refused to allow the heirs of the devisee to take under a statute which provided for distribution of the property to the devisee's heirs when a devisee lapsed, saying the statute was inapplicable in simultaneous death cases. But cf. Harrison v. Hillegas, 1 Ohio Supp. 160 [30 N.E. Reporter 2d] (P.C. 1939), and Matter of Macklin, 177 Misc. 432, 30 N.Y.S.2d 706 (Surr. 1941), where under statutes similar to the Iowa statute, the children of the devisee were allowed to take the devise. The cases can be distinguished by the fact that the Ohio and New York statutes made provisions for lapsed legacies only when the devisee was to a relative of the testator, and more clearly favored the blood heirs of the devisee. Ohio Gen. Code § 10504-73; N.Y. Decedent Estate Law § 29.

Where the testator has the foresight to provide expressly in his will that in the event he and his devisee die simultaneously the property is to be distributed in a certain manner, his intent will be followed, and his property distributed accordingly. Matter of Cashin, 182 Misc. 1, 46 N.Y.S.2d 955 (Surr. 1944) (property to go to others); Matter of Fowles, 222 N.Y. 222, 118 N.E. 611 (1918) (property to pass as though testator predeceased devisee, thus preventing a lapse). Glover v. Reynolds, 135 N.J. Eq. 113, 37 A.2d 90 (1944) (will making provision for simul-
Section 10503-18 of the Ohio General Code provides:

When there is no evidence of the order in which the death of two or more persons occurred, no one of such persons shall be presumed to have died first, and the estate of each shall pass and descend as though he had survived the other or others. When the surviving spouse or other heir at law or legatee dies within three days after the date of the decedent, or within thirty days... if such death resulted from a common accident, the estate of such first decedent shall pass and descend as though he had survived such heir at law or legatee...

The purpose and effect of this statute is to give the property of each decedent to his own heirs or legatees—the same basic result reached by the common law rule.

It will be noted that Section 10503-18 extends its provisions to instances where survivorship of one of the parties is actually known. In this respect, it changes the common law. Thus, if a husband and wife die as many as thirty days apart as the result of a common accident, or three days apart from independent causes, they do not inherit any property from each other. The property of each passes to his or her own estate as though the other did not exist. This provision is unique among the states. In Ostrander v. Preece, the Ohio Supreme Court, while intimating that such a provision would be unconstitutional as a presumption, held it valid as a statute governing descent and distribution. The statute wisely recognizes that since the right to dispose of property is an important element in the ownership thereof, any interval of time which is so brief as to preclude the exercise of this privilege should be excluded in determining survivorship. The statute also prevents double inheritance and therefore double taxation.

The second decedent is prevented from inheriting any property of the first decedent. In re Estate of Metzger, 140 Ohio St. 50, 42 N.E.2d 443 (1942). This was not the result reached before the enactment of Section 10503-18. See Evans v. Halterman, 31 Ohio App. 175, 165 N.E. 869 (1928), where husband and wife were murdered at about the same time. Evidence existed to show that the wife survived the husband for a few moments, and the property was distributed accordingly.

See Matter of Cashin, 182 Misc. 1, 46 N.Y.S.2d 955 (Surr. 1944), in which two sisters in similar wills provided for occurrence of death under conditions very similar to those in Ohio General Code Section 10503-18. One sister died five and one-half hours later than the other. Held; the “simultaneous death” provisions of the wills governed in the distribution of the property of both. For a compilation of similar cases, see Note, 173 A.L.R. 1254 (1948).

Section 1 of the Uniform Simultaneous Death Act,²² adopted by thirty-five states²² and two territories,²³ provides for substantially the same scheme of distribution²⁴ as the Ohio act. It applies solely, however, in situations where there is no evidence as to the order of death.²⁵ Neither Section 10503-18 of the Ohio General Code nor Section 1 of the Uniform Simultaneous Death Act apply in cases of jointly-owned property where the instrument creating the joint ownership creates therewith the right of survivorship. The rights of the survivor arise solely out of the original instrument which vest those rights in him; they are not affected by any law dealing with the inheritance or descent of property.²⁶ The solution of the problem created by the simultaneous death of the joint owners must be found elsewhere.

²² For a favorable discussion of the Ohio statute, see Legis., 50 HARV. L. REV. 344, 348-349 (1936).
²⁵ The only states which have not yet adopted it are Arizona, Georgia, Louisiana, Mississippi, Montana, New Mexico, Ohio, Oklahoma, Texas, Utah, and West Virginia.
²⁶ Alaska and Hawaii. The District of Columbia has not adopted it, nor have any of the United States possessions.

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

9 U.L.A. 659 (1942). Several states have introduced variations in this section of the Uniform Act. Nevada adds an additional section relating to the distribution of community property where husband and wife die simultaneously, which is similar to the provisions of the above section. NEV. COMP. LAWS § 9885.05 (1949 Supp.). After the words "... and there is no sufficient evidence that the persons have died otherwise than simultaneously..." Missouri adds: "as determined by a court of competent jurisdiction." MO. R.S.A. § 317.1 (1950 Supp.). The theory of the Act is that as to the property of each person he is presumed to be the survivor. Commissioners' prefatory note to the UNIFORM SIMULTANEOUS DEATH ACT, 9 U.L.A. 657-658 (1942).

The Uniform Simultaneous Death Act was not intended to change the degree of proof necessary to maintain survivorship. Commissioners' prefatory note to the UNIFORM SIMULTANEOUS DEATH ACT, 9 U.L.A. 657-658 (1942). For the amount of evidence needed to prove survivorship in general, see John E. Tracy and John J. Adams, EVIDENCE OF SURVIVORSHIP IN COMMON DISASTER CASES, 38 MICH. L. REV. 801 (1940).

²⁷ In re Kessler, 85 Ohio App. 240, 85 N.E.2d 609 (1949) (interest of wife in joint and survivorship bank account passed to the surviving husband immediately upon her death, by virtue of the contract of deposit. Section 10503-18 of the Ohio General Code had no application); Staunton v. P. L. & A. Insurance Co., 69 Ohio App. 27, 42 N.E. 2d 687 (1941) (rights between insured and beneficiaries arise solely out of insurance contracts; inheritance statutes inapplicable). So in the case of survivorship deeds any rights that the parties have arise out of the provisions of the deed and are in no way affected by General Code section 10503-18. Ross v. Bow-
DISTRIBUTION

1. Property held in joint tenancy or tenancy by the entirety

Where no evidence exists to show that one of the tenants in a joint tenancy or tenancy by the entirety survived the other, and no presumption as to survivorship is employed, how is the property to be distributed? In Bradshaw v. Toulmin, Lord Thurlow expressed the opinion that if joint tenants perish by one blow, the jointly held estate will remain in their respective heirs as joint tenants. Prior to the introduction of the Uniform Simultaneous Death Act, the view in the United States was that where joint tenants or tenants by the entirety perish in a common disaster, the property so held passes as though the owners were tenants in common, an equal portion passing to the heirs of each. Two exceptions to this rule should be noted: a) When one of the tenants has contributed more toward the tenancy than the other, there is authority for the view that the heirs of such tenant should succeed to the proportion which that tenant has contributed.

b) Where one of the tenants murders the other, some jurisdictions deprive


Under the wording of such a section, passing the property of each as though he had survived the other, the heirs of both owners would be entitled to the entire property. This is an impossibility. One parcel of land cannot pass exclusively to two sets of claimants. It is inconsistent to say that property designated to pass entirely to the one owner surviving, shall pass as though both survived.

27 If such a presumption were employed, the representatives of the surviving tenant would be entitled to the entire amount of the property.

2 Dick. 635, 21 Eng. Rep. 417 (1784). The oldest case involving simultaneous death of joint tenants was Broughton v. Randall, Cro. Eliz. 502, 78 Eng. Rep. 752 (1596) [Noy 64, 74 Eng. Rep. 1032 (1596)]. Although the two reports of the case differ as to which of the joint tenants—father or son—lived longer, both agree on the determining fact in the case: that one victim moved his feet or shook his legs after the other was dead.

The leading American case is McGhee v. Henry, 144 Tenn. 548, 234 S.W. 509 (1921). See also, Vaughan v. Borland, 234 Ala. 414, 175 So. 367 (1937) (personal property). Although a tenancy by the entirety was involved in the McGhee case, the same rule was adopted in respect to joint tenancies in Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y.S. 176 (1935), which cited the McGhee case as the authority on the subject. See Note, 18 A.L.R. 103 (1921). Note, 18 NOTRE DAME LAW. 138 (1942).

28 This rule was adopted in In re Strong’s Will, 171 Misc. 445, 12 N.Y.S.2d 544 (Surr. 1939), noted in 25 CORNELL L. Q. 316 (1940), 53 HARV. L. REV. 338 (1939), which involved the simultaneous deaths of husband and wife, tenants by the entirety, and in which it was held that since the tenancy had been created wholly out of the husband’s means, the property passed as though it had been owned by him alone before the simultaneous death.

Prior to the 1925 Law of Property Act, notes 8, 9, supra, it had appeared to be the English rule that although the joint owners held the legal title in equal shares, there was a resulting trust to the heirs of each in proportion to his contribution. Lake v. Gibson, 1 Eq. Cas. Abr. 291, 21 Eng. Rep. 1052 (1729); Rigdon v. Vallier, 3 Ark. 731, 26 Eng. Rep. 1219 (1751). Today, the younger would be presumed
the murderer or his heirs of all the property, despite the fact that the murderer is the survivor. Some courts, however, recognize that title passes to the murderer, but enforce a trust on the property in favor of the victim's heirs. In respect to tenancies by the entirety at least, some jurisdictions allow the murderer to keep the property, on the ground that he was already possessed of a vested interest in the entirety of the property before the murder, and that to deprive him of the property would be contrary to prohibitions against forfeiture of estate.

to have survived, and the entire property would be distributed to his heirs. An equitable contribution, however, might result where the deceased joint owners were of exactly the same age—a highly remote possibility.

31 Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y.S. 176 (1935) (presumption employed that murderer predeceased victim, although murderer committed suicide in another room, and there existed no proof as to survivorship). Matter of Sparks, 172 Misc. 642, 15 N.Y.S. 2d 926 (Surr. 1939) (plaintiff, in prison ten years for murder of his wife, presumed not to have survived her).

For disposition of property when a joint tenant or tenant by the entirety murders the other tenant, see Notes, 82 U. of PA. L. REV. 183 (1933), 44 HARV. L. REV. 125 (1930), 51 A.L.R. 1106 (1927).

The problems arising when an heir murders his intestate are discussed in Notes, 51 A.L.R. 1096 (1927), 156 A.L.R. 623 (1945). As to the right of a murderer to take as beneficiary under the will of his victim, see Notes, 51 A.L.R. 1113 (1927), 1 OHIO ST. L. J. 131, 135 (1935).


33 Wenker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939); Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S.W. 108 (1906). The Wenker case, following the reasoning used and the result reached in the Beddingfield case, based its decision on the peculiar nature of a tenancy by the entirety. Due to the common law fictional unity of husband and wife, there are no moieties in such an estate, and each owner holds the entirety by virtue of the original conveyance creating the tenancy. Statutes providing that a murderer shall not inherit any property from his victim are inapplicable since the murderer inherited nothing from the spouse's estate by his or her death, and the statutes do not operate to deprive persons of property vested in them before the murder. Ibid. Cf. Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935), noted in 1 OHIO ST. L. J. 131 (1935), 4 FORD. L. REV. 510 (1935) (property right to entirety of joint and survivorship bank account vested in murderer by contract of deposit; nothing new acquired by murder since prior to victim's death, murderer had right to withdraw entire funds had he so desired). In a recent case, Welsh v. James, 95 N.E.2d 872 (Ill. 1950), property held in joint tenancy was allowed to pass entirely to the surviving tenant, who allegedly murdered the other tenant. The court refused to impose a constructive trust in favor of the victim's heirs. To do so would unconstitutionally deprive him of property vested in him "... by the instrument creating the joint tenancy long before [the victim's] death." Id., at 875.

Section 3 of the Uniform Simultaneous Death Act provides that when there is no evidence of survivorship, property held in joint tenancy or tenancy by the entirety shall be distributed "...one-half as if one [tenant] had survived and one-half as if the other had survived." If there are more than two such tenants, the property is to be distributed equally in proportion to the number of tenants. This provision represents a codification of the prevailing common law view. Although the clear language of the Act would seem to rule out any disposition of such property according to the proportions of the contribution of each tenant, Section 3 is silent as to the situations where one tenant murders the other and survivorship cannot be proved. Thus, a court is not precluded from refusing to distribute the property to the heirs of the murderer on the basis of public policy.

Property held in joint tenancy or in tenancy by the entirety passes as though the joint owners were tenants in common, regardless of whether the particular jurisdiction has adopted the Uniform Simultaneous Death Act. But in the case of property held in concurrent ownership where no joint tenancy or tenancy by the entirety is created, the solution is not so plain. It is necessary, therefore, to examine at least two remaining types of survivorship instruments, and the dispositions to be made thereunder in the event of simultaneous death of the co-owners: instruments which create in the joint owners a tenancy in common of the fee subject to executory limitations; and instruments creating joint life estates with cross contingent remainders.

2. Tenancy in common in fee subject to executory limitations

The general rule in the United States is that if an executory limitation fails to take effect, the preceding estate will continue in the first taker or takers, according to his or their original limitation, unless a contrary inten-

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26 *Ibid.* California omits "or tenants by the entirety" from the section, DEERING'S PROBE. CODE § 296.4 (1949), and adds a section providing that in the case of community property, one-half is to be distributed as if the husband had survived and one-half as if the wife had survived. DEERING'S PROBE. CODE § 296.4 (1949). Connecticut, Nebraska, and Washington also omit reference to tenants by the entirety. CONN. STAT. REV. 1949 § 7070; NEB. REV. STAT. § 30-123 (1948); WASH. L. 1943, c. 113, § 3. Nevada retains the "tenancy by the entirety" provision of the Uniform Act, NEV. COMP. LAWS § 9885.03 (1949 Supp.), and adds an additional section dealing with community property. NEV. COMP. LAWS § 9889.05 (1949 Supp.). Missouri requires that a "court of competent jurisdiction" determine that the parties did not die otherwise than simultaneously. MO. R. S. A. § 317.3 1950 Supp.).
27 See note 29, supra.
28 Thus even New York has abandoned the contribution theory by the enactment of N. Y. DECEDECNT ESTATE LAw § 89. The equitability of the Uniform Act's provisions has been questioned by some authors. See Conway and Bertsche, The New York Simultaneous Death Law, 13 FORD. L. REV. 17, at 28 (1944).

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tion on the part of the grantor or testator appears. If the preceding estate was one in fee simple, subject only to the executory limitation, failure of the limitation makes the preceding estate absolute. Thus where A and B have a tenancy in common in fee, subject to the executory limitation that the fee is to pass to the survivor upon the death of either, upon destruction of that limitation — by reason of the simultaneous death of A and B — the interest of both A and B should become absolute in their heirs, passing as though they were tenants in common of the fee subject to no executory limitations.

3. Joint life estates with contingent remainders

Where a life estate is followed by a contingent remainder, a reversion remains in the transferor. If the contingency occurs and the remainder vests, the fee passes to the remainderman, and the reversion is destroyed. Upon failure of the contingency the owner of the reversion is entitled to possession. If survivorship instruments create joint life estates with contingent remainders in the life tenants, the above principles should

For examples of the language needed to create such interests, see Note, 3 WESTERN RESERVE L. REV. 60 (1951).

See Farnam v. Farnam, 83 Conn. 369, 77 Atl. 70 (1910); Saxton v. Webber, 83 Wis. 617, 55 N.W. 905 (1892). 2 TIFFANY, LAW OF REAL PROPERTY § 386, p. 147 (3d ed. 1939). 3 SIMES, FUTURE INTERESTS §§ 770-771 (1936). RESTATEMENT, PROPERTY §§ 228, 229 (1936). This rule is also followed in English cases where the executory limitation fails under the rule against perpetuities. Jackson v. Noble, 2 Keen. 590, 48 Eng. Rep. 755 (1838). But if the executory limitation fails for other reasons, the English rule is that the preceding estate will be divested unless there is some evidence of the conveyor's intent to the contrary. Doe d. Bloomfield v. Eyre, 5 C. B. 713, 136 Eng. Rep. 1058 (1848). 3 SIMES, FUTURE INTERESTS §§ 769 (1936).

This result is in accord with the American rule. See note 40, supra. A and B's tenancies in common were limited only by the condition that if either one survived the other, he was to take over his interest. Since neither survived, the limitation was destroyed by the simultaneous death of A and B. If the grantor or testator were to manifest his intent that the property was to vest elsewhere in the event the executory limitation were to fail, his intention would be followed. See note 65, infra.

Fidelity-Philadelphia Trust Co. v. Harloff, 133 N.J. Eq. 44, 30 A.2d 57 (1943); Pinckney v. Weaver, 216 Ill. 185, 74 N.E. 714 (1905); Gilpin v. Williams, 25 Ohio St. 283 (1874). 2 TIFFANY, LAW OF REAL PROPERTY § 311a (3d ed. 1939). 2 BL. COMM. *175.

It will be assumed, for the purposes of the present note, that the transferor has not transferred this interest.

3 SIMES, FUTURE INTERESTS §§ 774 (1936). The reversion in such case arises by operation of law. It is simply that portion of the estate remaining undisposable of. Id. at 68. 2 TIFFANY, LAW OF REAL PROPERTY § 311a (3d ed. 1939). 2 BL. COMM. *175.

apply. Failure of the contingencies by virtue of simultaneous death should result in reversion of full title to the transferor. 46 The result might not be particularly inequitable in the case where the land was a gift, as in the case of a gratuitous conveyance, or a devise to the co-holders. However, the same cannot be said for the ordinary commercial transaction, where consideration is given for the property by one or more of the joint transferees. But what is to be done with the fee, and upon what basis? a. The land may descend as though the life tenants were tenants in common of the fee, an equal portion to the heirs of each. b. The fee may revert to the transferor or his heirs to hold in trust for the heirs of the deceased life tenants.

a. Although there are as yet no cases on the matter, it is submitted that the former should be the result reached in the states which have adopted the Uniform Simultaneous Death Act. Section 9 of the Act provides that all laws or parts of laws inconsistent with the Uniform Act are repealed. If the Act is applicable, the manner of disposition of property provided thereby supersedes the general rules of property reaching an inconsistent result. 47 The problem is one of construction—i.e., whether the Act is applicable in the case of an instrument creating life interests with cross remainders contingent upon survivorship.

Section 2 of the Uniform Simultaneous Death Act provides:

Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.

The significance of the words "successively" and "successive" is not clear. It is uncertain whether this section is intended to apply in the case of simultaneous death of two or more "beneficiaries" who are designated to take alternatively by reason of survivorship—as is the case with survivorship deed grantees. Several writers 48 maintain that this is the intention. Five states, in their versions of the Act, have specifically added the words "or alternatively" and "or alternate" to Section 2 following the words "successively" and "successive," thereby seemingly bringing the holders of land

46 See note 44, supra. The reversioner is then entitled to immediate possession unless there is an alternate remainder to another. 2 TIFFANY, LAW OF REAL PROPERTY §§ 332, 333 (3d ed. 1939).
47 But this section of the Uniform Act is omitted by Connecticut, Florida, Kansas, Missouri, Nebraska, and North Dakota. Query, would these states employ the method of disposition set forth by the Act, if applicable?
under survivorship instruments within the provisions of the Act.\textsuperscript{49} Even without this modification the same result might be reached by a reasonable construction of Section 2. It might be argued that since the term "beneficiaries" is used in the section, its application is limited to trusts and testamentary devises. But the section makes no distinction between paying and non-paying transferees. For the purposes of the Uniform Act, payment of consideration is immaterial. By virtue of Section 2 and Section 9, the possibility of a reversion of the property is eliminated.

In a jurisdiction where the Uniform Simultaneous Death Act is not in effect, it would be difficult to circumvent the rule that a reversion results in the event of simultaneous death of the life tenants. Authors who have recognized the problem are divided in opinion.\textsuperscript{50} Desirable as it might be, a rule passing the fee equally to the heirs of the life tenants would necessarily be an arbitrary one, based on equitable considerations and the probable intent of the parties, rather than general rules of property law.\textsuperscript{51}

b. A second possibility would permit a reversion to the transferor or his heirs, but require the property to be held in trust for the heirs of the deceased life tenants. This would have the advantage of satisfying both the legal and equitable demands of the situation. It has been suggested that a trust should result in favor of the payor of the consideration, who might be only one of the life tenants.\textsuperscript{52} However, the resulting trust theory may not


\textsuperscript{50} In a Note in 24 Ohio Op. 119 (1942), Charles C. White expresses the attitude that in a so-called survivorship deed the whole title passes to the grantees "without any strings attached thereto ..." and indicates that it is his "hunch" that the court "would take the bull by the horns and divide the property equally among the heirs of the victims of the common accident." Id., at 120. Professor Arthur T. Martin, however, in The Incident of Survivorship in Ohio, 3 Ohio St. L. J. 48, at 64 (1936), insists that in such a situation the remainders are not vested but contingent. The transferor, therefore, would retain a reversionary interest. See Gray, Rule Against Perpetuities § 9 (4th ed. 1942).

If the transfer of the property were supported by consideration the fee would revert to the transferor in the event of simultaneous death of the co-tenants, but only to be held in trust for the payor of the consideration. Olds, Tenancy for Life or in Fee?, 18 Okla. B. J. 60, at 62 (1947).

In one writer's opinion, "... prior to the Uniform Act, if A and B were killed ... [simultaneously] ... it would appear that claimants under neither could succeed to the property, and it would revert to the grantor ..." Note, 13 Mo. L. Rev. 230 (1948).

\textsuperscript{51} See notes 54, 60, infra.

\textsuperscript{52} For this view see Olds, Tenancy for Life or in Fee?, 18 Okla. B. J. 60 (1947). Mr. Olds leads the reader to believe that section 423 of Scott, Trusts (pp. 2205-2206) stands for this proposition. This section, however, deals with resulting trusts
be applicable in the case of simultaneous death of survivorship deed grantees. It would seem that the theory of a constructive trust is a sounder basis for the imposition of a trust. Equity will enforce a trust even where there is none intended in the case of mistake leading to unjust enrichment of one of the parties. This is true even where the acquisition of the property is not wrongful. Such a trust has been imposed where, without the knowledge of either party, a deed covered more land than was intended. The same reasoning should apply where there is a conveyance of a smaller interest than was intended by all the parties, through oversight in failing to provide for the contingency of simultaneous death of the life tenants. The transferor assumes he is parting with full title. He receives full consideration for the property. It would therefore be unconscionable for him or his heirs to retain legal title should it revert to them. To prevent unjust enrichment which would otherwise result, courts of equity should declare the transferor or his heirs trustees of the fee, in favor of the heirs of the deceased transferees.

Even in the cases of a gift of the land, the problem of the intent of the grantor or testator must be considered. There may be cogent moral arguments for allowing the heirs of the deceased life tenants to take the property. It is highly unlikely that at the time of the transfer, the parties believed that any interest whatever remained in the transferor. As far as all were concerned, no conditions were attached to the conveyance or devise. However, in the case of a gratuitous transfer, it is impossible to avoid the fact that the transferor actually did not part with the entire fee, and that no equitable reason exists for him to do so. It might well be held that only in event that the transferor parts with the reversion by providing for the contingency of simultaneous death could the heirs of the deceased co-owners take.

arising from failure of express trusts. No express trusts are involved in most survivorship instrument cases.

6 As a general proposition, when one pays the purchase price for the conveyance of property to another, a trust results in favor of the payor of the consideration. 2 BOGERT, TRUSTS AND TRUSTEES §§ 454-463 (1935). 3 SCOTT, TRUSTS § 440 (1939). See RESTATEMENT, RESTITUTION, §§ 163-164 (1936). But here, the payors of the consideration — the co-grantees — have in fact received the property. The problem is to prevent the transferor from being unjustly enriched by re-acquisition of the land.

64 In re Berry, 147 F. 208 (2d Cir. 1906). 3 BOGERT, TRUSTS AND TRUSTEES § 474 (1935). In a constructive trust, it is not the intent of the parties as manifested by the words used which governs, but the equitable obligations arising from the relations of the parties. Modey's Admin'r. v. Tabor, 208 Ky. 702, 271 S.W. 1064 (1925).

65 3 SCOTT, TRUSTS § 462.2 (1939).


4. Express provision covering simultaneous death—transfers by co-owners

In the event that the parties foresee the possibility of simultaneous death and provide for a different disposition of the property should such contingency occur, the intent as manifested will govern, and the property will be so distributed. Section 6 of the Uniform Simultaneous Death Act contributes toward this flexibility by allowing the parties to make a different disposition of the property in any will, deed, trust, or contract of insurance.

Where the instrument creates joint life estates in A and B, with cross contingent remainders, the transferor has several alternatives to avoid the uncertainty regarding a reversionary interest. He may provide that in the event that there is insufficient evidence to show whether A or B survived, the property shall pass to a third person; b. shall be distributed equally among the heir's and representatives of A and B; or c. shall revert to the transferor.

a. Where the form of the instrument is “... to A and B for life, remainder to the survivor, his or her heirs and assigns, but if there is insufficient evidence to show whether A or B survived, remainder to C, his heirs and assigns ...” C has an alternate contingent remainder, to take effect if the contingent remainders in A and B should fail. The transferor's reversion is a technical one only.

At common law a contingent remainder could be destroyed by forfeiture of the life estate upon which it was based, resulting from a tortious conveyance by the life tenant of a greater interest than he possessed. A

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58 Dickey v. Citizens' State Bank of Fairmont, 98 Ind. App. 58, 180 N.E. 36 (1932) (transferor's power to give includes power to attach any conditions satisfactory to him and not contrary to law).


60 At the time of the transfer, there must be a reversion in the transferor if all the remainders are contingent. A reversionary interest exists where the transferor has failed to dispose of his estate fully. It is the undisposed of residue. 2 BL. COMM. *175. 2 TIFFANY, LAW OF REAL PROPERTY § 311a, p. 4 (3d ed. 1939). As defined in RESTATEMENT, PROPERTY § 154 (1936), a reversionary interest is any future interest left in a transferor or his successor in interest. In the example cited, since C's remainder is contingent, a technical reversion remains in the transferor. But because of the language of the instrument, the transferor will never enjoy the right to possession of the land.

61 2 TIFFANY, LAW OF REAL PROPERTY § 333 (3d ed. 1939). C's interest is what is sometimes referred to as a remainder on a contingency with a triple aspect. Ibid. See, e.g., Sumner v. Westcott, 86 Conn. 217, 84 Atl. 921 (1912).

62 Thus if A and B attempted to convey a fee simple estate by feoffment, fine, or recovery, the life estates of A and B were destroyed. All contingent remainders dependent upon the life estates of A and B, including C's remainder, also were destroyed. The person having the next vested estate (here the reversioner) had a right of entry which could be exercised immediately. 1 SIMMS, FUTURE INTERESTS § 100 (1936). 2 TIFFANY, LAW OF REAL PROPERTY § 328 (3d ed. 1939). It is
statute providing for forfeiture of a life estate in the case of waste\textsuperscript{63} or failure to pay taxes\textsuperscript{64} might have the same effect.\textsuperscript{65} Destruction of the life estate by merger\textsuperscript{66} or disseizoen followed by adverse possession for the statutory period\textsuperscript{67} destroyed the contingent remainders based upon the particular life estate.

Most states, either by statute or by judicial decision have abolished the doctrine of destructibility of contingent remainders.\textsuperscript{68} England has passed a statute making contingent remainders indestructible.\textsuperscript{69}

Section 10512-6 of the Ohio General Code prevents the destruction of contingent remainders by a tortious conveyance effected by the holder of the precedent estate, or "... by a destruction of such precedent estate by disseizoen, forfeiture,\textsuperscript{70} surrender, merger or otherwise ..." In the case of an alternate contingent remainder in C, the remainder would probably be

believed, however, that the destruction of a contingent remainder by a life tenant attempting to convey a fee is no longer possible, since the rule today is that a life tenant can convey no greater interest than he has. Howell v. Howell, 122 Ohio St. 543, 172 N.E. 528 (1930); Clark v. Leavitt, 335 Ill. 184, 166 N.E. 538 (1929). RESTATEMENT, PROPERTY § 124 (1936). 2 TIFFANY, LAW OF REAL PROPERTY § 59 (3d ed. 1939).

\textsuperscript{63} E.g., OHIO GEN. CODE § 10503-23.
\textsuperscript{64} E.g., OHIO GEN. CODE § 5688.
\textsuperscript{65} 1 SIMES, FUTURE INTERESTS § 100 (1936).
\textsuperscript{66} Blackstone wrote: "Whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated; or, in the law phase, it is said to be merged, that is sunk or drowned in the greater." 2 BL. COMM. *177. The doctrine of merger developed into highly technical rules. Among these was the rule that the merger would operate even though a contingent remainder intervened between the two estates concerned, since a contingent remainder was not an estate. A considerable number of decisions have sustained the destruction of contingent remainders by merger. See cases cited in 3 SIMES, FUTURE INTERESTS § 102, p. 173, N. 27 (1936). RESTATEMENT, PROPERTY § 152 (d) (1936). Statutes making contingent remainders indestructible by merger have changed this rule. See notes 68, 69, infra.
\textsuperscript{67} 2 TIFFANY, LAW OF REAL PROPERTY § 328 (3d ed. 1939). See 1 SIMES, FUTURE INTERESTS § 101, p. 172 (1936).

\textsuperscript{68} For statutes and decisions which have abolished the destructibility of contingent remainders rule see 1 SIMES, op. cit. supra, note 74, §§ 111-113. RESTATEMENT, PROPERTY § 240, special note, pp. 721-722 (1936) (lists state statutes making contingent remainders indestructible to January 1, 1936). See Simes, Fifty Years of Future Interests, 50 HARV. L. REV. 749, at 757 (1937).
\textsuperscript{69} (1845) 8 & 9 Vict. c. 106, § 8: "... a contingent remainder existing at any time after the 31st of December, 1844, shall be, and, if created before the passing of this act, shall be deemed to have been capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold in the same manner, in all respects, as if such determination had not happened."
\textsuperscript{70} This eliminates the possibility of destruction of a contingent remainder where the preceding life estate has been forfeited for failure to pay taxes, OHIO GEN. CODE § 5688, or for commission of waste, OHIO GEN. CODE § 10503-23.
looked upon by the parties as an "emergency" contingency, extremely unlikely to go into effect, and if so, solely to prevent any possible reversion of the property. The parties in all probability never intended to limit the power of A and B to convey a perfect title. Yet, the indestructibility of C's remainder defeats that very intent. The only way C's remainder may be destroyed is if the manner of destruction is provided for in the original instrument. This is permitted by the last portion of Ohio General Code Section 10512-6:

... but an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized ...

Thus A and B may convey a fee simple only if there were a power of sale expressly reserved to them in the survivorship instrument under which they held. Until the actual conveyance, however, C's remainder is valid. If A and B die simultaneously, still possessed of their estates, C receives the entire property in fee simple.

b. Where the form of the instrument is "... but in the event of simultaneous death of A and B, remainder to be distributed among the heirs of A and B..." the distribution is equitable, and in accord with the principles previously discussed. The transferor has no right to possession, present or future. So long as A and B hold the property, all is well. But in Ohio, at least, an attempted conveyance of a fee simple by A and B would be ineffectual. In view of the fact that the rule in Shelley's case has been abolished by statute in Ohio, and because of the statutory abolition of the

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71 E.g.: "... A and B together shall have the power to convey a fee simple absolute estate, anything to the contrary in this instrument notwithstanding ..." inserted in the instrument of transfer.

72 ... An expectant estate thus liable to be defeated [by any act provided for by the party creating the estate] shall not, on that ground, be adjudged void in its creation." OHIO GEN. CODE § 10512-6.

73 See note 60, supra.

74 OHIO GEN. CODE § 10504-70:

When lands, tenements or hereditaments are given by deed or will to a person for his life, and after his death to his heirs in fee, the conveyance shall vest an estate for life only in such first taker, and a remainder in fee simple in his heirs ... The rule in Shelley's case is hereby abolished and shall not be given force or effect.

Without going into the historical bases for the rule in Shelley's case, or into the intricacies of the rule, it is sufficient to note here, that the rule would make the remainder to the heirs words of limitation rather than words of purchase; thereby limiting and describing the estate in the ancestor (A and B, in our example), rather than granting any new estate. RESTATEMENT, PROPERTY § 312 (1940). Since the rule applies to contingent remainders as well, RESTATEMENT, PROPERTY § 312 (2) (1940), no remainder in anyone other than A and B would be created. Thus the provisions against destructibility of contingent remainders would be inapplicable, and A and B could together convey a good title to a third person.
destructibility of contingent remainders, the alternate contingent remainder to the heirs of A and B remains separate from the life estates and indestructible. Since A and B have no power of disposal or destruction of this remainder, their transferee takes subject to the remainder. Here too, if the original transferor wishes to allow A and B to freely alienate the whole fee, a power to convey a fee simple must be expressly given to them.

C. If the instrument provides "... but if there is insufficient evidence to show whether A or B survived, the property is to revert to the transferor, O...": In this instance, no constructive trust can be imposed in favor of the heirs of A and B, after title has reverted to the transferor or his heirs. The intent as expressed governs.

In none of the situations discussed above, is there any restriction on alienation. A and B are free to transfer the full extent of the interest they own. They may transfer their interests independently, or jointly to a single transferee. In no case, however, can they transfer a greater interest than they hold. Because of the indestructibility of contingent remainders today, neither A nor B can destroy the other's remainder by a purported conveyance of the fee.

5. Transfers under instruments not providing for simultaneous death

Even where the instrument under which A and B hold creates no alternative remainders or express reversion in the event of failure of their cross contingent remainders, A and B can not convey an absolute title because of the reversionary interest remaining in the original transferor.

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77 Restatement, Property § 124 (1936).
78 This is true whether or not the instrument under which A and B hold provides for a third contingency in the event of their simultaneous death. A's interest is an undivided one half life estate, plus a remainder in fee subject to the condition precedent of his surviving B; B's interest is the same, except that his remainder is subject to the condition precedent of his surviving A.

The estates for life, being vested estates, are freely alienable. 2 Tiffany, Law of Real Property § 59 (3d ed. 1939).


80 It is probable that there have been conveyances of what was assumed to be a full fee simple in such situations. But the event giving rise to the difficult problems — simultaneous death — has either not occurred, or if so, has not been brought to the attention of a court.
reversion, though not express, arises by operation of law. If it be said that A and B take title free of any reversionary interest, the result is arbitrarily reached, based solely upon the presumed intent of the parties. It would seem doubtful that such intent alone would suffice to transfer the complete fee. The problem will be avoided if an express power of sale in favor of the holders of the life estates is reserved in the survivorship instrument. No question would then arise as to their ability to create a fee simple in a third person. It is also possible that some courts will infer such a power, from the very nature of the instrument.

If such a power were not included, and A and B were to die simultaneously after joining in a conveyance to P, it seems clear that P should be able to force a conveyance out of the reversioner, on the basis of a constructive trust—as the heirs of A and B would be able to do, had A and B not transferred their interests. However, if P sought a court order forcing a conveyance out of the reversioner while A and B were still alive, the problem might be regarded as moot, and the remedy refused. It would seem, however, that P should be allowed to quiet his title to the land, even though simultaneous death of A and B may never occur.

CONCLUSION

The Ohio courts have not yet had to consider the problem of disposing of land held under survivorship deeds in the event of simultaneous death of the co-owners. Little precedent exists to serve as a guide. As Ohio stands today, simultaneous death of the co-owners would probably lead to an equal distribution of the land to their heirs or assigns. For the property draftsman, the most satisfactory approach would be to make A and B tenants in common in fee with executory interests—creating no troublesome reversion.

If the conveyance creates in the co-owners joint life estates with contingent remainders, the greatest problem is in circumventing the reversionary interest remaining in the transferor. Although a trust in favor of the heirs of the grantees would most likely be imposed upon the reversioner, a different result might be reached in the case of a gratuitous conveyance or a devise. The most satisfactory course is for the parties to provide for a third contingent remainder to take effect when survivorship of one of the life tenants cannot be shown. To avoid the embarrassment caused the co-

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80 See note 60, supra.

81 If, however, the original transfer to A and B was gratuitous, it is difficult to see how P could have a constructive trust imposed in his favor. If A and B are donees, most courts would not impose a trust upon the property in favor of their heirs. P has no greater rights than his transferors—A and B. The fact that he parted with consideration does not alter his legal position.

82 OHIO GEN. CODE § 10503-18.