

Comparative analysis of *commorientes* – a South African perspective: Part 1

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OPSOMMING

'n Vergelykende analise van *commorientes* – Suid-Afrikaanse perspektief

Die gelyktydige afsterwe van 'n familie, of lede van 'n gesin as gevolg van 'n katastrofiese gebeurtenis, het 'n direkte invloed op die aanwysing van begunstigdes en die beredding van die oorledenes se boedels. Dit blyk dat natuurrampe en ander rampe aan die toeneem is. Die gelyktydige dood van families en verwante kan 'n geskil ontketen oor die verdeling van die boedels (van persone wat gelyktydig gesterf het). Hierdie artikel spreek 'gelyktydige afsterftes' en die uitwerking daarvan op die erfreg oor 'n wye front aan. Die term '*commorientes*' word ontleed en die leerstuk word bespreek soos dit gemanifesteer het in die Romeinse siviele reg en die resepsie daarvan in die Romeins-Hollandse reg. Daarteenoor word die leerstuk in die Engelse gemeenregtelike jurisdiksies bespreek en vergelyk met die Romeins gebaseerde siviele reg wat Europese stelsels beïnvloed het. Die verskillende benaderings om 'gelyktydige sterftes' te bewys, word bespreek. Waar die Anglo-Amerikaanse stelsels die volgorde van sterftes reguleer deur wetgewing (siviele kodes) en gebruik maak van sekere vermoedens in die geval van onsekerheid oor die spesifieke volgorde, volg die Engelse gemeenregtelike jurisdiksies die benadering dat die volgorde van dood 'n feitevraag is wat telkens in die lig van die omstandighede wat gelei het tot die dood, bewys en beantwoord moet word. Die volgorde van dood op 'n oorwig van waarskynlikhede te bewys.

Die historiese aanloop tot hedendaagse benadering en die invloed daarvan op die Suid-Afrikaanse reg word onder die loep geneem. Uit enkele Suid-Afrikaans gerapporteerde hofsake oor die onderwerp, blyk dit dat die 'tradisionele gemenerereg' gevolg word en dat die volgorde van dood 'n feitevraag is. Wetgewing wat in ander jurisdiksies in die loop van die twintigste eeu geïmplementeer is om voorsiening maak vir 'n vermoedens van gelyktydige afsterftes, word toegelig. Daar word aangetoon dat statutêre ontwikkelings in ander gemeenregtelike jurisdiksies hoofsaaklik ten doel het gesamentlike eiendomsreg (*joint tenancies*) te reguleer. Ander ontwikkelings hou verband met klousules wat vir substitusie voorsiening maak (in geval van vooroorledenes) en 'gelyktydige afsterf' klousules wat deur testateurs gebruik word by die verlyding van testamente. Ten slotte word 'n kritiese evaluering van die verskillende stelsels gedoen en aangetoon dat Suid-Afrika nie 'n behoefte het aan hervorming nie en waarskynlik die billikste en regverdigste benadering van 'hy wat beweer moet bewys' volg.

1 Introduction

Simultaneous deaths of spouses or family members are neither rare nor unique.¹ In the current age of globalisation where long distance travel has become commonplace, the chances of common disaster claiming an entire family have increased.² Shared tragedies, where unfortunate victims die instantaneously include car accidents, fires, massacres, plane crashes and explosions.³ Nature also makes for catastrophes such as floods, earthquakes and volcanic eruptions, which have led to the simultaneous demise of thousands of people.⁴ Whenever, two or more related people die in the same accident or common disaster, and the order of deaths is uncertain (i.e. which person died first), the issue of simultaneous death arises in relation to dispositions in their wills or concerning the operation of the rules of intestacy.

People who died in the same accident or catastrophe are called 'commorientes', a term which originates from Latin.⁵ From a law of succession perspective, family members are likely to benefit people who are related to them (their loved ones).⁶ To inherit from a person, the beneficiary must have outlived (survived) the deceased person.⁷ If the order of deaths is unknown or cannot be established, it might have far reaching consequences for the possible testate or intestate beneficiaries.⁸

Problems associated with the sequence of the deaths (of victims) are not novel and have existed from the beginning of humanity.⁹ Ascertaining the sequence of deaths where several people died during

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- 1 Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 4-5 and 547; De Waal and Schoeman-Malan *Law of Succession* (2015) 12; Mee 'Commoirientes, Joint Tenancies and the Law of Succession' 2005 *Northern Ireland Legal Quarterly (NILQ)* 171-199; Schoeman 'Commoirientes in Heroënskou' (*Commoirientes Reconsidered*) 1999 *De Jure* 108 ff; Derrett 'Commoirientes' 1977 *University of Ceylon Review (UCR)* 55 ff (also in *Essays in classical and modern Hindu law* 270 ff).
 - 2 See Tracy and Adams 'Evidence of survivorship in common disaster cases' 1940 *Michigan Law Review (MLR)* 801 for 'common disaster'; Nótári and Papp 'The problem of simultaneous death in the law of inheritance – historical and comparative approaches' 2013 *Fiat Justitia (FJ)* 12-28; Lazarus 'Work of Appellate Courts: Private law: Successions and donations: *Commoirientes*' 1974 *Louisiana Law Review (LLR)* 363-365.
 - 3 Tracy and Adams (*MLR*) 801; Nathan 'Common disasters and common sense in Louisiana' 1966-1967 *Tulane Law Review (TLR)* 30 39-40 fn 19.
 - 4 Tracy and Adams (*MLR*) 801; Nótári and Papp (*FJ*) 12.
 - 5 See 'commorior' in *WordSense.eu Online Dictionary – commorior* (Latin). Alternative forms – 'commorior'. Verb – 'I die with another' (accessed 2016-02-16). See also Phillips and Berger *Encyclopedic Dictionary of Roman Law* (1953) 400.
 - 6 Dollar "'Common Disaster": Confusion' (2014-08) *Sunlife Advisory Notes (SAN)* 1-7.
 - 7 Corbett *et al* 4-5 and 547; De Waal and Schoeman-Malan 12.
 - 8 Tracy and Adams (*MLR*) 801 ff.
 - 9 Rickards explains: 'Throughout human history, there have been many world events that have seen a multitude of deaths and widespread

war or as result of a natural disaster has always been problematic. The chaos that normally in the aftermath of such disaster reigns complicates the issue as one is often left with very little evidence of what precisely happened during the demise of people.¹⁰ The following remarks made during the 1940's by Tracy and Adams evince of the long-standing problems concerning the simultaneous death of related people:¹¹

Almost daily, newspapers recount the details of another auto-mobile accident or airplane crash in which numerous persons are killed – a common disaster. *And determination of survivorship in common disaster cases present some of the most vexing problems that lawyers and judges meet.* Lawyers must search for evidence, frequently hard to obtain, and then must face difficult questions of relevancy, materiality, and probative value, since in almost all cases where any evidence is available it is wholly circumstantial.¹²

Although the *commorientes* doctrine is a universal concept recognised across legal systems,¹³ there are material differences between the approach adopted by on the one hand, the Roman civil law (and later the Roman Dutch law), which regulated the order of deaths through codes (legislation and civil codes),¹⁴ and, on the other hand, the common-law jurisdictions (influenced by English common law) which based their approach to 'simultaneous deaths' on precedents from case law to determine the sequence of death.¹⁵

Present day principles of law of succession on 'simultaneous death' have become a complex and intertwined set of rules,¹⁶ and reflect

destruction'. See Rickards '10 Deadliest World Events in Human History' *Listverse* available from listverse.com/2013/01/03/10-deadliest-world-events-in-human-history/ (accessed 2013-01-03).

- 10 Orji 'Simultaneity of death and survivorship – law of uncertainty and improbability' 2013 *The Conveyancer and Property Lawyer (CPL)* 501 504.
- 11 Tracy and Adams (*MLR*) 801. They refer to the first case *Broughton v Randall* Croke's Reports, during the time of Queen Elizabeth (Co Eliz) 502 (1596) where the principles of survivorship were apparently considered when a double hanging took place. The court found (on the evidence presented) that the son survived his father as his legs kicked (in reflex).
- 12 Own emphasis. See also Roeleveld 'Questions concerning simultaneous deaths' 1970 *Acta Juridica* 31-52 33.
- 13 De Beer *Simultaneous death: Arbitrary fact* (2012 LLM dissertation NWU) 6: 'Due to the uncertain, and at times impractical nature of the term, it is governed by statute in modern law'.
- 14 Using certain presumptions to prove the sequence in case of 'uncertainty'. See Hunter *A Systematic and Historical Exposition of Roman Law in the order of a Code* (1803) (D 34.5.18 pr) 928.
- 15 Here the order of deaths remained a factual question and had to be proved. See Re 'The Roman contribution to the Common Law' 1961 *Fordham L Rev (FLR)* 447 482; Chapman 'The presumption of survivorship' 1914 *University of Pennsylvania Law Review (UPLR)* 585; Yntema 'Roman law and its influence on Western civilization' 1949 *Cornell Law Review (Cor LR)* 77 ff and Gallanis 'Death by Disaster: Anglo-American Presumptions, 1766-2006' in Helmholz & Sellar (eds) *The law of presumptions: Essays in Comparative Legal History* (2009) 189-200.
- 16 This contribution does not deal with the harmonisation of law of succession. See Thomas 'Harmonising the law in a multilingual environment with different legal systems: lessons to be drawn from the

different approaches which, understandably, sometimes result in confusion and anomalies.¹⁷ In this contribution the origin, history and differences of approached to the doctrine as manifested in civil and common law jurisdictions are investigated. The diverse approaches (and developments) in different systems are identified and compared.¹⁸ In addition, the impact of joint tenancies and common calamity clauses are considered in the context of simultaneous deaths.¹⁹ The current state of the 'commorientes' doctrine in South African law is discussed critically and appropriate reform proposed will be considered.²⁰

2 Requirements for Death and Survivorship in the Law of Succession

In all legal systems, two universal requirements have to be met for both testate and intestate succession to become operative.²¹ Firstly, there must be a deceased person²² and, secondly, the beneficiaries of the deceased must be alive at the time of *delatio*.²³ As the estate only falls open (*dies cedit*) and rights vest (*dies venit*) upon the death of a person,²⁴

legal history of South Africa' 2008 *Fundamina* 133-155; Verbeke and Lelue *Harmonisation of the Law of Succession in Europe* (2010) 335 ff and Working group Max Planck Institute for Comparative and International Private Law 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession' 27-05-2010 (version of 26-03-2010) *Rabels Zeitschrift (RZ)* 74 (2010) 27.

- 17 88th Report of the Law Reform Committee of South Australia 'Relating to problems of proof of survivorship as between two or more persons dying at about the same time in one accident' *LRCSA* (1985) 3-39. Especially in mixed-jurisdictions such as South Africa. See Tetley 'Mixed jurisdictions: common law vs civil law (codified and uncoded)' Part I 1999 *Uniform Law Rev (ULR)* 591 599: 'Mixed jurisdictions are legal systems in which the Romano Germanic tradition has become suffused to some degree by Anglo-American law'.
- 18 Garner *A Dictionary of Modern Legal Usage* (1995) 180.
- 19 See Pawlowski and Brown 'Joint tenancies and English commorientes: a question of survivorship or severance?' 2011 *Property Law Review (PLR)* 122-134.
- 20 Verbeke and Lelue 335 ff; Max Planck Working group (RZ) 27.
- 21 See Maasdorp *The Law of Persons* (1947) 130 ff; Corbett *et al* 5; De Waal and Schoeman-Malan 12; Lazarus (*LLR*) 363; Schuster *The principles of German Civil law* (1907) 31; Kimbrough, 'Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection' 1994 *William & Mary L Rev* 269; Van der Burght and Ebben *Erfrecht* (2004) § 18-20; Casey *et al Will Probate and Estates* (2014) 26-27.
- 22 See *Succession of Feist* 274 So 2d 806 [La Ct App (1973)].
- 23 *Ex parte Wessels and Venter: In re Pyke-Nott's Insolvent Estate* 1996 2 SA 677 (O) 681B-C; See Van der Burght and Ebben § 19; Asser-Perrick *Erfrecht en Schenking* (2009) n 28; Boezaart *Law of Persons* (2010) 17; De Waal and Schoeman-Malan 12.
- 24 Corbett *et al* 5; De Waal and Schoeman-Malan 11-12; Lazarus (*LLR*) 363; Schuster 31; Van der Burght and Ebben § 18; Casey *et al* 26-27. Capron and

the division of the estates of several persons that have fallen open more or less at the same time, the interpretation of their wills or the application of the rules of intestate succession impacts on the distribution of their estates.²⁵ The establishment of the exact time of death,²⁶ consequently, becomes crucial – particularly when the devolution of assets depends upon the order of death on the one hand, and the determination of survivorship on the other.²⁷ Once a disaster or tragedy (in the context of the law of succession) has occurred and it has been established that there were several deaths, the sequence of deaths of related people become of the utmost importance for survivors.²⁸ In *Thomas v Anderson* the moment of death was explained as follows:²⁹ ‘Death occurs precisely when life ceases and does not occur until the heart stops beating and respiration ends. Death is not a continuous event and is an event that takes place at a precise time.’ Corbett and others explain it as follows:³⁰

Succession is conditional on survivorship. No person can succeed as an heir or legatee unless he or she survives the deceased person. One who has predeceased or died simultaneously with the deceased person cannot take any benefits from the estate; the will, however, may specifically provide that such person’s estate may benefit.’

Determination of the facts (who died first and who survived) is, however, only the first step of a comprehensive exercise to establish the status of the deceased and also, at the same time, to establish the survival and

Kass ‘A statutory definition of the standards for determining human death: An appraisal and a proposal’ 1972 *University of Pennsylvania Law Review (UPLR)* 87 and 89-90.

- 25 *S v Williams* 1986 4 SA 1188 (A); *Harris Trust & Savings Bank v Jackson* 412 Ill 261; 106 N E 2d 188 (Supreme Court of Illinois 1952) (heirs of person determined as of time of death of that person). See also Tracy and Adams (MLR) 804; Lazarus (LLR) 362; Corbett *et al* 5.
- 26 See Murray ‘Law of Succession (including Administration of Estates)’ 1978 *Annual Survey* 347 364: ‘A further complication is the differing views that have been held as to when death is deemed actually to have occurred. Is it when the heart stops beating, or breathing ceases, or when the nerve centre of the brain ceases to function’. See De Beer 6; Chapman (UPLR) 585; Belkin *Death before dying: History, medicine and brain death* (2014) 100 101; Provence ‘Proof of life: Understanding the Uniform Simultaneous Death Act’ (2014-19-06) *Advanced Estate Issues Probate (AEI)* 101 and Breslauer ‘Foreign presumptions and declarations of death and English Private International Law’ 1947 *Modern Law Review (MLR)* 122 ff.
- 27 See Phillips ‘Time of death: does it matter?’ 2010 *California Law Journal (Cal LR)*; Derrett (UCR) 62 and Chapman (UPLR) 585; De Beer 6; Casey *et al* 26-27.
- 28 See also Capron and Kass (UPLR) 89-90: ‘The right to a portion of the testator’s estate therefore depends upon the beneficiary surviving the deceased. When several people related to one another die together, survivorship will determine the vesting of rights and the lawfulness of claims’.
- 29 1950 215 P 2d 478 (California District Court of Appeals). See also Ryan ‘The Uniform Determination of Death Act: An effective solution to the problem of defining death’ 1982 *Washington and Lee Law Review (WLLR)* 1517-1518; Lazarus (LLR) 363; Schuster 31; Van der Burght and Ebben § 18; Casey *et al* 26-27.
- 30 Corbett *et al* 5 and 574.

standing of potential heirs in terms of the testate or intestate succession.³¹

3 Origin of ‘Simultaneous Deaths’ and ‘Commoventes’ Doctrines

The term ‘*commorientes*’ is universally used across legal systems, to describe people who died simultaneously (in the same disaster or catastrophe).³² The origin of the word lies in the Latin word *commorior* (die together).³³ Kinsella explains ‘*commorientes*’ as the phenomenon of several persons respectively entitled to inherit from one another, who die simultaneously in the same event (such as a shipwreck), without any possibility of ascertaining who died first.³⁴ The Latin word ‘*commorientes*’ (*de commorientibus*) is found in one text of *Ulpianus*, while similar words, such as ‘*simul perierint*’, ‘*simil obissent*’, are mentioned in other texts to refer to people who died due to the same accident.³⁵

‘Simultaneous deaths’ and ‘*commorientes*’ have been used and are still used as synonyms in both civil law and common law jurisdictions. Although the literal interpretation of ‘simultaneous death’ means that people died together (factually at the same time), it is apparent that the term ‘*commorientes*’ is not only used in a literal sense but also to refer to persons who died in the same event or catastrophe (common disaster).³⁶ Chapman explains it as follows:³⁷

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- 31 In *Thomas v Anderson* the court ruled on the issue of who of two persons died first is a question of fact for the determination of the trial court.
 - 32 See Garner 180. Also see <http://legaldictionary.thefreedictionary.com/Simultaneous+death> and <http://dictionary.thelaw.com/commorientes/> (accessed 2015-08-28); Roeleveld 31 ff; Schuster 31; Van der Burght and Ebben § 20; Asser-Perrick n 28.
 - 33 See *WordSense.eu Online Dictionary - commorior* (Latin); Phillips and Berger 400.
 - 34 ‘Common-law terminology and its relationship to Civil law terminology’ http://www.kinsellalaw.com/wp-content/uploads/publications/kinsella_civil-law-dictionary-pba.pdf (accessed 2015-12-23).
 - 35 See De Beer 6. Hamza (*AUV*) 43 ff: ‘In the sources of the Roman right [law] one doesn’t find any general technical term that appears in the fragments treating legal questions been born following the décès in the same event of several people. The expression relative ‘*commorientes*’ to several deceased in the same event is only [found] in only one source (D 24.1.32.14).’ See also Nótári and Papp (*FJ*) 12.
 - 36 See De Beer 6. The definition was recently confirmed in *Mandin Estate v Willey* 160 DLR 4th 36 (1996); *Re Mandin Estate* 1998 Alberta Court of Appeal (ABCA) 165 § 2; See also Contributor ‘Statutory solutions of the problem of survival in a common disaster’ 1936 *Harvard Law Review* (HLR) 344 and n 5 <http://heinonline.org> (accessed 2015-11-13); Tracy and Adams (*MLR*) 802; Nótári and Papp (*FJ*) 14; Mee (*NILQ*) 174; Pauchard ‘How ancient Rome influenced European law’ 19-08-2013 *Legal Roman Eagles* (LRE).
 - 37 (*UPLR*) 585.

The terms ‘common disaster,’ ‘same accident,’ ‘common calamity,’ ‘same catastrophe,’ and similar terms – are used to indicate the event which has ended the lives of two or more persons and made it necessary to determine which if any survived. The terms are broad enough to include anything from death in battle or by murder, to death in flood, fire or shipwreck.

A present-day denotation of the word confirms that it is still used as a broad concept,³⁸ to indicate those who died at the *same time*, as well as being applicable to situations where several persons die in the *same accident* (the phenomenon of people dying in the same (related) circumstances).³⁹ The term is, furthermore, also used to refer to situations where there is *uncertainty* about who survived or who died first, often due to the fact that there is no evidence as to what the sequence of death was.⁴⁰

Although the specific word (*commorientes*) is used only once,⁴¹ it is generally accepted that the origin of the ‘principle of simultaneous death’ lies in Justinian’s *Digest*.⁴² Hohmann refers to the relevant manuscripts in the *Digest*:⁴³

For similar reasons, presumptions establishing a sequence of death for parents and children dying together cannot claim to have a firm probabilistic foundation either. In some cases, the parents are presumed to have died before the children (D.34.5.9[10].1; D.34.5.9[10].4; D.34.5.22[23]), and in others, the reverse is presumed (D.23.4.26; D.34.5.9[10].4; D.34.5.23[24]). The cutoff [sic] point at which the presumption switches is the reaching of

38 Tracy and Adams (*MLR*) 802 explain that ‘common disaster’ as a brought concept.

39 See Anonymous, “Commoorientes”, available at <http://dictionary.thelaw.com/commoorientes/> (accessed 2015-11-13). See also Lazarus (*LLR*) 363. In the ‘Joint Response of the Law Society of England & Wales and the Society of Trust & Estate Practitioners to the European Commission’s Green Paper on Succession and Wills’ (*LCEW* and *STEP*) 1-20 ec.europa.eu/justice/news/consulting_public/successions/.../contribution_ls_en.pdf (accessed 2016-06-01) it is suggested that the use of the established term ‘*commorientes*’ may be more useful than the term ‘simultaneous death’.

40 Kinsella <http://www.kinsellalaw.com>; Mee (*NILQ*) 171; Corbett *et al* 5; Nathan (*TLR*) 39. See also Derrett (*UCR*) 60 explains that ‘*commorientes*’ is also used to refer to the dying persons themselves.

41 Chapman (*UPLR*) 585; Hohmann ‘Presumptions in Roman Legal Argumentation’ (2001-05-17) *OSSA Conference Archive* Paper 61 1-15; See Voet 34 5 3 and 36 1 16 (Gane’s translation 1956) 256-257; Schuster 31; Von Madai ?*Roman law Lehrbuch des Pandecten-Rechts* (1844) 373; Conway and Bertsche ‘The New York Simultaneous Death Law’ 1944 *Fordham L Review (FLR)* 18 n 10; Roeleveld 31-32; Nótári and Papp (*FJ*) 14; Pauchard (*LRE*).

42 Some modern-day scholars do not agree that the word ‘*commorientes*’ stems directly from presumptions in the *Digest* of Justinian. See *D* 24 1 32 14: ‘... licet de commorientibus oratio non senserit’. See Scott *The Digest or Pandects of Justinian* (1932) translation. See Hamza ‘Réflexions sur les présomptions relatives aux comourants (*commorientes*) en Droit romain’ (Reflexions [sic] on the presumptions relating to *commorientes* in Roman law) 1976 *Acta Univ Budapestinensis Sectio Politico Juridica (AUV)* (2008 translation) 43-68 and Nótári and Papp (*FJ*) 12 ff.

43 *OSSA* 2.

puberty, which in Roman law marked the coming of age and was set at twelve for girls and at fourteen for boys.

4 Historical Approaches to ‘*Commorientes*’

In essence, the foremost difference between Roman civil law, as reflected in the *Digest*, and uncodified English common law, lies in the approach to the *proof of simultaneous deaths* (order of death).⁴⁴ Roman law applied presumptions to establish the sequence of death, while English common law required factual proof of the exact order and applied the ‘no presumption rule’.⁴⁵ If there is proof of the order of death, the distribution of the estates will follow that sequence. However, if the order of deaths is ‘uncertain’, the methods of determining survivorship by means of presumptions based on the relative strength of the parties – as opposed to proof of death by evidence – can lead to different results for instituted beneficiaries.⁴⁶ For example: If A and B are heirs of each other and the younger of the two deceased persons, A, is presumed to have survived the older, B, the estate of the presumed first deceased, B, would be channelled through the presumed survivor, A, barring the beneficiaries of the presumed predeceased, B, to inherit from the first deceased.⁴⁷ If there is no presumption, A and B, would be regarded as having died simultaneously and they will not be beneficiaries of one another.

4 1 Roman Law ‘Presumption of Survivorship’

As seen above the Roman law used presumptions, explained in *Justinian’s Digest*, to establish the sequence of deaths.⁴⁸ Characteristic of the Roman manuscripts is that it discloses several tailor-made presumptions to establish the order of death when simultaneous deaths due to a common cause had occurred.⁴⁹ The order of deaths is based on

44 See Tracy and Adams (*MLR*) 801; Gallanis 189-200; Roeleveld 31-33; Corbett *et al* 4-5; Nótári and Papp (*FJ*) 12; Corbett *et al* 4-5 and Mee (*NILQ*) 178.

45 See Hamza (*AUV*) 43; Hunter 928; Benas and O K F ‘Notes of Cases’ 6 1942 *Modern Law Review (MLR)* 88-90; *LRCSA* (1985) 1-39. Nótári and Papp (*FJ*) 12.

46 *HLR* 344 and n 5; Nathan (*TLR*) 39-40 fn 19; Nótári and Papp (*FJ*) 12.

47 Derrett (*UCR*) 56-62. *Re Bate* [1947] 2 All ER 418; *Ross’s Judicial Factor v Martin* [1955] SC (House of Lords) 56; *Adare v Fairplay* [1956] OR 188 (Court of Appeal for Ontario) where a couple died together in their house from carbon monoxide poisoning; *Re Trenaman* [1962] South Australian State Reports (SASR) 95; *Janus v Tarasewicz* 135 Illinois Court of Appeals 3d 936, 482 NE 2d 418 Ill 1985; *Leete v Sherman* 290 Michigan App 647 803 NW2d 889 (2010).

48 *Sherman Roman Law in the Modern World: Manual of Roman law illustrated by Anglo-American law and the modern codes* (1917) 42-43. See Scott’s translation on *Digest* 34 5 23; *Digest* 34 5 24; *Digest* 34 5 9; *Digest* 24 1 32 14. See also Derrett (*UCR*) 62 ff and Hohmann *OSSA* 2.

49 Chapman (*UPLR*) 585; Hohmann *OSSA* 1-15; Voet 34 5 3 and 36 1 16 (Gane’s translation 1956) 256-257; Schuster 31; Von Madai ? 373; Conway

different status significances,⁵⁰ namely relationship, physical strength, age and gender of the departed persons.⁵¹ Nótári and Papp, in their discussion of the old Justinian manuscripts, conclude:⁵²

With regard to the regulation of inheritance from each other of persons who died in a common event / common disaster Roman law textbooks state, that [sic] the following: ‘To make it easier to decide inheritance disputes, in post-classical Roman law it has been presumed that in circumstances where ascendants and descendants died in a common disaster, underage children were deemed to have died before their parents, and grownup children to have died after their parents’:

Despite the ‘situation specific presumptions’, it is important to note that the presumptions in the *Digest* (although based on age and gender) were applicable in circumstances where there was ‘uncertainty’. Phrases such as: ‘If it *cannot be ascertained* which of them died first’ and ‘but *if this cannot be proved*, the question becomes difficult,’ indicate the broader principle which Derrett refers to when he explains the underlining principles of Roman law:⁵³

The Romans had a regard for the likelihood in the situation under discussion; and where the doubt was as to what course should be taken they adhered to that which was most practical. True to this outlook we find numerous discussions belonging to the topic *de commorientibus* which assume that two persons die at the same time or about the same time in the same disaster, in all of which the first question asked is whether one survived.

As will be discussed below, the broader principle of ‘uncertainty’ is also reflected in later Continental codes influenced by the Roman law.⁵⁴

4 2 Roman Dutch Law Presumptions

The presumptions known in Roman law were received into the Roman Dutch Law.⁵⁵ Voet refers (amongst other presumptions) to the presumption of simultaneous death when a freeman and his son die in a

and Bertsche (*FLR*) 18; Roeleveld 31-32; Nótári and Papp (*FJ*) 14; Pauchard (*LRE*).

50 For a discussion of Gaius, Bartolus and Iavolenus see Derrett (*UCR*) 65 fn 19-20.

51 Hamza (*AUV*) 43.

52 (*FJ*) 12; Hohmann *OSSA* 1-15; Hunter 928; Conway and Bertsche (*FLR*) 18; Roeleveld 31-32.

53 (*UCR*) 63. He notices that in many of these cases the jurists were content that for practical purposes neither survived the other. See also Sherman 42; Gallanis 189-200; Hohmann *OSSA* 3; Conway and Bertsche (*FLR*) 18 n 10; Roeleveld 31-32; Nótári and Papp (*FJ*) 14.

54 Chapman (*UPLR*) 586 refers to *Cowman v Rogers* 73 Md 403; 21 At Rep 64 (1891).

55 Sherman 42; Cowan *Roman Dutch law* (undated) <http://global.britannica.com/topic/Roman-Dutch-law> states: ‘In the southern Netherlands (today’s Belgium), the reception of Roman law began in the 13th century and was completed by the 16th century’.

shipwreck together.⁵⁶ He also refers to the ‘general presumption’ that if people die together (in the same catastrophe),⁵⁷ no one is deemed to have survived the other unless it is proved otherwise.⁵⁸ This presumption (that neither survived the other) became known as the ‘no survivorship rule’.⁵⁹ The reception of this doctrine from Roman law sometimes seems to be ambiguous and one must keep in mind the following remark by Derrett:⁶⁰

It is little wonder that the countries of the civil law tradition have not spoken with one voice on this subject. The Roman law was complicated, and, illustrated with these few examples in Justinian’s Digest, not entirely perspicuous and decisive. It left a good deal of room for judicial equity, which hampers the descendants of the jurists who do not share their atmosphere or their skill.

Although the Roman Dutch scholars managed to merge Roman law with some legal concepts taken from the traditional Germanic customary law of the Netherlands, they themselves abandoned Roman-Dutch law when they placed themselves under the code of the usual Continental type.⁶¹ The Dutch, however, had introduced the legal system of their state to their colonies.⁶² In this way, the Dutch variety of the European *ius commune* came to be applied in South Africa, Scotland and Sri Lanka and forms the foundation of South African law (of succession).⁶³ As will be

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- 56 See *D* 34 5 3 and *D* 36 1 16. See Derrett (*UCR*) 62; Van Mourick *et al* 25; Schuster 31; Mee (*NILQ*) 171-199; Roeleveld 34 and his reference in n 5 to ‘*Tractatus de repraesentatione* (1676) and n 6 ‘*Leges Municipales ad Mechlin* (Antwerp 1626). Cf Nathan (*TLR*) 42; Nótári and Papp (*FJ*) 16. Kaser *Das Römische Privatrecht* 1 (1955), 237 who gives references to modern continental discussions of the presumptions (at n 21).
- 57 Voet *D* 34 5 3. Williams (*YLJ*) 156; Derrett (*UCR*) 64 n 16 refers to Johan à Someren ‘*Tractatus de Repraesentatione* (1673) III 59-60.
- 58 When there is doubt as to who survived, the son (younger) is presumed to have died first. See Cowan (undated); Hunter 929; Heubner *A History of Germanic Private Law* (Philbrick’s translation) (1918) 46; Hamza (*AUV*) 43-68; Derrett (*UCR*) 62; Nótári and Papp (*FJ*) 19 and Van Mourick *et al Erfrecht* (2011- II 2) 25.
- 59 See Derrett (*UCR*) 64 fn 17 explain the reception of presumptions.
- 60 (*UCR*) 63. They advised that the *Digest* should be read with the commentary of Voet. They refer also to Menochio *De Praesumptionibus Coniecturis* VI 50 (Venice 1590 II 108-111), where the principles and instance are compendiously and clearly set out.
- 61 See Lee *An Introduction to Roman-Dutch Law* (1946) 369; Zimmermann and Visser ‘South African Law as a Mixed Legal System’ in *Southern Cross: Civil Law and Common Law in South Africa* (1996) 3 n 16 and 2-13 and 2-13; Williams (*YLJ*) 156.
- 62 Du Toit 278.
- 63 Williams (*YLJ*) 156 explains: ‘The consequence is that one must go back to a comparatively remote period for the majority of the text-writers and cite as authorities books no longer authoritative among the Dutch themselves’. See also Meijer and Meijer ‘Influence of the Code Civil in the Netherlands’ 14 2002 *European Journal of Law and Economics (EJLE)* 227-236. For SA law see Lee *The History of South African Law and its Roman-Dutch Roots* (2002) 1; Lee (1946) 369; Du Toit 282.

discussed below, neither Roman nor Roman Dutch law influenced the simultaneous deaths-doctrine in the South African context.⁶⁴

4 3 Continental Codifications on ‘*Commorientes*’

Most continental jurisdictions received the civil law doctrine on ‘*commorientes*’ from ancient Rome and retained it by codification.⁶⁵ The early application of the principles is explained by Chapman.⁶⁶

As illustrations of the way in which the civilians decided these cases, we find that in 1572 the Parliament of Paris dealing with survivorship in the Massacre of St. Bartholomew, decided that parents would be slain before their children because the slayers would regard them as the more dangerous. In 1629 a mother and her daughter, aged four years, were drowned in the Loire, the Parliament of Paris held that it would be presumed that a child of such tender years died first.⁶⁷ In 1658 a father and son were slain in the battle of the Dunes and on the same day the daughter became a nun and therefore civilly dead at the same hour the battle began. The court held that the son should be decided to have survived.⁶⁸

The *Napoleonic Code*, enacted in 1804, showed similarities with the Roman law approach towards ‘simultaneous deaths’. It provided for a complex set of presumptions where persons who were entitled to inherit from one another, had died in the same catastrophe.⁶⁹ The following rules were applied when it was not possible to ascertain who had died first: If all persons were over 60 years of age, the youngest is presumed to have survived; if they are all under 15 years of age, the eldest is presumed to have survived; if they are between 15 and 60 years of age, the male is presumed to have survived, provided there is a difference of age of not more than one year; or if they are all males or all females the youngest is presumed to have survived.⁷⁰

Yntema explains the outline of the Code:⁷¹

64 See Roeleveld 33; Schoeman 108-109; Corbett *et al* 5; Boezaart 157; De Waal and Schoeman-Malan 12.

65 For the position in Italy see Menochio *De Praesumptionibus Coniecturis* 108-111, where the principles and instance are compendiously and clearly set out. In 1495, Roman law was officially declared as subsidiary applicable in Germany. Sherman 42-43.

66 (UPLR) 587.

67 Stryk Diss io C.

68 Fodere Vol 2 220. Also see Puelinckx-en Coene ‘De commoriëntenleer, een voorbijgestreefde theorie’ 1970 TPR 239.

69 See also Tracy and Adams (MLR) 806 n 40; Hamza (AUV) 43-68; Lazarus (LLR) 364; Nathan (TLR) 42; Tetley (ULR) 600.

70 See Derrett 66-67. See the former Art 720-722 of the *French Civil Code* (until 2001) and Hunter 928: ‘When it is uncertain whether the legatee or the testator died first. In cases of apparently simultaneous death of two or more people, as by shipwreck, fire, or in battle, it often was material, in determining the devolution of an inheritance or the fate’. See also Garb and Wood § 3.28 for Austria; Sherman 42; Pauchard (LRE); Roeleveld 38 for France and Belgium. Roeleveld refers to Planiol *Traitépratique du droit civil français* 1710-1719 who apparently criticise the presumptions.

71 (Cor LR) 77.

The theoretical refinement of the modern civil law, however deeply indebted for its inspiration to the Roman sources, is largely post-Roman, and its symmetrical organization in the Code Napoleon and succeeding modern codifications is the product of scholastic attainments or at least interest in synthetic analysis, that neither the Roman jurists nor the English judges customarily displayed.

The Code was originally introduced into areas under French control such as Belgium, Luxembourg and parts of Western Germany, either in the form of (i) simple translation of the provisions or (ii) sometimes with considerable modifications. The influence of the *Napoleonic Code* was diminished at the turn of the 20th century by the introduction of the moderated *Dutch Civil Code* (1838),⁷² the *German Civil Code* (1900)⁷³ and, the *Swiss Civil Code* (1907).⁷⁴ The reason why the detailed rules of the French law were not adopted in other continental jurisdictions is that they were regarded as too complicated.⁷⁵ The Dutch, German, Swiss and Austrian law adopted a presumption of ‘no survivorship’.⁷⁶ Derrett explains:

Although the approach (to use presumptions) is retained, the presumption was simplified. Germany, Switzerland and Greece have remained faithful to the fundamental Roman concept, and have enacted the simple rule that simultaneous death is presumed. As we have seen, the rule that neither is understood to have survived the other amounts in fact to a presumption of simultaneous death. As we saw at the outset this solution causes serious problems when property is limited to pass upon a survival or non-survival or predecease.

72 *Burgerlijk Wetboek* (BW – *Dutch Civil Code*) of 1838. See also Williams (YLR) 156; Asser-Perrick n 28. See Van der Burght and Ebben § 20; Meijer and Meijer (EJLE) 227-236; Yntema (*Cor LR*) 77 ff and Roeleveld 40 ff who explains that the presumption is only valid if the moment of death is uncertain and that the rule of the French law was not adopted because it was far too complicated.

73 See Art 32. See also Schuster 31 who explains the position in Germany: ‘BGB 20 on the other hand establishes a presumption to the effect that persons who have succumbed to common danger have died at the same moment. The effect of this is that neither person can become entitled to any right in the estate of the other as his survivor’. While common law countries generally follow the procedural characterisation of simultaneous death and apply the *lex fori*, German law was applied as the *lex causae* in *Re Cohn* [1945] Ch 5. See Garb and Wood § 3.28 for Austria, § 16 France and § 17 for Germany.

74 See also the *Austrian Civil Code* (1891) Art 25; *Italian Civil Code* Book Art 4; Roeleveld 43.

75 See Cowan (undated); Von Madai 373; HLR 344 fn 6-9 for case law before 1936; Derrett (UCR) 62; Nótári and Papp (Fj) 19; Verbeke and Lelue 335 ff; Pauchard (LRE). See also Breslauer (MLR) 131-132; Meijer and Meijer (EJLE) 227-236. Roeleveld 42 refers to Völker (*Neue Juristische Wochenschrift* (1947/1948) 375 who points out that the application of the presumption could have unreasonable results. In the opinion of Völker the Roman Law had more reasonable results and emphasises equity more than probability’.

76 Lee (2002) 2. See also Chapman (UPLR) 586; Sherman 42; Derrett (UCR) 55.

According to Derrett, the aim of the provisions was to reproduce the logically most reasonable state of facts, rather than to settle the financial standing as fairly as possible.⁷⁷ The variation (modification) adopted in these jurisdictions was to the effect that, if the sequence of death is 'uncertain', the presumption is that people died at the same time. France continued using a highly complicated casuistic system to establish who died first, until 2001.⁷⁸

Since 2001, France has also recognised a presumption that the persons involved in a common disaster, died simultaneously (similar to other Germanic countries).⁷⁹ Apart from initially finding favour in European civil law systems, presumptions based on the *Napoleonic Code* were also adopted in, for example, Louisiana and some territories in Canada.⁸⁰

4 4 English Common Law Before 1925

As mentioned above, the English common law followed a different approach towards establishing the order of deaths. The traditional common law of England has always refused to indulge any guessing as to survivorship and has enforced the well-known rule 'he who affirms must prove'.⁸¹ The following remark, from a law of succession perspective, was made in the *Harvard Law Review*.⁸²

The sinking of the *Lusitania*, the flood at Johnstown, the San Francisco earthquake, the fire that destroys a home in the night – all present variations

77 (UCR) 67.

78 See also Nótári and Papp (FJ) 17; Gallanis 192. See Max Planck Working group (RZ) 27.

79 See Art 725–1 of the *French Civil Code* (since 2001). Art 4:2 of the *New Dutch Civil Code* provides: 'Order of death of two or more persons – 1. When it is impossible to determine the order of death of two or more persons, those persons are considered to have died at the same time, so that none of them shall benefit from the estate of the other.' See Van der Burght and Ebben § 19. See also Art 2 of the Annex to the 1972 'Benelux Convention on *Commorientes*' which was adopted in Art 721 of the *Belgian Civil Code* and Art 720 of the *Luxembourgian Civil Code* and Max Planck Working group (RZ) 27 and 100 ff.

80 Louisiana receipt the Napoleonic Code in 1825 (revised in 1870 and still in force). See also HLR 344; Nathan (TLR) 41; Lazarus (LLR) 363 who explains the Louisiana Civil Code (LCC) arts 938 and 939. Most case law on the principles of the French Code (presumptions of death) is found in Louisiana and California. See *Cowman v Rogers* 73 Md 403; 21 At Rep 64 (1891); *Hollister v Cordero* 76 California 649, 18 Pac Rep 855 (1888); In re *Succession of Langles* 105 Louisiana 39; 29 So Rep 739 (1900); *Collins v Becnel* 297 So 2d 506 (La Ct App 1974); In re *Estate of Schmidt* 67 Cal Rptr 847 854 (1968); *Roeleveld* 31–33. Haneman and Booth '120 Hours Until the Consistent Treatment of Simultaneous Death Under the California Probate Code' 2015 *Nova Law Review* (NLR) 451–471.

81 Chapman (UPLR) 594; Gallanis 189–191; Re (FLR) 482; *Roeleveld* 44 ff and *LRCSA* (1985) 3–39. See also Garb and Wood § 2.35 for Australia.

82 HLR 344 and n 5 <http://heinonline.org> (accessed 2015-11-13). See also Nathan (TLR) 39–40 fn 19; Nótári and Papp (FJ) 12; Corbett *et al* 4–5; *Roeleveld* 31 ff and Mee (NILQ) 178.

of the perplexing enigma: ‘Who dies first in a common disaster?’ Unable to answer the riddle, but faced with the necessity of determining the devolution of property, *the common law relied on the incidence of the burden of proof*.⁸³

The influence of the Roman civil law on law of succession in England and Wales has not been significant,⁸⁴ and at no time did it form part of it.⁸⁵ Sir Henry Maine, in his book *Ancient Law*, explained the possibility of Roman law influence as follows:⁸⁶

The early ecclesiastical chancellors contributed to it, from the Canon Law, many of the principles which lie deepest in its structure. The Roman Law, more fertile than the Canon Law in rules applicable to secular disputes, was not seldom resorted to by a later generation of Chancery judges, amid whose recorded dicta we often find entire texts from the *Corpus Juris Civilis* imbedded, with their terms unaltered, though their origin is never acknowledged.

The traditional common law position (proof requirement) was long established in case law such as *Underwood v Wing*,⁸⁷ and *Wing v Angrave*⁸⁸, where any presumption to establish the sequence of death was rejected. These cases became acknowledged as authoritative on the position of ‘*commorientes*’.⁸⁹ Although the ‘no presumption rule’ differs in theory from the ‘no survivorship presumption’, it has, by implication, the same result. As was explained in *Re Phen’s Trusts*⁹⁰ the rule that 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 (proof).⁹¹ If the order of death could not be established, the victims were regarded as having died simultaneously.

83 Own emphasis.

84 Reference to the ‘traditional common law’ means for this discussion the position as it was in England and Wales before 1925. See also Von Madai 373; HLR 344 n 6-9 for case law before 1936. See also De Colyar ‘Notes on the presumptions of death and survivorship in England and elsewhere’ 1911 *Journal of the Society of Comparative Legislation (JSCL)* 255-277; Gallanis 189 fn 2 for common law cases and Verbeke and Lelue 335 ff in general.

85 See *Mason v Mason* (1816) 35 ER 688; See also Derrett (*UCR*) 71-2 where he discussed case law from 1767-1816. See also Re (*FLJ*) 482; Freeman ‘Influence of Roman Law in English Courts’ (undated) 1-8 <http://damienfreeman.com/wp-content/uploads/2014/11/PDF38-Influence-of-Roman-Law-in-English-Courts.pdf> (accessed 2016-02-21).

86 (1883) 44-45.

87 (1855) 4 De G M & G 633. See Tracy and Adams (*MLR*) 809, Chapman (*UPLR*) 589-600 and LRCSA (1985) 3-8 for a thorough discussion of older common law cases. See also De Colyar (*JSCL*) 255 ff; Hubback *A Treatise on the Evidence of Succession to Real and Personal Property* (1845) 150; Gallanis 190 fn 4 for *Sillick v Booth* (1841) 62 Eng Rep 1137.

88 (1861) 8 HLC 183. See also *Taylor v Diplock* 2 Phillimore’s Ecclesiastical Reports 261 267; 161 Eng Rep Repr 1137 1140 (1815); Gallanis 190-191; De Colyar (*JSCL*) 255 ff;

89 See also *Rex v Dr Hay* (1767/8) 96 ER 372; *Mason v Mason*; LRCSA (1985) 3-5 for case law in Australia; Roeleveld 44; Gallanis 193.

90 LR 5 Eq 139 (1870).

91 LRCSA (1985) 5.

The traditional English common law approach (as it was before 1925) was followed in most American states and can be best clarified with reference to the 1934 case *Matter of Burza*:⁹²

- (i) There is no presumption either of survivorship or of simultaneous death;⁹³
- (ii) there is no presumption of survivorship from difference in age, sex or even relative strength;⁹⁴
- (iii) proof of the facts and circumstances concerning the survival of one or the other must be put forward;⁹⁵
- (iv) the party asserting survivorship has the burden of proving it.⁹⁶

The application of no presumption results in the *assumption* by the courts that the deceased all died at the same time.⁹⁷ However, if the order of death can be proved by the sequence in which the deceased persons died, that sequence will determine the distribution of the estate. When the order of death remains 'uncertain', a presumption will not facilitate the order of death. This might result in the claimant being unable to inherit from the departed, *as no one of them is regarded as having survived the other*.⁹⁸

Although the common-law principle was replaced in England by section 184 of the *Law of Property Act 1925*, this common-law approach is currently still followed in jurisdictions such as South Africa and Northern Ireland.⁹⁹

92 151 Misc 577 Surrogate's Court of the City of New York (1934). See the case law in Tracy and Adams (*MLR*) 806 and 831; Zadnik 'Simultaneous Deaths of Joint Owners' 1951 *Western Reserve Law Review (WRLR)* 70-71.

93 See also Roeleveld 33 and Schoeman 108-109. *Estate Rowley; Schmitt v Pierce* 344 SW 2d 120 Supreme Court of Missouri En Banc (1961).

94 *HLR* 344-5; Tracy and Adams (*MLR*) 810-813; De Beer 10.

95 Tracy and Adams (*MLR*) 810-813; Chapman (*UPLR*) 589. See *Schmitt v Pierce*.

96 Folkerth 'The Uniform Simultaneous Death Act for Ohio' 1948 *Ohio State Law Journal (OSLJ)* 684; Tracy and Adams (*MLR*) 808 refer to *In re Herrmann* (1912 case) to illustrate the common law position. For more recent case law see also *Brundige v Alexander* 547 SW 2d 232 234 (Tenn 1976); *In re Estate of Moran* 77 Ill 2d 147, 395 NE 2d 579 (1979); *Estate of Nancy Schweizer v Estate of Roland* 7 Kan App 2d 128 (1981); 638 P 2d 378; Hubback 149-151; Mee (*NILQ*) 179 ff; Pawlowski and Brown (*PLR*) 122.

97 Own emphasis. *LRCSA* (1985) 5-8.

98 Own emphasis. Zadnik (*WRLR*) 71: '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.'

99 Schoeman 108-109; Corbett *et al* 5; De Waal and Schoeman-Malan 12; Mee (*NILQ*) 171 ff; Orji (*CPL*) 501; *LRCSA* (1985) 8 for South Australia.

5 Developments on ‘*Commorientes*’ After 1925

5 1 England – Legislation

As seen in the previous paragraph, when the order of death was in dispute in traditional common law jurisdictions, the person who asserts the sequence of deaths, had to prove same.¹⁰⁰ This evidentiary burden often led to a state of affairs where courts are required to make a ruling (often with very little evidence to assist them) on the order of deaths.¹⁰¹ This sometimes led to cautious judgements. Contributing to the problem with simultaneous deaths was the property regime known as joint tenancies.¹⁰² Helmholz explains simultaneous deaths of joint tenants to property.¹⁰³

The common law joint tenancy is very old, going back at least to the thirteenth century. In its main features, it has exhibited a remarkable durability. As the preferred form of common ownership in earlier English law, the joint tenancy's existence was presumed over a tenancy in common in cases where there was doubt about which had been created.

In estate law, joint tenancy is a special form of ownership by two or more persons of the same property.¹⁰⁴ The individuals (joint tenants) share equal ownership of the property and have the equal, undivided right to keep or dispose of the property. Joint tenancy creates a right of survivorship.¹⁰⁵ Conway and Bertsche explain the predicament that arises with simultaneous deaths as follows:¹⁰⁶

The problem presented when two or more persons die in a common disaster, there being no evidence as to the order of death, is an intricate one, not easily solved without recourse to arbitrary rules of law.

100 Conway and Bertsche (*FLR*) 19 who refer to earlier cases in America: *Newell v Nkhols*, 75 N Y 78 (1878); *Young Women's Christian Home v French* 187 US 401, 23 Sup Ct 184 (1903). See also Chapman (*UPLR*) 589-600; Mee (*NILQ*) 173 and the *LRCSA* (1985) 19.

101 *LRCSA* (1985) 9 ff; Orji (*CPL*) 501 and Sawyer and Spero *Succession, Wills and Probate* (2015) 156.

102 For a detailed discussion of joint tenancies in English common law jurisdictions see Spitzer 'Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England' 1985 *Texas Tech Law Revue (TTLR)* 629 635-636.

103 'Realism and Formalism in the Severance of Joint Tenancies' 1998 *Nebraska Law Review (NLR)* 1-34. Chapman (*UPLR*) 585; Yntema (*Cor LR*) 77 ff; Gallanis 189 and Kerridge 'Intestate Succession in England and Wales' *Comparative Succession Law Volume II: Intestate Succession* (2015) (eds) Reid, De Waal and Zimmermann 328.

104 See also Folkerth (*OSLJ*) 684; Re (*FLR*) 482.

105 See <http://legal-dictionary.thefreedictionary.com/Joint+Tenancy> (accessed 2016-12-21). Tenancy in common is a form of concurrent ownership of real property in which two or more persons possess the property simultaneously; it can be created by deed, will, or operation of law.

106 (*FLR*) 17-18 fn 9 refer to the marginal notes in *Taylor v Diplock* 2 Phillimore's Ecclesiastical Reports 261 267, 161 Eng Rep Repr 1137 1140 (1815). Zadnik (*WRLLR*) 70.

When the sequence of death was doubtful, due to scanty evidence, the courts (as it did in the *Underwood* case),¹⁰⁷ tend to lean towards accepting the proof that the victims did not die together.¹⁰⁸ England, therefore, reverted to legislation. The *Law Reform Committee of South Australia* explains this development:¹⁰⁹

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

Zadnik states that '[I] legislation was to save unnecessary applications to the Court for orders presuming deaths where, for instance, the deceased have been drowning together.'¹¹⁰ The English legislature adopted legislation in the form of the *Law of Property Act 1925*.¹¹¹ Orji explains the motive behind section 184 as follows:¹¹²

This statutory rule sets out a default position which is to be assumed or followed by the court unless some other position is established 'subject to any order of the court'. The displacement of this default provision may be effected by evidence, or the exercise of judicial discretion, or both. There may be a need for the interplay of science and the philosophy of law to work out the final destination of properties jointly owned by the deceased in this event.

Lord Walker of Gestingthorpe explains the provisions in section 184 (which introduced a presumption of seniority) as follows:¹¹³

In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in

107 When a husband and wife were swept into the sea by the same wave and were never after-wards seen the court, rejecting all speculations and presumptions and held that there was no evidence to show which was the survivor, and that therefore they must be taken to have died at the same time. The words 'and in case my said wife shall die in my lifetime' were interpreted strict.

108 Zadnik (*WRLR*) 71.

109 (1985) 8.

110 (*WRLR*) 72; *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).

111 *Idem* 189. See also Breslauer (*MLR*) 131; Garb and Wood § 15 for England and Wales; Kerridge 328 and Walker 'Cold-blooded and warm-blooded presumptions' paper presented 10-2008 *Statute Law Society Conference (SLSC)* 2.

112 (*CPL*) 502. Wislizenus 'Survival in Death by Common Disaster' 1921 *St Louis L Re* 1 (argument in favour of civil law presumptions).

113 (*SLSC*) 1-5; Mee (*NILQ*) 177. See Zadnik (*WRLR*) 71: 'All other factors are disregarded. Evidence of actual survivorship, however, is not excluded.'

order of seniority, and accordingly the younger shall be deemed to have survived the older.

Section 184 applies ‘for all purposes affecting the title to property’, including joint tenancy.¹¹⁴ Whenever property was held as joint tenants, and the tenants die in circumstances where the sequence of death is uncertain, they would have been regarded as if they had died simultaneously.¹¹⁵ The main difference between ownership by tenants in common and joint tenants is that the latter includes the right to survivorship.¹¹⁶ When a property is owned by joint tenants, the interest of a ‘deceased joint owner’ automatically gets transferred to the ‘surviving owners’.¹¹⁷ On the contrary, co-owners have no rights of survivorship.¹¹⁸ Unless the departed co-owners’ wills specify that his or her interest in the property is to be divided among the surviving owners, a deceased tenant in common’s interest belongs to his or her estate and their estates will be distributed separately.¹¹⁹ Another question that might arise is whether a person, married in community of property, is entitled as the ‘surviving spouse’ to the (half) share of the first dying (the estate is channelled through the ‘survivor’) if they die in a common calamity. In this regard, Corbett and others opine as follows:¹²⁰

... [W]here a man or woman who was married to his or her spouse in community of property dies, the heirs of the predeceased spouse do not acquire co-ownership in individual assets of the joint estate, but merely the right to claim from the executor half of the net balance of the joint estate. Nor is the survivor, despite the fact that he was during the lifetime of the predeceased spouse co-owner of half of the joint estate, vested with *dominium* or half of the assets. Like the heirs of the predeceased spouse, he is restricted to a right against the executor to half of the balance.

114 See Curtis ‘The benefits and pitfalls of joint tenancy’ <http://www.investopedia.com/articles/pf/08/joint-tenancy.asp#ixzz3s6ySGuRl> (accessed 2015-11-21).

115 See <http://legal-dictionary.thefreedictionary.com/Tenancy+by+the+Entirety> (accessed 2015-10-17): ‘A type of concurrent estate in real property held by a Husband and Wife whereby each owns the undivided whole of the property’.

116 Phillips (*Cal LR*). The most distinctive characteristic of a joint tenancy is indeed that of survivorship and the immediate transfer of ownership to the survivor’.

117 *Sloan v Jones* 192 Tenn 400 402; 241 S W 2d 506 507 (1951); *Bennett v Hutchens* 133 Tenn 65 69; 179 S W 629 630 (1915). Instead, upon the death of one spouse, the surviving spouse possesses an undivided interest in the whole estate that is no longer subject to the undivided interest of another in that estate, or, in other words, the surviving spouse possesses the property simple absolute.

118 In South Africa, however, only co-ownership of property is known. See Du Bois *et al Wille’s Principles of South African law* (2007) 558 and 673: ‘The modern position is therefore that a beneficiary has merely a personal right, *jus in personam ad rem acquirendam*, against the executor and does not acquire ownership by virtue of a will’. See also *Booyesen v Booyesen* [2011] ZAGPJHC 27.

119 *Ibid.*

120 *Idem* 14-15.

Interestingly enough, the words in section 184 narrate the civil law presumption known in Roman law and shows similarities with the French civil law approach (as it made provision for the younger being presumed to have survived the older).¹²¹

As far as intestate succession goes, section 184 was subsequently modified in 1952. Spouses were presumed to have survived each other for the purpose of distributing each spouse's inheritance.¹²² Kerridge explains that after World War II the rule (in section 184) tends to favour wives, as they are usually younger than their husbands.¹²³

5.2 Developments in Other Common Law Jurisdictions

The acceptance of legislation (section 184) in England was the result of certain seemingly unfair interpretations of the 'traditional common law principles'.¹²⁴ Soon commonwealth jurisdictions, as well as traditional common law jurisdictions were influenced by section 184.¹²⁵ While certain jurisdictions adopted legislation based on the seniority principle similar to that of England, other jurisdictions enacted Acts that deal with simultaneous deaths in their *Succession Acts*.¹²⁶ All these jurisdictions also regulate aspects of joint tenancies.¹²⁷ If there is proof that one joint tenant has survived the other, the survivor succeeds to the whole estate, not by virtue of survivorship, but because there is no other tenant

121 Gallanis 193 indicate that the source for s 184 could have been the Roman or French law. He refers to *D* 34 5 9 4 and *D* 34 5 22.

122 Gallanis 189. See *Intestates' Estate Act* 1952 and s 46 [3] of the *Administration of Estates Act* 1925. See also Roeleveld 45 See Sawyer and Spero 155-156; Mee (*NILQ*) 179; Zadnik (*WRLR*) 71.

123 *Idem* 329. Since 1995 it is required that a spouse survives the intestate spouse by 28 days in order to inherit. If the husband and wife have had a tragic accident and the husband dies and the wife survives by more than 28 days and both parties have not made a will then the wife will take the estate of her husband. See also Kerridge 343-344 n 121.

124 *Underwood v Wing* 660-661 per Lord Cranworth LC. In *Wing v Angrave* 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.' Since these two cases have been reported the principles were followed in a number of cases in America, Australia and New Zealand.

125 For Commonwealth jurisdictions see *LRCSA* (1985) 1-39. See also Law Institute Victoria *Review of the Property Law Act* 1958 (Vic) (2011) 'Presumptions of Survivorship' § 44. See also Coffey and Long *The Law Handbook* (2014) 1315 who explain the Australian position; Pawlowski and Brown (*PLR*) 122 for New South Wales and Garb and Wood § 2.49-2.51.

126 See Zandik 73 for Ohio. *LRCSA* (1985) 8-9 for Australia and New Zealand. See below the *USDA* and *UPC*.

127 Conway and Bertsche (*FLR*) 27; Phillips (*Cal LR*); Dollar (*SAN*) 3; Pawlowski and Brown (*PLR*) 122-134; Mee (*NILQ*) 186-189 discusses and criticise the conventional understanding of 'joint tenancies' in the case *Bradshaw v Toulmin* (1784) 2 Dick 633 and Orji (*CPL*) fn 3 and 507-508 for the origin of joint ownership. Cf Hubback 149-150 and Walker (*SLSC*) 1.

(owner) with whom to share the title.¹²⁸ When the presumption in section 184 was applied in *Hickman v Peacey*,¹²⁹ the House of Lords ruled that *unless it was possible to say for certain* which of the persons died first, the younger is presumed to have survived.¹³⁰

5 3 Republic of Ireland, Northern Ireland and Scotland

The traditional common law still applies in Northern Ireland and the *Law of Property Act* was never extended to it.¹³¹ The *Northern Ireland Law Reform Commission*,¹³² recommends:

Under the common law there is a presumption of simultaneous death¹³³ but the Commission is inclined to adopt a provision whereby commorientes is treated as an event which severs a joint tenancy. In that case the deceased persons would be treated as holding their jointly owned land as tenants in common at the time of their death.¹³⁴

The Republic of Ireland, adopted limited reform in the shape of section 5 of the *Succession Act*.¹³⁵ Section 5 provides for a *presumption of simultaneous death* in cases of uncertainty.¹³⁶ It differs from the English rule and applies only 'for the purposes of the distribution of the estate of any commorientes'.¹³⁷ It does not apply, as the relevant English legislation, 'for all purposes affecting the title to property'.¹³⁸ Section 5

128 Phillips (*Cal LR*); Dollar (*SAN*) 3; Pawlowski and Brown (*PLR*) 122-134; Nótári and Papp (*FJ*) 20; Coffey and Long 1315; Gorgopa; Kerridge 329.

129 [1945] Appeal Case (AC) 304. See also *In re Pringle* [1946] Ch 124; *Ex parte Chodos* 1948 4 SA 221; *LCRSA* (1985) 11.

130 There was no evidence to show whether any of the deceased had survived the other. See also *Re Lindop Lee-Barber v Reynolds* [1942] Ch 377 382; Mee (*NILQ*) 179; Roeleveld 45.

131 See Mee (*NILQ*) 173: 'In the absence of legislative intervention, the common law position (established in the English case law) still applies in Northern Ireland'.

132 *Report – Land Law NILC 8-2010* para 7.22-7.23. Orji (*CPL*) 506-507 and the proposal of the *NILC* clause 50 on 'commorientes' which implements the recommendation of the Commission for the introduction of a provision dealing with 'commorientes' (simultaneous deaths of joint tenants).

133 The common law didn't follow a presumption of simultaneous death approach but follows a 'no presumption' rule. See Garb and Wood § 22 for Ireland § 36 for Northern Ireland. See also *Law Institute Victoria* § 44.

134 (*NILC*) 2010 par 7.15. The provision is modelled on one contained in the *Republic's Civil Law (Miscellaneous Provisions) Act 2006* (No 20).

135 1965. See also *Republic of Ireland Law Reform Commission (LRC) 70-2003* Ch 3.

136 See Mee (*NILQ*) 173-176. S 5 was applied in *Re Kennedy* [2000] 2 Ireland Reports 571; where a married couple was killed when they had driven off a pier in bad weather. See Belkin 100, 103 and Casey *et al* 374.

137 Mee (*NILQ*) 175 for a discussion on s 5 and how s 184 influenced the outcome in *Re Rowland: Smith v Russell* [1963] Ch 1. See also Casey *et al* 30-31.

138 Mee (*NILQ*) 176 recommendation that s 5 should also apply to all purposes as does s 184; Orji (*CPL*) 501. See also *Wills and Administration Proceedings* (NI) Order 1994, Art 30 and *Succession* (NI) Order 1996 a 3.

does little more than to codify the common-law position.¹³⁹ Section 68 of the *Civil Law (Miscellaneous Provisions) Act*¹⁴⁰ amended section 5 of the *Succession Act* and made it applicable to joint tenancies.

Scottish law had applied the traditional common law rules until 1964, when they enacted section 31 of the *Succession (Scotland) Act*.¹⁴¹ Although it was modelled on section 184, there are three distinct improvements. Firstly, it does not apply between husband and wife. Secondly, it does not apply where a testator made a gift to one beneficiary with a direct gift over to another beneficiary. Thirdly, it omits the ambiguous parenthesis 'subject to any order of the court'.¹⁴² The position is explained by Tainsh:¹⁴³

Section 31 of the 1964 Act, provided rules for two situations where two people die simultaneously and it is not known who survived the other. For the purposes of succession, spouses and civil partners were deemed to have failed to survive each other and where the parties weren't married or in a civil partnership, the younger was deemed to have survived the elder.

The laws of succession in Scotland have recently been brought up to date for the first time in 50 years. The new *Succession (Scotland) Act*,¹⁴⁴ which came into force on 4 March 2016, is intended to clarify certain situation and make it fairer. One such change is that section 9 of the Act has revoked the rule for spouses and civil partners and provides that, where two people die simultaneously, neither is presumed to have survived the other, provided the rule in section 10 below does not apply. Section 10 regulates the equal division of property if the order of beneficiaries' deaths is uncertain. Tainsh explains it as follows:

Section 10 covers situations where property will pass to a person depending on the order of death but that property does not form part of either estate. An example of this is the proceeds of a life policy. This situation wasn't covered by the 1964 Act so this is a new addition to the legislation. The new rules therefore provide that in situations such as this, the property is to be divided equally between the estates of those persons unless there is express provision to the contrary.'

139 Mee (*NILQ*) 175 explains that the provision was derived from Art 20 of the *German Civil Code*.

140 2008.

141 See s 31(1)(b). Garb and Wood § 40 for Scotland. See *Lamb v Lord Advocate* 1976 Session cases (Scotland) 110.

142 Orji (*CPL*) 506; Walker (*SLSC*) 5.

143 'New rules on Succession in Scotland – how they will affect who inherits your estate' 2016-03-11 <https://www.harpermacleod.co.uk/hm-insights/2016/march/new-rules-on-succession-in-scotland-how-they-will-affect-who-inherits-your-estate/> (accessed 2016-10-29).

144 2016.

5 4 United States of America

Most American states,¹⁴⁵ have received the ‘traditional common law’ principle based on the traditional English law to establish the order of deaths.¹⁴⁶ Typically, whenever the order of death could be established (through evidence), even when it was evidenced that one deceased survived the other deceased only for a very short period of time (seconds), the distribution follows the facts of the situation (and the ‘no presumption’-rule was applied).¹⁴⁷ However, acceptable proof of the facts and circumstances concerning the survival of one or the other (victim) should have been put forward by the asserting party.¹⁴⁸ In general, most states did not adopt the post-1925 English approach.¹⁴⁹

Since 1940, most states had, however, adopted the *Uniform Simultaneous Death Act (USDA)* which originally attempted to simplify situations where ‘simultaneous deaths’ occur,¹⁵⁰ and specified that if spouses died together, their estates passed to their individual heirs, unless proof existed of who died first.¹⁵¹ This provision represents a codification of the prevailing common law view. Phillips explains it as follows:¹⁵²

This presumption, codified by adoption of the Uniform Simultaneous Death Act, is an attempt ‘... to supplant the former arbitrary and complicated presumptions of survivorship with effective, workable and equitable rules

145 Tracy and Adams (*MLR*) 808 refer to *In re Herrmann* (1912 case) to illustrate the common law position. See also Belkin 101 and Kimbrough (*W&M L Rev*) 289-299.

146 See Folkerth (*OSLJ*) 684; *Young Women’s Christian Home v French* in general; Nathan (*TLR*) 40; Lazarus (*LLR*) 636. See Gallanis 194-195 for the position in all the different states and case law; Tracy and Adams (*MLR*) 810-813; Chapman (*UPLR*) 589.

147 *Estate Rowley*; *Schmitt v Pierce*; *HLR* 344-5; Tracy and Adams (*MLR*) 810-813; Roeleveld 33; Schoeman 108-109 and De Beer 10.

148 Zadnik (*WRLR*) 77; Folkerth (*OSLJ*) 684; For more recent case law see *Brundige v Alexander* 547 SW 2d 232 234 (Tenn 1976); *In re Estate of Moran* 77 Ill 2d 147, 395 NE 2d 579 (1979); *Estate of Nancy Schweizer v Estate of Roland* 7 Kan App 2d 128 (1981); 638 P 2d 378; Hubback 149-151; Mee (*NILQ*) 179 ff; Pawlowski and Brown (*PLR*) 122.

149 The statutory presumption that was adopted in England is quite different from their contemporary American counterparts. See Kerridge 328. Some States followed the *Napoleonic code*. See Phillips (*Cal LR*) for California (*Uniform Determination of Death Act* 1954) and Lazarus (*LLR*) 363 for the *Louisiana Civil Code (LCC)* arts 938 and 939. See Mee n 22 who explains: ‘The tendency in modern times has been to discard the presumptions.’ He refers to Samuel ‘The 1997 Successions and Donations Revision - A Critique in Honor of AN Yiannopoulos’ 1999 *Tulane Law Review* 1041 1043.

150 See the *Uniform Simultaneous Death Act* 1940 (*USDA*). Haneman and Booth (*NLR*) 451-471; See also *LRCSA* (1985) 8 ff and Cohen ‘The Common Law in the American Legal System: The Challenge of Conceptual Research’ 1989 *Law Library Journal (LLJ)* for the different *Survivorship and Presumption of Death Act* and *Succession Acts* in the different States.

151 S 3 of the *USDA*. See Folkerth (*OSLJ*) 684; Zandik (*WRLR*) 82.

152 (*Cal LR*) (n 48). He refers to *Azvedo v Benevolent Soc of Calif* 125 California App 2d 894 (1954). See also Belkin 101.

applicable to the ever-increasing number of cases where two or more persons have died under circumstances that there is no sufficient evidence to indicate that they have died otherwise than simultaneously'.¹⁵³

The original *USDA* supposes that the estates divide separately and provided for cases where 'there is no sufficient evidence' of survival.¹⁵⁴ Nótári and Papp summarise the position in America as follows:¹⁵⁵ 'In the United States of America, the *Uniform Simultaneous Death Act* with almost identical text in all of the states from the 1950's regulates the issue'. Following the *USDA*, the *Uniform Probate Code* was promulgated in 1969.¹⁵⁶ It is a comprehensive statute that unifies, clarifies, and modernises the laws governing the affairs of decedents and their estates, certain transfers accomplished other than by a will, as well as trusts and their administration.¹⁵⁷

The 'sufficient evidence' principle was criticized after the Illinois Court of Appeals case *Janus v Tarasewicz*. In this instance, there was evidence of survival (by a very short time), and the estate of the first dying (husband) was channeled through the survivor's (wife) estate.¹⁵⁸ As a result, the *Uniform Probate code*, in the early 1990's, introduced a requirement that the survivor should outlive the first deceased by at least 120-hours to qualify as a survivor.¹⁵⁹ This rule replaced the 'no sufficient evidence' standard rule.¹⁶⁰ The Act contains a clause that makes provision for a situation where the end result would be an intestate estate devolving to the state.¹⁶¹ Gallanis explains:

The reason for the drop-off in enactments is that the Act works well when the order of deaths is unknown, but when the details occur in a rapid but ascertainable sequence the Act fails to achieve the desirable result.

153 (*Cal LR*). See Gallanis 200; Provence 'Uniform Simultaneous Death Act: Part II' 09-07-2014: (*AEI*) *Advanced Estate Issues*. He explains the latest development in the South Carolina Probate Code where the *USDA* includes both intestate and testate estates. See *Estate of Meade* California Court of Appeal [Civ No 295 Fifth Dist June 24 [1964] for the application of the *USDA*.

154 Amongst, the adopting jurisdictions, there are variations from state to state, some of which are significant. To determine the law in a particular state one should check the code *as actually adopted* in that jurisdiction.

155 (*FJ*) 13.

156 Andersen 'The Influence of the Uniform Probate Code in Non-adopting States' 1985 *University of Puget Sound Law Review (UPSLR)* 599-600.

157 Art II, sec 2-104 and 2-702. Garb and Wood § 48-50; De Beer 25. It is not the purpose of this article to discuss the Acts in detail.

158 *Supra*. See also *Olson v Estate of Rustad* 2013 North Dakota 83.

159 Gallanis 198. The 120 hour requirement of survival sought to implement the testators possible intention.

160 Haneman and Booth (*NLR*) 451-471; Zadnik 77. S 6 of the *USDA* 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.

161 Gallanis 197 explains: 'The reason for the drop-off in enactments is that the Act works well when the order of deaths is unknown, but when the details occur in a rapid but ascertainable sequence the Act fails to achieve the desirable result'. Haneman and Booth (*NLR*) 451-471.

From a South African point of view the ‘uncodified traditional common law’, as it applied before the *USDA* and *UPC* remains important, as the courts still rely on the traditional common law position in South Africa.¹⁶²

¹⁶² Saslaw ‘Simultaneous deaths: Testator’s will v State law’ 1993 *The CPA Journal* 60. See also *Estate Acord* 946 F 2d 1473 (9th Cir 1991) where the court found that the will of the husband overrides the 120-hour rule where his wife died 38 hours after her him.