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By the partial adoption of the Uniform Simultaneous Death Act,† it is now provided in New York‡ that:

"Where 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..."§

However, if the commorientes¶ were joint tenants or tenants by the entirety, the effect of the statute is that the joint property shall pass as though they were equal tenants in common,‖ also where those dying were an insured and the beneficiary of his life or accident insurance policy the death benefits are to be distributed as if the insured had survived.¶ Specific provisions in wills, trusts, deeds or insurance contracts calling for a different rule of distribution will, however, be given effect.¶¶ Moreover, the statute does not apply to the disposition of property of a person who has died before its effective date or to the disposition of property passing under an instrument, other than a will, executed before such date.¶¶

The Nature of the Problem

The problem presented when two or more persons die in a common

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2. N. Y. Laws 1941, c. 479, effective Sept. 1, 1943, adding § 89 to the DECEDENT ESTATE LAW, 13 McKINNEY'S CONSOLIDATED LAWS OF N. Y.
3. N. Y. DEC. EST. LAW § 89, subd. 1; UNIFORM SIMULTANEOUS DEATH ACT, 9 U. L. A. § 1.
4. The word "commorientes", denoting "persons who perish at the same time in consequence of the same calamity," [BLACK'S LAW DICT. (3d ed. 1933)], has been used throughout this discussion for the sake of convenience.
5. N. Y. DEC. EST. LAW § 89, subd. 2; UNIFORM SIMULTANEOUS DEATH ACT, 9 U. L. A. § 3.
6. N. Y. DEC. EST. LAW § 89, subd. 3; UNIFORM SIMULTANEOUS DEATH ACT, 9 U. L. A. § 4.
7. N. Y. DEC. EST. LAW § 89, subd. 4; UNIFORM SIMULTANEOUS DEATH ACT, 9 U. L. A. § 6.
8. N. Y. DEC. EST. LAW § 89, subd. 5. Cf. UNIFORM SIMULTANEOUS DEATH ACT, 9 U. L. A. § 5. The change made by the New York Legislature in this provision of the Uniform Act is discussed infra, page 37.
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. Lord
Mansfield is said to have admitted that he knew of no legal principle
upon which such cases might be decided, and felt bound to advise the
litigants to settle out of court. With the problem unsolved, title to prop-
erty may hang in abeyance. The necessity for a solution to the question
has resulted in three different views: (1) a presumption that one party
had survived; (2) a presumption that death had been simultaneous; and
(3) that no presumption at all should be indulged in.

(1) The presumption of survivorship is that of the Roman Law, under which, where a father and son perished in a common disaster, and
the son had not reached puberty, the father was presumed to have sur-
vived; the presumption being the reverse where the son had reached
puberty. Similarly, the Code Napoleon provides that where persons
entitled to inherit from one another die in the same catastrophe, without
any possibility of ascertaining who died first, the following rules shall
govern: If all 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 pre-
sumed 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. The Louisiana legisla-
ture has adopted the same provision with the sole difference that
where the commorientes are all between 15 and 60 years of age, and there
is more than one year’s difference in age, the youngest will be presumed
to have survived, even as between a male and a female. This type of

1137, 1140 (1815); see also the Commissioners' prefatory note to the Uniform Simultane-
ous Death Act, 9 U. L. A. 657, 658 which calls the problem "un-resoluble."
10. Digest, Liber 34, Title 5 (Scott's Translation).
11. See Cowman v. Rogers, 73 Md. 403, 21 Atl. 64 (1891).
13. A statute including this provision is not restricted to cases of intestate succession,
but applies as well in cases of testate succession. Succession of Langles, 105 La. 39, 29 So.
739 (1900). An obelisk in a New Orleans cemetery, inscribed simply and majestically
"Angele Marie Langles—105 La. 39" bears enduring witness to the rule of law applied in
Succession of Langles.
15. Louisiana Civil Code (Dart. 1942 Supp.) Arts. 936-938. For a discussion of the
Louisiana presumptions see Comment (1938) 12 Tulane L. Rev. 623.
16. This change was intended to take care of the situation disclosed in Robinson v.
Gallier, 2 Woods 178. 20 Fed. Cas. 1006, No. 11951 (C. C. A. La. 1875) where a male of
statute has been adopted by various other states.\textsuperscript{17}

(2) The presumption that death was simultaneous is found in the Mohammedan Law of India\textsuperscript{18} and in the Austrian,\textsuperscript{19} German\textsuperscript{20} and Italian\textsuperscript{21} Civil Codes. Apparently none of the United States has adopted a similar rule.

(3) The view that no presumption at all will be indulged in is that of the common law.\textsuperscript{22} While the most honest of the three views, this approach to the problem has the definite drawback that it fails to establish a basis for the distribution of the property of the decedents.\textsuperscript{23} What is really required is a rule of law regarding the devolution of property dealing with the situation arising from simultaneous deaths.\textsuperscript{24}

In 1925, Parliament wiped out the common law principle that no presumption exists where the order of death cannot be inferred, by enacting a statute\textsuperscript{25} which creates a presumption of survivorship based upon the

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{17} 68 years of age was commorient with a female of 44. No provision of the Louisiana Code took care of such a situation; see \textit{Louisiana Legislation of 1938 Pertaining to the Civil Code} (1938) 1 \textit{La. L. Rev.} 83, 87; Comment (1938) 12 \textit{Tulane L. Rev.} 623. The Quebec Civil Code, Arts. 604-605 presumes that, where a male and a female between 15 and 60 are commorient, the male survived.

\item\textsuperscript{18} See for example: \textit{Cal. Code Civ. Proc.} (Deering, 1937) § 1963 (40); \textit{No. Dakota Code Civ. Proc.} § 7936 (40); also see \textit{Puerto Rico Rev. Stat. and Codes} (1911) § 1470 ¶ 39; \textit{Philippine Islands Ann. Code of Civ. Prac.} (Fisher, 1925) § 334 ¶ 37. Maryland had adopted this type of statute in 1920, but in 1941 it was abrogated in favor of the Uniform Simultaneous Death Act. For a strong argument in favor of the adoption of these civil law presumptions see \textit{Wislizenus, Survival in Death by Common Disaster} (1925) 6 \textit{St. Louis L. Rev.} 1.

\item\textsuperscript{19} See \textit{Cowman v. Rogers}, 73 Md. 403, 21 Atl. 64 (1891).

\item\textsuperscript{20} \textit{German Civil Code}, Book I, Part I, Title I, Art. 20.

\item\textsuperscript{21} \textit{Italian Civil Code}, Libr I, Title I, Art. 4.


\item\textsuperscript{23} "The reason for the difficulty of administration is that it is impossible to know which of the persons has survived. Yet the 'common law rule' in effect says that the person who claims by virtue of an alleged survivorship must prove the survivorship which is tantamount to demanding the impossible," Commissioners' prefatory note to the Uniform Simultaneous Death Act, 9 \textit{U. L. A.} 657.

\item\textsuperscript{24} See 9 \textit{Wigmore, Evidence} (3d ed. 1940) § 2532a.

\item\textsuperscript{25} \textit{Law of Property Act}, 1925, § 184.
\end{enumerate}
\end{footnotesize}
seniority of the commorientes. Under the present English statutory rule the younger is presumed to have survived the elder, regardless of sex, health or other factors. The English statute may be subject to the criticism that it arbitrarily fixes upon one factor, age, (certainly not the most significant evidentiary factor in resolving an issue of this kind) to the exclusion of all other circumstances. Of course, the very purpose in enacting such legislation is to reach some conclusion, which inevitably will be more or less arbitrary, regarding the distribution of property. The choice of age as the determining factor does have the merit that such fact is easily and definitely established, more so than any of the other circumstantial evidence (aside from sex) usually available in cases of contemporaneous death. Utilization of the less objective circumstances of strength or health as factors determinative of survivorship would necessitate comparisons and a consideration of conflicting inferences which the enactment of such a statutory presumption seeks to avoid.

In its practical operation the common law rule against presumptions was ordinarily tantamount to a presumption of simultaneous death. Thus where $A$, having bequeathed all his property to $B$, perishes with $B$ in a common disaster, $B$'s heirs would have to prove that $B$ survived $A$ in order to obtain $A$'s estate, and, there being no proof of survivorship, $B$'s heirs would necessarily fail and $A$'s heirs would take. A presumption in favor of simultaneous death, it will be noted, would carry the same re-

26. 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. . . ." In respect to the discretion apparently vested in the court by the phrase within parentheses it was said in the recent case of *In re Lindop* [1942] Ch. 377, 2 All. Eng. Rep. 46 (apparently the first reported opinion to consider this question) that the purpose of the exception was not to permit the court to disregard the statutory presumption but to enable it to receive evidence on the order of death "and if the evidence is such as to displace the statutory presumption, to act upon that evidence." Such an interpretation renders the parenthetical provision meaningless since, even without it, the presumption would only operate where the order of death is uncertain as a result of a lack of evidence; see (1942) 86 *The Solicitor's Journal* 263. It is submitted that the decision deprives the statute of an elasticity which might have proved helpful. With the statute given this restrictive interpretation, its consequences may at times border upon the absurd. Thus where a week-old baby and a strapping man in his physical prime are drowned in a shipwreck, the former would be presumed to have survived, and the court would have no discretion in the matter.

27. One difficulty in using age as the determinant is presented by the synchronous death of twins. In such a case it would seem they would have to be held to have died simultaneously, if there were lacking evidence of the order of their birth.
While in the ordinary case, as above, the practical result is the same, an important distinction is shown by the famous English case of *Wood v. Angrave*. A and B, husband and wife, perished in a common disaster each leaving all his or her property to the other, with a substitutional gift to C in case A or B died during the other's lifetime, as the case might be. Although if C could have established that the deaths were not contemporaneous, he would have taken regardless of which one died first, since, as it turned out, C could not prove that fact, neither could he establish the one through whom he claimed and, therefore, the legacies lapsed. If C had been aided by a presumption that both A and B had died at the same time, he would, it might be argued, have obtained both legacies because in that case he would have taken under each will separately.

The common law rule applicable to the case of the death of two or more persons in a common disaster has been accurately summarized as follows in the New York case of *Matter of Burza*:

"(1) There is no presumption either of survivorship or of simultaneous death.

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28. See *In re Wilbor*, 20 R. I. 126, 37 Atl. 634 (1897); *Russell v. Hallett*, 23 Kan. 276, 278 (1880). In a case of intestacy, for instance, where an intestate and his nearest of kin die without proof of which one survived, the next of kin of the intestate will take the intestate's property on the theory that such next of kin need not prove the non-survivorship of the deceased nearest of kin, a negative proposition; *In re Greene's Settlement* L. R. 1 Eq. 288 (1865); *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 132 (1888). *Matter of Burza*, 151 Misc. 577, 272 N. Y. Supp. 248 (Surr. Ct. 1934); see, Whittier, *Problems of Survivorship* (1904) 16 Green Bag 237. *Contra In re Evans Estate*, 291 N. W. 460 (Iowa, 1940) in which it is held that the next of kin claiming the intestate's property have the burden of proving that the nearer next of kin who died with the intestate had not survived the intestate.


30. An American case which reaches a contrary conclusion and which is cited with approval as reaching an obviously just result, is *Fitzgerald v. Ayres*, 179 S. W. 289 (Texas, 1915), noted (1916) 29 Harv. L. Rev. 461. The theory upon which the court proceeded is that presumptively the intention of the testator was that, should the primary legacy fail for any reason, the gift over was to take effect. The court based this rule of construction upon the statement in the opinion of *Van Vorst*, J. in *Newell v. Nichols*, 12 Hun. 604, 622 (1st Dep't 1878), *aff’d*, 75 N. Y. 78 (1878), that the words "if the legatee should not survive" means "if the preceding legacy should from any cause fail." However, the facts of *Fitzgerald v. Ayres* were quite distinguishable from *Newell v. Nichols* since in the latter case there was no question of a reversion. It should be noted that the court in *Newell v. Nichols* definitely applied the doctrine of *Wing v. Angrave*. Also see *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385 (1891).

2) There is no presumption of a survivorship from difference in age, sex or even relative strength.

3) Proof of the facts and circumstances concerning the survival of one or the other must be adduced. In the absence of proof of facts and circumstances, the test of experts is sheer speculation and must be disregarded.

4) The party asserting survivorship has the burden of proving it.”

This is the rule prevailing in a majority of the States, generally as a matter of common law, but sometimes through express statutory declaration.33

Concerning the Distribution of Property

The New York Simultaneous Death Law34 provides as follows:

“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 otherwise provided in this section.”

At the outset it should be recognized that, although the above subdivision of the statute does not set forth the statement of a presumption, and certainly not one of survivorship, it does in effect adopt the presumption that death was simultaneous, since the disposition of the property directed by the statute is that which would be made were it presumed that the deaths were simultaneous.35 Of course, by the express wording of the statute, the presumption, implied in its provisions, that death occurred simultaneously is a rebuttable one. An Ohio statute,36 which became effective in 1932, raises a presumption that, as far as the disposition of property is concerned, deaths resulting from a common accident within thirty days of each other shall be considered simultaneous. The Ohio Supreme Court held the statute constitutional.37 It

33. For example GEORGIA CODE ANN. (1933) § 113-906 (property of each coheir shall descend to the respective heirs, excluding each as heir of the other; section only operates when decedents could inherit from each other; death in common disaster not required).
34. N. Y. DEC. EST. LAW § 89, subd. 1; UNIFORM SIMULTANEOUS DEATH ACT, 9 U. L. A. § 1.
35. See note 28 supra.
37. Ostrander v. Preece, 129 Ohio St. 625, 196 N. E. 670 (1935), appeal dismissed 296 U. S. 543, 56 Sup. Ct. 151 (1935). One interesting application of the Ohio statute was pointed out in the recent case of In re Metzger, 140 Ohio St. 50, 42 N. E. (2d) 443 (1942).
might be urged that such a presumption, divorced from the purpose for which it was created, would be unconstitutional as violating due process, since a presumption should have its basis in the reasonableness of the fact presumed\(^8\) and that there is no reason for presuming generally that two persons, dying under such circumstances (i.e., within thirty days of each other), die simultaneously. However, as in the case of the Ohio legislation, it is obvious that what is intended in the Uniform Act is a new rule for the succession to property and it would seem that the State has power to enact such legislation.\(^9\) The necessity for such a solution to the difficult problem arising from death in a common disaster has frequently been advocated.\(^40\) It has been pointed out that the ultimate problem has always been the determination of the person to whom the property is to go and that the only purpose of inquiring into the order of death is to answer that problem.\(^41\) Why should the identity of the person entitled to property vary depending upon whether \(A\) or \(B\) died a split second before the other, especially since there is no question of depriving the actual but momentary survivor of any enjoyment of the property? The Uniform Act disregards this factor. No account is taken of the inherent probabilities of the order of death. On the contrary, a rule having no relation thereto is established in order to furnish certainty in the determination of the person who shall take the property involved.

\(W\) died three hours after \(H\), her husband, both deaths being the result of the same disaster. It was held that by virtue of the arbitrary rule of the Ohio statute, \(W\) was never a widow and hence her administrator could not recover the statutory widow's allowance from \(H\)'s estate. The court stated that such an arbitrary presumption was not unreasonable as applied in this case since the purpose for the allowance had failed.

38. "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." Tot v. United States, 319 U. S. 463, 467, 63 Sup. Ct. 1241, 1245 (1943); see also Manley v. Georgia, 279 U. S. 1, 49 Sup. Ct. 215 (1929); Western and Atkinson R. R. v. Henderson, 279 U. S. 639, 49 Sup. Ct. 445 (1925); Comment (1943) 31 CALIF. L. REV. 316, discussing the California presumptions of survivorship, and pointing out that, even though the conclusion is drawn in the face of obviously inconsistent facts, the conclusion is not haphazard. "It is in accordance with circumstantial evidence, even though the bearing of this evidence may be remote. In other words there is at least an attempt to decide according to probabilities."


40. Tracy and Adams, Evidence of Survivorship in Common Disaster Cases (1940) 38 MICH. L. REV. 801, 830; 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2532a.

41. 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2532a.
To show how the new enactment will operate and to point out the changes thereby worked in the New York law, a few examples will be given. Applying the statute to the state of facts disclosed in *Wood v. Angrave*, to which reference has already been made, the substitutional legatee named in the reciprocal wills of the commorientes would receive the legacy, or, to be more accurate, the legacies. It would appear that, with the possible exception of this instance, the first subdivision of the statute is a mere codification of existing New York law. For instance, the New York law relative to the situation where a beneficiary under a will and the testator are not shown to have died otherwise than simultaneously seems to remain unchanged by the enactment. Prior to the statute it was clear that the legacy would have lapsed since those claiming through the legatee would be unable to sustain the burden of proof as to the legatee's survivorship. Under the statute, the result would appear to be the same, since the first subdivision provides that in such a case "the property of each person shall be disposed of as if he had survived." In other words, the property in question is that belonging to the testator at the time of his death and, as to the devolution of that property, he is deemed to have survived. A contrary conclusion would require rather obvious reasoning in a vicious circle: the property involved belongs to the beneficiary because he is deemed to have survived and he is deemed

42. 8 H. L. Cas. 183, 11 Eng. Rep. Repr. 397 (1860). We will assume that this would represent the previous New York rule in view of Newell v. Nichols, 75 N. Y. 78 (1878); see note 30, supra.

43. The application of the statute to the above situation results in the anomalous determination that each of the testators survived the other. As a matter of practical administration the will of each testator would be separately probated and the substitutional legatee would take the separate property of each testator.

44. Thus, Surrogate Foley states: "This is the present rule under judicial authorities." Foley, *Inheritance Law Changes*, N. Y. L. J., July 14, 1943, p. 98, col. 2.

45. St. John v. Andrews Institute, 191 N. Y. 254, 83 N. E. 981 (1908). Also see Note (1903) 16 Harv. L. Rev. 368 which discusses the correct reasoning upon which the devisee's heir is defeated as distinguished from the reasoning used to defeat the next of kin of the deceased legatee. None of the decisions seem to have adopted the refined reasoning advanced in this note.

46. Since the statute only applies to "the property of" the commoriente under whom a persons claims, query whether the statute would apply in the following case: A bequeaths property to B with a general power of appointment. B appoints by will to C, if living, otherwise to D. B and C die contemporaneously. Clearly the heirs of B would not be entitled to the property, but might not D successfully claim the property upon the argument that by a liberal construction of the statute the property had belonged to B? The property would be taxable to B's estate under the federal estate tax; INT. REV. CODE § 811 (f), 26 U. S. C. A. § 811 (f) (1942).
to have survived because the property belongs to him. On the contrary, as already pointed out, distribution under the statute is based on what is in effect a presumption of simultaneous deaths. In addition, there is no sound reason of policy which would suggest the enactment of a statute favoring the next of kin of the legatee in such a case. If the legatee was closely related to the testator, the legacy will not lapse. If the testator wishes to disinherit his statutory distributees by preventing the lapse of a legacy, he may provide in his will for a distribution as though the legatee had survived, in the event that he and the legatee die simultaneously, and the provision, under the express terms of the statute, will be given effect. If his intention to disinherit is not expressed by a complete disposition of his estate to others, the statutory provisions relating to the execution of wills would seem to be a sufficient ground for not giving effect to such an intention.

The case of St. John v. Andrews Institute not only involved this question of survivorship between a testator and a legatee, but also another novel feature. The testator, his wife and the legatee had, all three,

47. A bequest to a descendant, brother or sister of a testator will not lapse if there are alive descendants of the deceased legatee. N. Y. Dec. Est. Law § 29. Of course, a substituational gift will prevent the operation of this section, Matter of Neydorff, 193 App. Div. 531, 184 N. Y. Supp. 551 (3d Dep't 1920). In Matter of Macklin, 177 Misc. 432, 30 N. Y. S. (2d) 706 (Surr. Ct. 1941) a father and his son, a legatee under the father's will, perished in a common disaster. The son's children were held to be entitled to the legacy even though they could not prove, in accordance with the language of section 29, that the legatee had died "during the lifetime of the testator." The court held the legislative intent was to preserve the gift whenever the legatee "fails to survive" the testator and that the burden of proof of survivorship of the legatee did not rest upon the children. Contra: Carpenter v. Severin, 201 Iowa 969, 204 N. W. 448 (1925), where the statute provided against failure of a devise "if a devisee dies before the testator."


50. A "will" merely disinheriting an heir has no effect. In re Trumble's Will, 199 N. Y. 454, 92 N. E. 1073 (1910); Nagle v. Connard, 79 N. J. Eq. 124, 81 Atl. 841 (1911); Tea v. Milten, 257 Ill. 624, 101 N. E. 209 (1913). However, it has been held that a codicil revoking a will "so that I may die intestate" constitutes a bequest to the next of kin. Brenchley v. Lynn, 2 Rob. Ecc. 441, 163 Eng. Rep. Repr. 1375-(1852).

perished in a fire. It was found that the legatee survived the testator but, as to the testator and his wife, the relative time of their deaths was held to be unascertainable. Since the will of the testator gave more than one-half of his estate, after the payment of his debts, to a charitable corporation, such devise or bequest would have been invalid under section 17 of the New York Decedent Estate Law to the extent that it exceeded one-half, if his wife had survived him. Since there was no proof that the wife survived the testator, the court held that section 17 did not apply. Would the pertinent provision of the Simultaneous Death Law call for a different conclusion today? It would not appear so. It is true that the immediate members of the testator's family, who are given the right by section 17 to object to the charitable gift where one of their number survived the testator, would receive the prohibited excess of the charitable gift, if there is no residuary clause. However, it does not follow that, under the facts of St. John v. Andrews Institute, on that account the wife should be considered to have survived the testator. As pointed out in the preceding paragraph, this would involve a prior assumption that the property belonged to the wife at the time of her death in order to render operative the new statutory rule. The following observation of the Court of Appeals in the St. John case would still hold force:

"There was no point of time when the title of Mr. Andrews was divested at which Mrs. Andrews could have taken it, and in construing such statute [section 17] her simultaneous death is in effect the same as a death before his death."

The fact that the Simultaneous Death Law constitutes a rule of property rather than a rule of evidence is emphasized when we consider it from the standpoint of conflict of laws. At the outset it should be clear that the Uniform Act does not become applicable merely because the deaths occur in New York State, or the question of title to property resulting from such deaths is litigated here. The general principle is that the devolution of immovable property is governed by the law of its situs, whereas the law of the domicile of the owner of personal prop-

52. Since 1929 (N. Y. Laws 1929, c. 229 § 3) these members of the family are the spouse, child, descendant, or parent. See In re Plaster's Estate, 179 Misc. 80, 37 N. Y. S. (2d) 498 (Sur. Ct. 1942), aff'd, 266 App. Div. 439, 43 N. Y. S. (2d) 1 (3d Dep't 1943).
property governs its devolution. Accordingly, the Uniform Act will apparently not be operative where a different rule of distribution obtains in the jurisdiction where the real property involved is situated, or where the decedent, who owned the personal property to be distributed, had resided.

The Case of Joint Tenants

The problem of the effect of the contemporaneous demise of joint tenants seems to have been first introduced into the law in an interesting case in which father and son were hanged together from one cart and where it was found that one of them survived the other because his legs were seen to shake during the hanging after those of the other. In Bradshaw v. Toulmin, Lord Thurlow was of the opinion that if joint tenants perish by one blow, the jointly-held estate will remain in their respective heirs as joint tenants. Blackstone, however, believed that a tenancy in common would result. The leading American case holds that an estate by the entirety descends as if the commorientes had been tenants in common.

The second subdivision of the New York law provides:

"Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants." 58

The paucity of our language undoubtedly compelled the draftsmen to speak of each of the commorientes as though each had survived the other (an obvious impossibility) in stating the basis for the distribution of the jointly owned property, and one would be hypercritical to question the

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57. Ennis v. Smith, 14 How. 400 (U. S. 1852); Matter of Majot, 199 N. Y. 29, 32, 92 N. E. 402, 403 (1910); Restatement, Conflict of Laws (1934) § 303.
58. Broughton v. Randall, Cro. Eliz, 502, 78 Eng. Rep. Repr. 752 (1596) in which it is stated that the son survived; but see the report of this case in Noy 64, 74 Eng. Rep. Repr. 1032 in which it is stated that the father survived.
60. 2 Blackstone Commt. 180.
61. McGhee v. Henry, 144 Tenn. 548, 234 S. W. 509 (1921); also see Vaughan v. Borland, 234 Ala. 414, 175 So. 367 (1937).
62. N. Y. Dec. Est. Law § 89, subd. 2; Uniform Simultaneous Death Act, 9 U. L. A. § 3. It should be noted that the provision does not expressly refer to community property which is recognized by some states.
63. The same expression of the basis of distribution is to be found in the first sub-
provision on this score. However, when we consider the substance of this provision, it would appear that the draftsmen of the Act in dealing with the distribution of the jointly-owned property proceeded in accordance with purely historical and legal concepts governing the incidents of joint tenancy in disregard of equities which may have attached to the joint ownership. In the case of two joint tenants it is provided by the Act that the property shall be distributed equally; in the case of more than two, it is provided that the property shall be distributed "in the proportion that one bears to the whole number of joint tenants." While legally the individual interests of joint tenants or tenants by the entirety are always considered identical, it would seem inequitable and less in accord with modern notions of property that the joint tenants should have the same distributable interests if they happened to have contributed unequally to the purchase price of the property or to its present value. It appears to be the English rule that in the latter case, while the joint owners hold the legal title in equal shares, there is a resulting trust to each in proportion to his contribution. There also is support for this view in the New York law. It is submitted that a distribution, more just and less legalistic, would be one in which the property were simply distributed as though the commorientes had been tenants in common, or, to be more explicit, in proportion to their equitable interests. It may be argued that the provision of the Act in question was not intended to prevent the application of equitable principles and also that the first section of the Act might govern. However, the unambiguous language employed in the provision relating to joint tenants, read by itself, requires that the property be distributed equally regardless of the beneficial interests involved. It is believed that joint tenancies and those by the entirety, in which there have been unequal contributions, occur frequently enough to warrant a re-examination and clarification of this provision.

64. 2 Tiffany, Real Property, (3d ed. 1939) § 418.
66. See Matter of Strong, 171 Misc. 445, 452, 12 N. Y. S. (2d) 544, 552 (Surr. Ct. 1939), noted in (1940) 25 Corn. L. Q. 316, which involved the simultaneous deaths of husband and wife, tenants by the entirety, and in which it was held that since the entirety 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 deaths.
67. Both the Internal Revenue Code [§ 811 (e); 26 U. S. C. A. § 811 (e) 1942] and the
Except as just noted, the provision dealing with joint tenants appears to represent a codification of the prevailing view of the law. Mention should be made, however, of one interesting New York decision which comes close to deviating from the current of authority (and therefore from the Act), if it does not actually do so. The case is *Bierbrauer v. Moran*, in which a husband murdered his wife and then committed suicide. The Appellate Division reversed a finding by the trial court that the husband had survived the wife and decided that, even though there was no proof of survivorship, the property which they had held as joint tenants should be distributed in its entirety to the wife's heir and not to the husband's devisee. The court, though it recognized the general rule that, in the absence of proof of survivorship, the jointly-held property should devolve as though it had been held by the commonitorus as tenants in common, decided that the whole title should pass to the wife's heir on the principle enunciated in *Riggs v. Palmer* that no one should be permitted to profit by his own wrong. However, the effect of the decision was to deprive the husband's estate of the interest in the property which, under the rule ordinarily applicable to joint tenants, the husband possessed at the time of his death. As to this interest of the husband in the property, the holding seems to amount to the penalty of forfeiture for crime, which has been done away with in New York. A rationale which could support the decision is the invocation of a presumption

New York Tax Law [§ 249-r (5)] recognize for purposes of estate taxation the amounts originally contributed by the respective joint tenants.

69. 244 App. Div. 87, 279 N. Y. Supp. 176 (4th Dep't 1935); also see *In re Sipworth* [1935] 1 Ch. 89.
70. 115 N. Y. 506, 22 N. E. 188 (1889).
71. See Oleff v. Hodapp, 129 Ohio St. 432, 195 N. E. 838 (1935), discussed in (1935) 4 FORDHAM L. REV. 510 holding that a joint tenant was entitled to the entire property, although he had murdered the other joint tenants, on the ground that a joint tenant is seized of an undivided whole from the time of the creation of the estate. In Barnett v. Couey, 244 Mo. App. 913, 27 S. W. (2d) 757 (1930) it was held that the murder effects a severance of the joint tenancy into a tenancy in common. Some courts give the estate to the tenant (or his heirs) having the greater life expectancy charged with a trust in favor of the other tenant (or his heirs) for the period of his life expectancy. Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927); Sherman v. Weber, 133 N. J. Eq. 451, 167 Atl. 517 (1913). New York places a trust on the entire estate for the benefit of the victim's heirs, completely ignoring the "vested rights" argument, Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (1918).
72. N. Y. Penal Law § 512. See also: U. S. Const. Art. III, § 3: "No attainder of treason shall work corruption of blood, or forfeiture, except during the lifetime of the person attainted."
that the victim outlived her murderer and this is the basis upon which the decision is explained in a later case.\textsuperscript{73} Nevertheless, a presumption that the murderer predeceased his victim, particularly where, as here, the probabilities would be the other way, is purely fictitious and appears to be a mere makeshift utilized by the court to transfer to the victim’s estate what would normally pass to the murderer’s estate. One apparent justification for invoking such a presumption is the argument that the murder foreclosed the possibility that the victim might have survived her husband, in which case she and her heir would have received the estate free from the possibility of her husband’s survivorship. A more forceful ground for justifying the result reached by the court is that, had the murderer survived, he would have been declared, at least in New York,\textsuperscript{74} a constructive trustee of the estate for the benefit of his victim’s heirs. \textit{A fortiori}, the murderer’s heirs should acquire no greater rights, where he is not proved to have survived. If these reasons constitute valid grounds for the holding, then it may be that we must accept the \textit{Bierbrauer} case as a special-circumstance exception to the joint tenancy provision of the Uniform Act.

The Case of Insured and Beneficiary

The third subdivision of the New York statute provides:

"Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary."\textsuperscript{75}

The above provision, specifically dealing with the case of the simultaneous deaths of insured and beneficiary, is not a mere particular application of the rules provided for in the two preceding subdivisions of the New York Statute. Those rules govern the distribution of \textit{property belonging to the deceased} at the time of his death. It is not until an insured dies that the proceeds of the policy come into existence. While in a substantial sense it is due to the act of the insured that the beneficiary becomes entitled to the proceeds of the policy, they never belonged

\textsuperscript{73} \textit{Matter of Sparks}, 172 Misc. 642, 15 N. Y. S. (2d) 926 (Surr. Ct. 1939). The court stated that the plaintiff who had been in prison for ten years for the killing of his wife would be presumed not to have survived her.

\textsuperscript{74} \textit{Ellerson v. Westcott}, 148 N. Y. 149, 42 N. E. 540 (1896).

to the deceased as his property and it would appear, therefore, that the 
provisions contained in the first two subdivisions of the New York 
statute would not apply to the distribution of the proceeds of the policy. 
The third subdivision was clearly required to deal with the situation.

It should be noted at the outset that, given a purely literal interpreta-
tion, the insurance provision of the statute is not restricted to cases 
where the rights of the beneficiary depend upon his survivorship of the 
insured. In terms the provision applies to the simultaneous death of 
any beneficiary and insured. However, when we bear in mind the pur-
pose of the statute and the fact that its other provisions, dealing with 
dispositions of property in case of simultaneous death, are brought into 
operation only where the order of death would affect the disposition of 
property, it seems certain that the insurance provision only applies where 
the rights of the beneficiary depend upon survivorship of the insured. 
Take the case of a policy payable to the beneficiary, "his executors, ad-
ministrators or assigns." The almost unanimous view of the courts is 
that the interest of such beneficiary in the proceeds of the policy be-
comes absolutely vested upon his designation as beneficiary, and even 
if he should predecease the insured, the proceeds will go to the estate of 
the deceased beneficiary. The legislature could hardly have intended 
the insurance provision of the statute to apply merely because the bene-
ficiary and the insured happened to die simultaneously, for in such a case 
the order of death is unimportant. There are other instances in which 
the simultaneous death of a beneficiary with the insured would not appear 
to deprive the estate of the beneficiary of the vested interest which the 
beneficiary had in the proceeds of the policy during his life time: an 
"assured" who procures and maintains the contract of insurance on the 
life of the insured, such as a creditor of the insured; a beneficiary who 
has given a valuable consideration for his designation as such in a 
policy procured and paid for by the insured.

77. Sterritt v. Manhattan Life Ins. Co., 38 App. Div. 599, 52 N. Y. Supp. 1132 (2d Dep't 1899); cf. Johnson v. Van Epps, 110 Ill. 551 (1884). It might also be urged that the in-
surance provision would not apply, since this is a case "where a provision other than that 
provided for by this section has been made for the disposition of property", N. Y. DEC. 
EST. LAW, § 89, subd. 4; cf. UNIFORM SIMULTANEOUS DEATH ACT, 9 U. L. A. § 6, where 
the language differs slightly but the sense is the same; see infra, page 00.
78. See Ferdon v. Canfield, 104 N. Y. 143, 10 N. E. 146 (1887); Connecticut Mutual Life 
79. See Smith v. National Benefit Society, 123 N. Y. 85, 25 N. E. 197 (1890). Further-
more, a strict interpretation of the word "beneficiary", as used in the statute, would seem
The case which will call the provisions of the statute into operation is the one where the terms of the policy make survivorship a condition to payment of the proceeds. The common law principle is that survivorship is an affirmative proposition to be proven like any other fact. In a case where there is no proof as to the actual survivorship of insured or beneficiary, the claimant upon whom the law casts the burden of proof—the secondary beneficiary or the personal representative of the insured or of the primary beneficiary—must fail in his claim. Lack of harmony, if not confusion, exists in the decisions upon this important question of the burden of proof.

In a leading case, United States Casualty Co. v. Kacer, the policy in question provided that upon the death of the insured the proceeds should be payable to his daughter “if surviving.” Both insured and his daughter perished in a shipwreck. The Missouri court held that, since the insured had not reserved the right to change the beneficiary, her interest was vested, subject to being divested by her death before the insured, and consequently, that the burden rested upon the representatives of the insured to prove that the beneficiary had not survived the insured. In other words the interest of the beneficiary was interpreted as being subject to a condition subsequent. In MacGowin v. Menken, the proceeds of the policy were payable to the insured’s wife “if living,” if not, to his estate. The New York Court of Appeals held that the survivorship of the wife was a condition precedent to her taking and that, therefore, her personal representative had the burden of proving to comprise only donee-beneficiaries; see Vance, Insurance (2d ed. 1930) 537; 2 Cooley, Briefs of the Law of Insurance (2d ed. 1927) 1298.

80. 9 Wigmore, Evidence (3d ed. 1940) § 2532; Whittier, Problems of Survivorship (1904) 16 Green Bag 237.
81. 169 Mo. 301, 69 S. W. 370 (1891).
82. Accord: Cowman v. Rogers, 73 Md. 403, 21 Atl. 64 (1891); contra: Hildebrandt v. Ames, 27 Tex. Civ. App. 377, 66 S. W. 128 (1901), which follows the trust theory, i.e., that the insurer is a trustee, the insured a settlor and the beneficiary a cestui que trust; the trustee cannot be compelled to execute the trust before it is proven that the contingency which entitled the cestui to the fund has happened, in default of which proof there is a reversion; the only “vested interest” is one in expectancy, liable to be divested by the predecease of the beneficiary, and not one in possession. The court distinguished Paden v. Briscoe, 81 Tex. 568, 17 S. W. 42 (1891) on the ground that in the latter case there was a second named beneficiary and therefore the burden of proof was on such substituted beneficiary. Actually the second “named” beneficiary was “the heirs” of the insured. Cf. Deyo v. Grosfeld, 163 Misc. 27, 294 N. Y. Supp. 1010 (Mun. Ct. 1936), aff’d 163 Misc. 30, 294 N. Y. Supp. 1014 (App. Term, 1st Dep’t 1937).
83. 223 N. Y. 509, 119 N. E. 877 (1918).
ing that fact. The court expressly refused to adopt the reasoning of the court in *United States Casualty Co. v. Kacer* resting its decision upon the mere language of the condition. However, the court did distinguish the latter case by pointing out that since in the New York case before it the insured had reserved the right to change the beneficiary, the wife did not have a vested interest but a mere expectancy, subject to being defeated by the insured designating another beneficiary. Other decisions of the lower courts in New York have also seemingly disregarded the reasoning of the court in the *Kacer* decision, almost invariably placing the burden of proof upon the personal representative of the beneficiary without animadverting to the question of whether the right to change the beneficiary had been reversed. It is true that in an Appellate Division case, decided prior to the *MacGowin* case, the dissenting opinion made the point that the insured had not reserved the right to change the beneficiary. However, aside from this minority reference to the distinguishing factor relied upon in the *Kacer* decision, and the mention of it by our Court of Appeals in the *MacGowin* opinion, the New York courts appear not to have considered the reservation of the right to change the beneficiary as important in determining the claimant upon whom rests the burden of proof. In a jurisdiction, such as Missouri, which holds that a beneficiary's interest is vested, even though conditionally, where the interest is terminable solely upon non-survivorship (as distinguished from the mere act of the insured in changing the beneficiary), the adoption of the Uniform Act will apparently

84. Only three cases have been found, however, where, in a policy under which the right to change the beneficiary had been reserved, the language was held to constitute a condition subsequent, with the burden of proof upon the personal representative of the insured: *Matter of Cava*, 174 Misc. 750, 21 N. Y. S. (2d) 999 (Surr. Ct. 1940); *Watkins v. Home Life Insurance Co.*, 137 Ark. 207, 208 S. W. 587 (1919); *Roberts v. Hardin*, 179 Ga. 114, 175 S. E. 362, 180 S. E. 634 (1934): and see, *Matter of Valverde*, 148 Misc. 49, 265 N. Y. Supp. 484 (Surr. Ct. 1933); *but cf. Paden v. Briscoe*, 81 Tex. 563, 17 S. W. 42 (1891), in which the court construed the words "die before" as constituting survivorship a condition precedent to the beneficiary taking.


87. *Id.* at 483, 126 N. Y. Supp. at 233.
alter the law. If we consider the decision in the *MacGowin* case as broadly holding that the burden of proof will rest upon the beneficiary, whether or not the right to change is reserved by the insured, the provision of the statute which distributes the proceeds as though the insured has survived makes no change in the New York law. In any event, the delicate problem of fixing the burden of proof in a case of simultaneous death is obviated by the adoption of what is in effect a conclusive presumption that the insured survived.

The Case of Successive Beneficiaries

A notable feature of the New York statute is its failure to include the following provision of the Uniform Act dealing with the situation where successive beneficiaries die simultaneously:

"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 equal 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."

One reason which suggests itself to account for New York's failure to include this provision is the difficulty of readily envisaging the circumstances to which the above section of the Uniform Act was intended to apply. An instance to which this provision might have been intended to apply consists of a case where property is devised to *A* for life, remainder to *B* if living at *A*'s death, otherwise to *C*. *A*, *B* and *C* die under such circumstances that it is impossible to prove the order of their deaths. In such a case *A* would not appear to be a successive beneficiary,

90. Professor Wigmore, under a somewhat differently worded provision of a prior draft of the Act, which will be found set out in 9 *Wigmore, Evidence* (3d ed. 1940) 486, gives the following example: "A will of X devises a lot of land to M for life with remainder to N if living, but if N does not survive M, then a residuary bequest to charities. M and N perish in a common disaster." Wigmore concludes that under his draft, N and the charity would each receive one-half of the devise.
91. It is to be noted that no other section of the Law would cover this situation as the property in suit is not that of one of the coommorientes.
since his interest does not succeed but precedes that of the other beneficiaries. B and C are successive beneficiaries and under the above quoted provision of the Uniform Act it was undoubtedly intended that the property be divided equally between the heirs of B and C. This would appear to be an equitable distribution, and would avoid a disposition of the property based upon a nice distinction as to the onus of the burden of proof, to which otherwise a judge must have recourse. Where this provision of the Uniform Act does not govern (as in New York today), C's heirs would take all the remainder if, by applying analogously the decision in MacGowin v. Menken, it is held that B's heirs have the burden of proving his survivorship as a condition precedent. However, if the reasoning employed by the court in United States Casualty Co. v. Kacer, is to prevail in the case of successive beneficiaries named in a will, then it may be argued that the burden of proof rests upon C's heirs, since B had a vested remainder subject to being divested.92

To give effect to the apparent intent of the draftsmen, an example has been given above in which A, the life tenant, was one of the commoriens. If A survived B and C, who had died simultaneously, it would seem that C's heirs would take the entire remainder, since they would merely have to show that B did not survive A. This would be true today in New York,93 and if the Uniform Act was intended to give a contrary result it is understandable why the New York legislature failed to adopt the Act in its entirety.

In view of the lack of clarity as to the meaning and scope of the provision dealing with successive beneficiaries and doubts as to its real utility, one can appreciate the hesitation of the New York legislature in committing itself to this provision.

The Saving Provisions

The statute contains two saving provisions. The first provides that the statute

"... shall not apply in the case of wills, living trusts, deeds or contracts of insurance wherein a provision other than that provided for by this section has been made for the disposition of property."94

Without this provision the statute might be construed as an invariable

92. See Schraub v. Griffin, 84 Md. 557, 36 Atl. 443 (1897).
94. N. Y. DEC. EST. LAW, § 89, subd. 4; UNIFORM SIMULTANEOUS DEATH ACT, 9 U. L. A. § 6. The New York statute contains an immaterial change in the language used in the Uniform Act.
rule for the devolution of property in the case of simultaneous deaths. This could hardly have been intended since the Act was drafted to make certain the devolution of property where evidence of survivorship is lacking and where no aid can be obtained from the terms of an instrument under which the property passes. If the intention as to the distribution of property, in case of doubt as to priority of death, is manifested in an appropriate legal instrument, there should be no need to call into play a statutory rule which is designed primarily to express the presumed intent of the deceased.

In drafting a provision intended to render the statutory rule inoperative, caution would seem to dictate the omission of a statement as to the time of death in the form of a presumption, at least in the case of a will. A direct gift over by way of substitution seems preferable. Where a testator undertakes to direct that he or a legatee shall be considered to have died first without having made a gift by way of substitution, the claim may be made that there is an attempt to evade the statute of descent and distribution. However, so far as a New York estate is concerned this precaution is less imperative since in the well known case of Matter of Fowes, Judge Crane, writing on this point held that a provision stated thus presumptively constituted in legal effect a valid substitutional gift. Another matter which should be carefully considered in framing the provision is the manner in which the event resulting in the simultaneous death is described. It has been suggested that use of the expression "common disaster" should be avoided. This suggestion has undoubtedly been made for two reasons. First there may later arise a question as to whether the occasion of the "simultaneous" deaths does constitute a common disaster. Secondly, the deaths, though caused by

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96. 222 N. Y. 222, 239, 118 N. E. 611, 615 (1918). Although Judge Crane dissented. this part of his opinion was adopted by the majority of the Court of Appeals; id. 234. 118 N. E. at 614.
97. A provision that if legatees died before the testator leaving issue the gifts should not lapse "but should take effect as if his or her death had happened immediately after mine" was given effect as a bequest to the personal representatives of the named legatees in Matter of Greenwood [1912] 1 Ch. Div. 392.
98. Tracy and Adams, Evidence of Survivorship in Common Disaster Cases (1940) 38 Mich. L. REV. 801, 830. For a recent decision in which the court held (somewhat narrowly, it would seem) that the intention not to restrict the deaths to those resulting from a common disaster was insufficiently expressed, see Matter of Bull, 175 Misc. 197, 23 N. Y. S. (2d) 5 (Surr. Ct. 1940).
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a common disaster, may be separated by a considerable length of time and this fact may not only frustrate the intention of the testator, insured or settlor but may also raise theoretical as well as practical difficulties.

The other saving provision contained in the New York statute reads as follows:

“Nothing contained in this section shall be deemed or construed to apply to the disposition of property of a person who has died before the effective date of this section or to the disposition of property passing under an instrument, other than a will, executed before such date.”

The italicized portion of the statute does not appear in the Uniform Act. New York, apparently following the lead of Massachusetts, added the italicized language to save the statute from grave doubts as to its constitutionality. As previously emphasized throughout this discussion, the Act cannot be considered as establishing mere rules of evidence. It definitely constitutes a rule for the distribution of property and if the statute were intended to alter vested property rights, it would appear to violate both the due process and the contract clauses of the Constitution.

The Scope of the Statute

This statute might become popularly known as the “Common Disaster Law.” It would be highly inaccurate to thus describe it. Neither by

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100. See for example Rutherford Trust Co. v. Stagg, 127 N. J. Eq. 541, 14 A. (2d) 514 (1940).

101. See Brown, May a Man Provide in His Will That His Wife Shall Not Take Under it Unless She Shall Survive Him for a Period of Forty-Eight Hours? (1925) 1 WASH. L. REV. 135.

102. N. Y. DEC. EST. LAw § 89, subd. 5. The failure to include wills in the non-retroactive provision of the saving clause is understandable since a will is in its nature ambulatory and is not operative until the death of the testator.

103. UNIFORM SIMULTANEOUS DEATH ACT, 9 U. L. A. § 5. There are other unsubstantial differences in the language of the two provisions.


105. U. S. CONST. AMEND. XIV, § 1; Wilkinson v. Leland, 2 Pet. 627, 658 (U. S. 1829); Citizens Savings & Loan Ass'n v. Topeka City, 20 Wall. 655 (U. S. 1875); Lowell v. City of Boston, 111 Mass. 454 (1873).


107. The initial drafts of the Act were entitled “Uniform Death in Common Disaster Act”; see 1937 Handbook of National Conference of Commissioners on Uniform State Laws 245. The Act was renamed in 1937 specifically in order to cover deaths “in disasters
its terms nor its implications can it be limited to deaths resulting from common accidents or disasters. The statute should apply "wherever there is no sufficient evidence that the persons have died otherwise than simultaneously." This seems clearly to include situations where the deaths actually occur at different times and where they do not at all arise out of the same event or succession of events. For example, even though the time of death of one of the persons is definitely established, the statute by its terms should become operative where there is no proof as to the relative time of death of another. The incidence of the Uniform Simultaneous Death Law, under present war conditions, is obvious. Where a person is reported missing in action there is a strong presumption of fact that he is dead. A large number of persons (civilians as well as members of the armed forces) must have been, and will be, killed in the present war under circumstances rendering the manner and time of their deaths unknown. A peace-time instance, and one likely to recur frequently, is found in In re Rhodes. There the owner of the property disappeared. At the time he was last heard of his mother and two brothers were his nearest kindred. Seven years thereafter, when the presumption of death became effective, his next of kin were six nephews, the mother and brothers having died in the seven year interval. The question presented to the court was to whom should the property pass, to the personal representatives of the next of kin who were alive when the intestate was last heard of, or to the nephews. Although the time of death of the mother and brothers was known, the time of their death in relation to that of the presumed death of the owner of the property was uncertain. The court admitted itself unable to solve the

which were not common and under circumstances which were not disasters." The murder at one time of three persons should come within the Act, although "the occurrence could not be termed a 'disaster.'" 1938 Handbook 277. However in 1939 it was still called the "Uniform Death in Common Disaster Act" 1939 Handbook 75.

108. The history of the Uniform Act clearly shows that it is applicable wherever sequence of death, determining the disposition of property, is in question. 1937 Handbook of National Conference of Commissioners on Uniform State Laws 236.


110. The majority of decisions seem to hold that the presumption of death from seven years' absence merely extends to the fact of death and neither to the time of death, Claywell v. Inter-Southern Life Ins. Co., 70 F. (2d) 569 (C. C. A. 8th, 1934); Tyrrell v. Prudential Ins. Co., 109 Vt. 6, 192 Atl. 184 (1937), nor to the celibate, childless or intestate condition of the person presumed to be dead, at the time of his death, Still v. Hutto, 48
problem and suggested a compromise. If the court had been aided by
the present statute, seemingly the problem would be solved by applying
the provision that where “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.” The property would,
therefore, have gone to the nephews because as to the intestate’s prop-
erty, he is deemed to have survived the mother and brothers.

While the rule of the statute applies only where the distribution of
property is in question, this factor is not in itself enough to bring the
statute into play. There must also be involved the question of the order of
death of two or more persons. This limitation upon the scope of the
statute is graphically illustrated by the case of Durrant v. Friend, in
which a testator and certain of his chattels were lost at sea. These chat-
tels had been bequeathed by the testator to specific legatees. The chattels
had been insured and there was a contest between the specific legatees
and the executors of the estate as to the disposition of the proceeds of
the insurance. If the testator had died before the chattels were lost, the
executors would have held the insurance for the benefit of the legatees,
whereas if the testator had “survived” his chattels, the legacies would

S. C. 415, 26 S. E. 713 (1897), Lachowicz v. Lachowicz, —Md. —, 30 A.
(2d) 793 (1943); see 9 Wigmore, EVIDENCE (3d ed. 1940) § 2531a. However, in Connor v.
New York Life Ins. Co., 179 App. Div. 596, 166 N. Y. Supp. 985 (2d Dep’t 1917) the
court stated that the general rule in New York is that, in the absence of other evidence
as to the time of death, there is a presumption that death occurred at the end of the seven
year period. Cases in other jurisdictions support this view; see cases collected in Notes
(1925) 34 A. L. R. 1389, (1931) 75 A. L. R. 630.

111. See Shraub v. Griffen, 84 Md. 557, 36 Atl. 443 (1897).
note 110 supra, the same result would be reached without recourse to the Uniform Simul-
taneous Death Law. However, it would seem that the Uniform Simultaneous Death Law
would prevail over the presumption that death occurs at the end of the seven year period.
In a case where the time of death of the intestate is known but the next of kin (such as
the mother or brothers in the Rhodes case) are presumed to have died after a period of
seven years’ absence within which the intestate has died, under the rule of property set
forth in the Uniform Act, the intestate’s property would be distributed as though he had
survived. This statutory rule of property would govern despite the aforementioned pre-
sumption because “there is no sufficient evidence” as to the order of death, the presump-
tion not constituting evidence. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE
COMMON LAW (1898) 337; (1943) 12 FORDHAM L. REV. 185, 187. As to what constitutes
evidence see Fidelity Mutual Life Association v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662
(1902) and Leach v. Hall, 95 Iowa 611, 64 N. W. 790 (1895).
have deceased. The court held that the testator and his chattels had perished together and found for the executors.

One more word of comment upon the scope of the Act. The statute only applies where there is "no sufficient evidence" of the order of death. It may be asked whether the adoption of the statute was intended to raise the quantum or quality of the evidence, sufficient to warrant an inference of survivorship, over what is now the prevailing standard of proof. Little can be added to the discussion of evidence in survivorship cases contained in an excellent article recently written upon the subject.\(^\text{114}\) The evidence offered in such cases would lead one to question whether rights to property should depend upon such tenuous proof—very often in close cases opinion or cadaveric evidence. It has been held in an extreme decision that even a "shadow of evidence" is sufficient to determine the question of survivorship.\(^\text{115}\) The Uniform Act, which affords an equitable distribution of property in cases of contemporaneous deaths, diminishes the necessity of drawing tenuous findings from meagre or barely probative circumstantial evidence, and it will be a question of statutory construction for the courts whether the expression "sufficient evidence" used in the Act was intended to have any special significance. That expression, as used in other statutes, has been interpreted as requiring a higher than the ordinary standard of proof.\(^\text{116}\) The expression takes an added meaning when viewed in the light afforded by the history of the Act. In its penultimate draft, the Act contained a provision that "a priority of time shall not be deemed to be sufficiently evidenced unless such an interval of time between the deaths is shown to have elapsed that the survivor had a clear period of consciousness."\(^\text{117}\) This "clear period of consciousness" test was omitted from the final draft on the ground that to require more than just survivorship was not

\(^\text{114}\) Tracy and Adams, *Evidence of Survivorship in Common Disaster Cases* (1940) 38 Mich. L. Rev. 801.

\(^\text{115}\) Pell v. Ball, 1 Cheves Eq. 99, 103 (S. C. 1840); *see also* Coyle v. Leach, 8 Metc. 371 (Mass. 1844); *cf.* Matter of Burza, 151 Misc. 577, 212 N. Y. Supp. 248 (Surr. Ct. 1934).

\(^\text{116}\) *Catholic Encyclopedia*, 662 states: "The only absolutely certain sign of death is decomposition."

\(^\text{117}\) *1939 Handbook of the National Conference of Commissioners on Uniform State Laws* 211.
germane to the object of the legislation. It should not follow that, because the Commissioners on Uniform State Laws determined to discard the "clear period of consciousness" test, there was no intention to improve the standard of proof which would preclude the application of the Act.

Conclusion

The foregoing discussion indicates that, for the most part, the statute merely codifies the pre-existing New York law. Nevertheless the impact of the statute as a new rule of law will be perceived when there comes under consideration the distribution of property of those who have not died in a "common disaster" but the order of whose death is unknown. Despite possible defects in draftsmanship (perhaps inevitable in this type of legislation), the statute as a whole constitutes a distinct advance towards the goal of certainty and uniformity in the law. The draftsmen have wisely limited the scope of the Act and have not attempted to embrace all problems which may arise from simultaneous deaths. Nevertheless, some provision might have been drafted defining simultaneous death in such a manner as to exclude short intervals between the deaths. The opportunity to dispose of the property which would come to the actual survivor by reason of survivorship is a minimum incident of the enjoyment of such property. Any interval of time which is so brief as to preclude even the exercise of this privilege should be disregarded in determining survivorship. The alternative method of solving this problem is by the less satisfactory technique of formulating arbitrary presumptions as rules of evidence. Not having gone so far as to overcome the difficulty by the means suggested, it is commendable that no attempt was made to encumber the Act with rules of evidence inappropriate in a law creating a rule of property intended to be uniform through the states.

A global war of the kind now being fought will inevitably result in a great many deaths, the time of which will be unascertainable. The Simultaneous Death Law has the merit of timeliness in its grim practicality.

118. *Ibid* at 209, 211-213.