Commorientes

ONE of the more exciting of the functions of the lawyer in our society is advising on law-reform. The lay public expects to be told what the proposed cures are for the mischiefs which it has ceased to endure patiently: in other words the drafted legislation has to be explained and justified. All too often the lawyer acts as a prophet. "If you pass a section like this," he says, "the courts will almost certainly react as follows....." The lay public is expected to make up its mind what it wants, to determine what are the symptoms of its complaint, to search for a remedy, and the lawyer will suggest possible prescriptions and (more happily) comment on other people's suggestions. A gift for brief, lucid, draftsmanship is not seldom put to employment in our governmental departments, though we all know that judges and textbook-writers profess to admire its results less often than they could wish.

Apart from the relatively straightforward task of determining what the public needs, and what it wants (they do not always coincide!), and later drafting the legislative measure which should meet the requirement, there is a more difficult task of adopting a legal rule for the solution of a technical problem, particularly a problem which recurs none too frequently, in which no public demand manifests itself, and there is no stable and ancient local precedent to serve as a guide. The maxim *Nil innovandum* expresses a reliable instinct, and the legal draftsman rightly prefers not to depart lightly from what his countrymen have lived with and by for many years without notable discomfort. Naturally it seldom happens that rules are introduced rashly and inconsiderately: without a demand for a change the old rule, however antique, deserves to remain undisturbed. But in countries like India, Burma, Indonesia, Malaya, where codification has begun, is under way, or under active consideration, or in a country like Ceylon, where unification of private laws is bound to come sooner or later, there will, sooner or later, be a demand for reconsideration of rules which have been enjoyed, or endured, for centuries—and of several quite practical rules one or more must go to the wall. A preference will be inevitable, and it must be justified. In these technical contexts it does not by any means follow that the rule used by a majority community will be the best for the whole country, because in terms of jurisprudence or comparative law the minority's rule may happen to be better.

In the first volume of the *University of Ceylon Law Review* the present writer had the pleasure of discussing that troublesome problem, the disqualification of a slayer from taking a benefit as a result of his crime. The different communities of India, or indeed any other country, cannot be assumed to have different views as to the propriety of excluding the slayer: yet the very basis of the exclusion, its extent and results were found to be in doubt, and the subject was as difficult as the remedies in various parts of the world were found to be incompatible. In that case India had legislated too soon, without the aid of ample comparative legal research. Ceylon would not want to follow her without a careful investigation. In this paper the writer wishes to tackle the less sombre, but otherwise very similar problem, jurisprudentially speaking, of the legal position, in the field of acquisition of property, which arises when two persons die in such circumstances that it is uncertain which survived the other. Here again we have a pure technical legal problem, which cannot possibly be aided by local preferences, sentimental or religious leanings, communal prejudices, or national traditions. If we can find the answer it will be true for all countries and all times, and if systems of law fail to adopt it they will be faulty to the extent that they have failed to approximate to it. This is something of a challenge, and it should be fun to cope with it.

The problem and a solution in vacuo

If the king of Utopia were thinking of legislating on this subject how would he apply his mind to the problem ? Firstly what is the problem about ? Let us suppose that in Utopia people have private possessions which may pass by testamentary or intestate succession (an incongruous supposition but inevitable for our present purpose!) Let us suppose that a father and son go out fishing. Neither returns in the morning and the question is what should happen to their assets. If the father died first his heirs which would include the son (for he must have died after) will inherit; and the heirs of the son will take the son's assets plus his share of his father's estate, the heirs of the son, of course, not including the father himself because he has predeceased. If the son died first the father might well be his nearest heir in which case the son's assets will pass to the heirs of the father (excluding the son) along with the father's assets. If they could somehow be proved to have died simultaneously (if that is a practical possibility, which has been doubted) the estate of each will go to his heirs respectively, excluding the other. If we do not know which died first what are we to do ? It makes a good deal of difference to surviving relatives, dependants, friends,

charities, the State. There are two possibilities: we may be in doubt (1) which survived the other, or (2) whether either survived, and if so which. A comedian may suggest that there is no difference between (1) and (2). But let us take the case of a couple, perhaps man and wife, sitting side by side in the front seat of a car, and being struck simultaneously by a lorry driven in the opposite direction at speed. As a matter of fact it may have happened that one survived the other, for though both may have lost consciousness together, life may have remained longer in husband than wife, or vice versa. We know that life can remain even though the heart stops beating, a fact of which surgery has recently been able to take profitable advantage. But courts do not proceed upon theoretical possibilities except in penal and other somewhat untypical contexts. In our car-crash there is no practical doubt whether either survived. The conscience of the court can readily be satisfied that neither survived the other: in other words, there is no doubt whether either survived and if so which. But let us take a different case, of a house collapsing in an earthquake. The two deceased were on different floors, or were together in a basement or ground-floor apartment. The conscience of the court is not easily satisfied that there is no doubt whether either survived: indeed there is every doubt whether either survived and if so which. There is also a doubt whether one survived the other. Thus in our first example doubts (1) and (2) are not present; in our second example both doubts (1) and (2) are present. We can however have a third case whether one doubt is present but not the other. A fishing-vessel founders and most of the crew are saved. As they move in the darkness they hear a voice calling, but it cannot be recognised. It is found, by a process of elimination, that two men were left in the water. One has been heard calling, not the other. The conscience of the court may readily be satisfied that one, the caller, survived the other, but there is doubt as to which it was. Thus, though there is no doubt for practical purposes that one survived the other, so that doubt (2) is absent, doubt (1) remains.

It may be submitted that the Utopian monarch will, after establishing the types of doubt and the nature of the problem, apply his mind next to the principles and objects of the law which have to be satisfied. What are the possibilities ? A benefit may accrue, or fail to accrue, because a particular fact cannot be proved. Benefits may come from various quarters and be conditioned to accrue upon a variety of conditions. The very survivorship of a person may be not merely his qualification for benefiting, but another person's qualification for gaining or reason for losing property. So also the non-survivorship of a person. For example, a father may leave property by will to his wife, but if she does not survive him, to his daughter.

Or he may leave property to his daughter for life, and if his son does not survive his daughter, to a charity absolutely. Or he may leave property to a friend until his mother shall survive his brother when he bequeaths it absolutely to his mother. If in all these examples the people contemplated die in such circumstances that the court's conscience cannot be satisfied as to survivorship the testator's or settlor's intentions may well be frustrated. And this is certainly an eventuality to be avoided and to be provided against, where possible by general legislative provision. Defects which the testator could not have provided against ought to be made good by the interference of the State. The king of Utopia would grasp this readily enough. The intentions of a testator, lawful and irreproachable, ought to be given effect according to their tenor, and should not be frustrated by accidents that could hardly have been within his contemplation.

What of intestate succession ? The property of each deceased should pass to those who need and merit it. This universal principle, not entirely satisfactorily provided for in all systems of law, is founded upon the *ideal*, that for which human institutions strive. By a mixture of carefully regulated intestate shares and individual adjustments on the basis of 'family protection' or maintenance-provision for dependents, the ideal can become a reality in very many cases if not all. Cases of persons dying together, or in circumstances leaving a doubt as to survivorship, put a spoke in the wheel of the law, and the ideal is often quite simply frustrated. Let us suppose that a father with several children by his first marriage dies in such circumstances with his newly-married young wife, with whom and whose family his children are on bad terms. If, according to the applicable system of law, the surviving spouse takes a share of the estate, the wife's relations would benefit quite unexpectedly and unmeritoriously if they could show that she survived her husband, or if the court were prepared to act upon the presumption that she must have survived him. Or one may take a case (as has actually happened) where two spouses adopt informally a child, bring him up, and see him married and starting a family of his own. If they both die in the circumstances stated, and it is impossible to hold that either survived the other, the property of each will go to the blood relations of each, and if either or both of them made provision by testament, insurance or otherwise for the welfare of the adopted child and his family after the death of the survivor of them, the provision will come to nothing simply because there has been no survivor.

The insurance cases are particularly tiresome. It frequently happens that the beneficiaries under the terms of the policy were so nominated be-

cause they could take the benefit and employ it in ways contemplated by the insured. A man insures his life in much the same way as he makes a will, in the hope that a fund will become available for purpose of which he approves, and for the use of a person whom he trusts. Frequently both he and his beneficiary have saved and even suffered in order that these intentions might be fulfilled. If the beneficiary dies along with the insured, or in such circumstances as we have discussed throughout this section, the benefit may very well be taken by persons quite outside the contemplation of the insured. The wife may not be held to survive her husband, whose life has been insured at the expense of both of them, and the benefits of the policy will go as on the husband's intestacy; but if she is held to have survived by the application of some rule-of-thumb principle it may happen that as she cannot benefit personally, nor supervise the application of the fund, it will go to her relations whom the insured, and indeed she herself, had not the slightest intention of benefiting.

For this reason wills and other dispositions are often drafted so as to provide for the contingency of two persons' dying 'simultaneously' or 'contemporaneously'. This is a mistake, for if it is not possible to prove that the death was actually simultaneous, etc., as is usual, the condition cannot operate. In one of the more interesting cases on the subject of *commorientes* arising in the last half-century this was pointed out strikingly. In *Re Rowland*, a case in the English Court of Appeal in 1962,[1] T left his estate by will to his wife, directing "in the event of the decease of my wife preceding or coinciding with my own decease" his estate should be divided between a brother and a nephew. T's wife made a similar will leaving her estate to T with a gift over to a niece of hers. T and his wife were on a vessel which disappeared, and no evidence was forthcoming as to the manner, or even the date, of their deaths. The claimants under the 'gift over' wanted to establish that T died coincidentally with his wife. Lord Denning, M. R., opined that for practical purposes the deaths must have been coincident within the meaning of that word as used by that testator executing that will. His brother judges held otherwise, and by a majority (with which all academic lawyers are likely to agree) the claim of these conditional legatees was rejected, on the ground that they could not prove the happening of the condition: the wife had not either predeceased or died coincidentally with her husband—for, for all anyone knew, she might have survived on a raft

1. *Re Rowland (dec'd). Smith* v. *Russell and others* [1962] 2 All E. R. 837 (C.A.). The case is considered at 233 L.T. 295 (June 1st, 1962).

days after her husband was eaten by sharks. That coincidental or simultaneous deaths *can* occur no one doubts, and an instance of such a rare event is to be found in *In re Pringle*,[2] when Cohen, J., held that the deaths of two sisters were simultaneous when they were shown to have been killed by a bomb which struck the place in which both of them were together.

Thus our imaginary legislator will be aware that for various purposes various principles must be satisfied. Legacies ought, if possible, to be given their effect, although the legatee did not survive, if it appears that the real intention was to benefit the legatee *or* the legatee's heirs. Where the legacy is evidently personal there can hardly be any justification for its vesting when the legatee did not predecease (so that, except for an important exception to which we shall return, there would not be an automatic lapsing of the bequest) and yet did not survive long enough to exercise adequate volition in respect of the enjoyment and further disposition of the property in question. The benefits of an insurance policy ought not to operate in favour of the beneficiary named in it unless that beneficiary actually survives and can exercise volition in respect of the amount.

Is it likely that one short, simple proposition would meet these requirements ? A proposition that each should be neglected in distributing the property or estate of the other might seem to meet many objections, but it does not cope with the situation where, because of the non-predecease of the other deceased, the heirs of the latter, who might well expect to benefit out of the estate of the *propositus*, can be excluded from benefit. Thus if we suppose a father dying together with his son, which son leaves sons of his own, the natural and proper devolution of the property of the father would be to his grandsons. But if we introduce a rule that the son should be neglected in distributing the estate of the father the grandsons will find themselves in competition with other relatives of the *propositus* on very unfavourable terms, since they cannot represent their deceased father because the latter did not predecease the *propositus*. On the other hand, if a presumption were introduced that in such cases the son should be taken to have survived, the grandsons would then take their deceased father's share as his own heirs—unless, of course, he had disposed of his property elsewhere on the understanding that his own father would be providing for his sons. It must be recollected in this connexion that under English law,[3] and the somewhat similar Indian law,[4] a legacy to a descendant does

2. *In re Pringle. Baker* v. *Matherson* [1946] Ch. 124.
3. The Wills Act, 1837, section 33. Section 32 enacts a very similar intention.
4. Indian Succession Act, 1925, section 109.

not lapse if that descendant *predeceases* the testator leaving lineal heirs, but the legacy vests as if the descendant had died immediately after the testator. A similar effect is achieved by the rule of construction called *conditio si institutus sine liberis decesserit* in Scots law.[5] It is therefore established that conditions will be read into a testament in favour of the issue of a descendant (in Scots law a person to whom the testator stood *in loco parentis* for this purpose), and it is in no way an innovation to secure some such favour even in the marginal and embarrassing cases where the descendant did not predecease the testator because of the 'simultaneous' or similar death.

We have already seen that on very practical grounds rule-of-thumb provisions, presumptions to be applied for want of evidence in every case, have serious limitations. Before conjecturing what an ideal monarch would enact as his *commorientes* rule let us review briefly what has happened in this connexion in various countries. A completely comprehensive survey would be bulky and tiresome, and it will be sufficient to cover the countries and jurisdictions which are relevant to the situation of Ceylon, amongst South East Asian countries contemplating wholesale revision of private law. We shall look first to the Roman law and countries of the Roman law tradition, then to the Jewish law, the remarkable provisions of which have attracted by no means the attention they deserve, then (very briefly) the discussions of the Islamic lawyers, whose opinions cannot but be of interest in Ceylon, Malaya and Indonesia and finally the complex but highly interesting meanderings and empirical tinkerings of the Common Law world, within which India must for this purpose be comprehended.

The Roman and Civil Law Solutions

One of the less satisfactory features of the common-law case-law on the subject of *commorientes* is the patronising and incompetent manner in which the Roman and Romanic precedents are reviewed. The testy manner in which Scots judges have dismissed the civil law material as not binding upon them[6] is perhaps not so hard to understand. But English and American judges have on occasions had ample justification for considering whether the civil law might not supply, in point of principle if not in point of the actual rules, some guidance of a more than superficial character. Perhaps

5. Gloag and Henderson, *Introduction to the Law of Scotland*, 4th edition, 529, Testate Succession, section 25.

6. *Drumond's Judicial Factor* v. *H. M. Advocate* [1944] Session Cases 289, 301, per Lord Justice-Clerk Cooper. See also *Mitchell's Executrix* v. *Gordon's Factor* [1953] S.C. 176.

the blame for their rapid and inadequate survey lies at the door of the sources they chose to employ. However we find in their discussions of the civil law sources[7] far less understanding than the comparative lawyer seeks to encourage in his students.

The main rules are to be found in Justinian's Digest, book XXXIV, tit. V (De Rebus Dubiis), leges 9 (otherwise counted as 10), 16 (17)—18 (19), 22(23), and 23(24). It is instructive, especially for the purposes of Ceylon, to read this chapter with the commentary of Voet.[8] However perhaps the best discussion is that of Iacobus Menochius, *De Praesumptionibus, Coniecturis, etc.*, VI, praes. 50. (Venice, 1590, II, fos. 108-111), where the principles and instances are compendiously and clearly set out. The mediaeval jurists show considerable acumen in correcting what they believe is the faulty reasoning of their text in places, but apart from this it seems that little new was discovered or derived, for both the general principles and the positive rules were clear enough. In most common-law treatments of the civil law position it is assumed that all we can find from the Digest is the somewhat puerile rule that one must presume in cases of *commorientes* that the younger died first when he was below puberty, but that he survived if he was over puberty. We are also told that civil law countries improved on this by parity of reasoning. The latter may not be altogether unfounded, but the former allegation is a parody of the facts.

To commence, we must note that the maxims of the civil law which govern this field of enquiry are (1) *in dubiis ea interpretatio est sequenda, quae est verisimilior*, and (2) *in ambiguis ea sententia est sequenda, quae rei gerendae magis convenit:* when the meaning of a disposition is doubtful that interpretation should be followed which is more likely to fit the facts, and in an ambiguity that opinion is to be followed which best suits the effecting of

7. See above-mentioned cases; also *Ross's Judicial Factor* v. *Martin* [1955] S.C. (House of Lords) 56 (see 1954 S.C. 18). In Ross's case two sisters died together in a common calamity, each leaving a formal will whereby she bequeathed her whole estate to her brother and sister equally and the survivor of them. Each provided, in the event of her brother and sister predeceasing her, for the appointment of the same person as trustee and executor, and each in addition made identical provision for the division of her estate in that event. Both wills were executed on the same day. There was no evidence that either sister survived the other or that they died simultaneously; and the brother predeceased his sisters. It was held that as there was no proof or presumption that either sister had survived the other or predeceased the other, both estates fell into intestacy. A statutory presumption that both died simultaneously would have carried into effect the intention, it is submitted, of the testatrices.

8. Johannes Voet, *Commentarius ad Pandectas*, II (Hague 1734), XXXIV, 5. 3 = p. 457. M. Kaser. *Das Römische Privatrecht*, I (Munich, 1955), 237 gives references to modern continental discussions of the presumptions, at n. 21. P. Gane, *Selective Voet*, vol. 5 (1956) 264-5. See also Dig. XXIV, 1, 32, 14

the purpose in hand.[9] 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 tne 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. It is of importance to notice that in many of these the jurists were content that *for practical purposes* neither survived the other: see for instance Dig. XXXIX, 6. 26.[9a] They were not concerned to create a presumption for all cases: on the contrary the general result was that *neither of the two survived the other.* As a result of the non-survival various rules which would operate upon the assumption of a survival, and dispositions which could take effect only upon a survival, would be inoperative, and this is amply illustrated.[10]

On the other hand this general situation would create difficulties in particular instances. In certain situations a presumption was admitted, however the likelihoods might fall, in order that an anomalous result should be avoided. We emphasise that the special rules derogate from the general position, stated above, and are not really fitted to be taken, themselves, as the foundation for a general solution to the *commorientes* problem. Thus where a freedman died along with his son in the lifetime of his *patronus*, the general rule of neither surviving—which fits the procedural law, since by definition no evidence of actual survival was forthcoming—would lead to the property passing to the son's heirs, to the exclusion of the patron, who would be entitled if the father died sonless. [11] He would not die sonless if he died simultaneously with his son (which is the result of a rule excluding survivorship of either by the other), and to get over this difficulty it was established that in such a case, in favour of *patronatus*, the son shall be held to have died first,[12] whatever his age and state of health and the probabilities as to his capacity to survive in the common calamity. This is not an exception to the rule about the son below puberty, etc., to which we shall come, but an exception to the general rule stated above. Similarly, if husband and wife perish together and there is no evidence leading to an inference that the wife survived, the stipulation regarding dowry would

9. *Iacobi Cuiacii Iurisconsultorum. . . . Principis Operum* Tom. II, (Lugduni, 1606), col. 1062. See also 1066 for the commentary on the lex *Qui duos.*

9a. Voet, op.cit., XXXIX, 6. 7 (trans. L.E. Krause, p. 99); cf. ibid. XXIV. 1. 4, pp. 110-1: reciprocal gifts *mortis causa.*

10. See for example Dig. XXXIV, 5, 16-18. Also 9 (substitution favoured).

11. Inst. III, 7.

12. Dig. XXXIV, 5, 9, 2.

operate to the benefit of the wife's heirs. This must be so even if the husband died during the wife's lifetime, since the payment of the dowry, is obligatory if the husband did not survive his wife.[13] Therefore it was essential that the wife should be held to have predeceased her husband, and this is laid down, not, we notice, because she might be weaker than her husband, though that consideration is a somewhat feeble confirmation of the good sense of the rule.[14] Further, if it be written in a testament that a fideicommissary must hand over the property "if he dies without children", the fideicommissum would be frustrated if the fideicommissary and the latter's son died together, for he would, upon the general rule, have not died without children. Consequently, in favour of the fideicommissum, the fideicommissary's son is presumed to have died first as in the case of the freedman and his son.[15] Fourthly and lastly where two brothers, the one with offspring the other without, perish in a wreck, leaving other sons of predeceased brothers surviving them, by parity of reasoning with the cases mentioned above it was thought that it ought to be presumed that the brother who had offspring died first. This was in order that in that way the children of brothers may succeed *per capita* to the brother without offspring, and that thus those whom nature has put in an equal relationship might take equal shares. "So" says Voet "natural fairness prompts."[16]

Against the background of the general rule that neither is understood to have survived the other we must set those cases also where the Roman jurists thought it desirable to set up an apparently distinct presumption from those set out above. Where father and son had perished in war (not necessarily in the same battle) and the mother claimed the estate of both as if the son had survived, but the agnates claimed as if the father had survived, the emperor Hadrian held that the son survived, from which one would be inclined to draw a general presumption that when father and son die together (except in the case of the freedman shown above) the son survived.[17] When,

13. It is well known that if the wife survived the husband the *dos* was hers; if he survived her it (i.e. except for *dos recepticia*) remained his . Kaser, I, 289.

14. Dig. XXXIV, 5, 9. 3. See also Dig. XI, 7, 32. 1.

15. Dig. XXXVI, 1, 17 (18), 7. Trans. A. J. McGregor, p. 39.

16. On Dig. XXXIV, 5. para. 3. Following Johan à Someren, *Tractatus de Repraesentatione* (Trajecti ad Rhenum, 1676), III, i, no. 11 = pp. 59-60, who says *in dubia enim hujusmodi morte inspiciendum est, quid naturali rationi et aequitati magis conveniat* (with citations of Barry, *de Success*, XVII, tit. 6. no. 12 and decisions).

17. For another example of the force of equity in raising a presumption of this character, and so placing the burden of proof see Antonius Faber (Favre), *Codex Fabrianus*, IV, XIV, def. 39, cf. def. 2 ibid: a pretermitted son is presumed to have survived a testament where other sons also are pretermitted —equality is equity. Dig. XXXIV, 5, 9. 1. So, on the local statute of Mechlin, P. van Christynen, *In Leges Municipales Commentaria*, tit. XVI, art. 28 = 3rd. edition, Antwerp, 1657, pp. 511-2, nos. 13-14 So also Simon van Leeuwen, *Censura Forensis*, III, XIV, i = 3rd. edn. Amsterdam 1685, p. 238.

again, a man had instituted his son his heir by testament, the son being above the age of puberty, and there was doubt as to the question of survivorship of father and son, the two perishing in a common disaster, the heirs of the son were allowed to take the legacy, upon the assumption that the son had survived. But if the son had been below the age of puberty, the father was presumed to have survived. Menochius approves the opinion that the same rule should apply even to minors who are above the age of puberty if their strength, etc., so suggests. Here as elsewhere the probabilities are looked to, and the question of relative strength will hardly be relevant where the deaths were in different disasters. In both cases the presumptions applied only if no evidence was forthcoming concerning survivorship, and we are to understand that even one witness could testify to a person's survival, whereas in controvertible questions two witnesses were always required.[18] The jurist Iavolenus, dealing with a shipwreck in which mother and son, above the age of puberty, perished in such circumstances that the survivorship of neither can be proved, held that "it is more natural to believe (*humanius est credere*) that the son lived longer."[19] Bartolus is jealous of this rule and holds that though the heirs of the son will, according to the rule, take the estate of the mother, they can do this only if they are *heredes sui*, so that testamentary heirs, for example, will have no right to the property. Contrasted with that example, Gaius held that if a woman and her immature son perished in a shipwreck the son would be understood to have died first: as the gloss says, this presumption arises from the tender age of the victim. But in both these cases *nisi ratio singularis suadeat contrarium ut pro patrono*, in other words, unless, as in the case of the rule in favour of the patron, a particular justification should set the presumption aside.[20]

The presumptions, therefore, that the younger succeeded, or survived, when he was above the age of puberty, but that he failed, or predeceased the other, when he was below the age of puberty proceed, evidently upon the probabilities of the case, in those circumstances only where a 'particular justification' did not indicate the contrary. We have seen four examples of such cases. In others, and we find they are all of father and son or mother and son, and not of all individuals indifferently, it was more likely that the younger, if he were mature, would struggle longer and so survive longer and there was no reason why the law should not proceed upon a conjecture as to the probabilities. Naturally, if the evidence was that the son, though

18. So Voet ad fin.

19. Dig. XXXIV, 5, 22.

20. Dig. XXXIV, 5, 23. See ordinary gloss thereto, and Bartolus thereon (*Bartoli Comm. in Sec. Infort. Partem*, Lugn., 1547), fol. 109r.

mature, was a cripple, the Roman law would have excluded this presumption—it would have been, as we say, rebutted. Ultimately, then, the general rule of no survivorship was open to modification in one of two directions, according to the results which would attach to its application, and subject in every case to rebutting evidence as to the probabilities.

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. We may briefly review the present situation in continental and other countries.

The French rules were followed until 1947 in the State of Oregon, they are still followed in Quebec, and were and (so far as the writer is informed) still are followed in Louisiana, California, Montana, North Dakota and Wyoming.[21] The French Civil Code provides:—[21a]

1. Where two or more persons respectively called to the succession one of another perish *in the same disaster* without evidence of priority of death, the presumption of survival is determined by the circumstances of the fact, and in their default, by refrence to age or sex.
2. If both are less than 15 years old, the older survived.
3. If both are over 60 years old, the younger survived.
4. If one is under 15 and another (or others) is over 60, the former survived.
5. If all (or both) are between 15 and 60, the male survived as long as the ages were the same within a year.
6. If they are of the same sex or different ages, the younger survived.

Much as common lawyers are inclined to laugh at this ingenious amplification of a partial aspect of the Roman law,[22] there can be no doubt but that it served as the source of the modern English statutory law which by no means shares the French rule's ingenuity or completeness, as we shall see.

21. See 50 Harv. L. R. 344-9 (1936); also H. McCall, " Presumptions of survivorship among commorientes," 12 Tulane L. R. 623-8 (1938). On the contrast between English and civil-law rules see H. F. Jolowicz, " Some curiosities in the history of the commorientes rule," in *Festschrift Fritz Schultz* (Weimar, 1951), 289-297.

21a. Artt. 720-722.

22. See *Wing* v. *Angrave*, *Hickman* v. *Peacey*, cited below.

The French Civil Code omitted the case of simultaneous deaths of a person under 15 and one between 15 and 60: the general opinion is that in this and the comparable case of a person over 60 and one between 15 and 60 the survivor is the one in the intermediary period,[22a] and this has been embodied as a rule in the corresponding provision of the Quebec Civil Code (Art. 604). It seems superfluous to comment that the probabilities do not always lie as the scheme supposes. Where the *commorientes* were spouses, for example, the husband would attempt to prolong the life of his wife, and he might well not survive in fact, though the law would presume survival.[22b]

Germany,[23] Switzerland,[24] and Greece[25] 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. The solution adopted in Germany is the one which has recommended itself to Spain, and it is well represented in consequence in Central and South America.[26] It is to be remarked that while the French rule leaves no room for judicial equity and proceeds upon the basis of sex and age, the German and Spanish rule leaves no room for judicial equity, proceeding upon a cast-iron presumption, to be applied in all cases where evidence is not forthcoming, from which the Romans themselves were careful to make multiple exceptions.

The Jewish solution

It was a maxim of the Jewish law of succession that a certain heir always excludes an uncertain heir.[27] The following passage from Maimonides will indicate how that maxim was applied.[28]

22a. Planiol-Ripert, *Traité Élémentaire de Droit Civil*, para. 1516, 3rd. edn., III, 493.

22b. See D. Dardano, " Uniform Simultaneous Death Act," 30 *Oregon* L.R. 172-7 (1951).

23. Art. 20 of the B.G.B. replaced by Art. II, Law of 4 July 1939.

24. Art. 32 of the Z.G.B.

25. Greek Civil Code of 1946, sec. 38.

26. Codigo Civil, art. 33; so Argentina, art. 109; Colombia, art. 95; Chile, art 79.

27. Horowitz, *Spirit of the Jewish Law* (New York, 1953), pp. 379-380.

28. Maimonides, *Mishneh Torah*, XIII (Book of Civil Laws), V. 5, 6-9. Translated by J. J. Rabinowitz (New Haven, 1949).

If a house collapsed upon a man and his wife, and it is unknown whether the wife died first, so that the husband's heirs are entitled to inherit all of her property, what is the rule ? The *melog* property is presumed to belong to the wife's heirs,[28a] and the *ketubbah*, principal and additional, is presumed to belong to the husband's heirs,[29] and the iron sheep property they divide equally, the wife's heirs taking one half thereof and the husband's heirs taking the other half.[30]

But if a house collapsed upon a man and his mother, the mother's property is presumed to belong to the mother's heirs, because their heirship of the mother is certain, whereas the sons' heirs' heirship of the mother is doubtful, since, as we have stated, the son's brothers by his father have nothing in the mother's property if the son predeceases the mother.

If a house collapsed upon a man and his daughter's son, and it is unknown whether the grandfather died first, and his daughter's son succeeded to the inheritance, so that the grandfather's property belongs to the grandson's heirs, or his daughter's son died first, and—the rule being that a son does not succeed to his mother's inheritance while he is in the grave, as we have stated[31]—the grandfather's property belongs to his heirs, the property is to be divided between the heirs of the grandfather and the heirs of the daughter's son.

Simlarly, if the grandfather was taken captive and died in captivity and his daughter's son died in his home country, or if the grandson was taken captive and died in captivity and his mother's father died in his home country, the grandfather's property is to be divided between his own heirs and those of his daughter's son.

If a house collapsed upon a man and his father, or upon any other person to whose inheritance he would succeed if he were living, and there is outstanding against the son his wife's *ketubbah* and other debts, and the father's heirs say, "The son died first and did not leave anything, so that the debts are lost," while the creditors say, "The father died first and the son acquired a right in his inheritance, so that we are entitled to collect from his share," the property is presumed to belong to the heirs, and the woman and the creditors must produce proof or go without anything.

28a. *Melog* ('plucking') that part of the wife's property of which the husband has the usufruct, but for the depreciation of which he is not answerable.

29. *Ketubbah*, the sum assured to the wife in the marriage contract by the husband-to-be and a first charge on his estate at his death.

30. 'Iron sheep (*son barzel*) property' is property belonging to the wife but in the husband's keeping and for any depreciation of which he is liable in any event.

31. The Jewish law does not recognise inheritance by representation of a deceased person in such a context as this.

> The rule with regard to those who died under the ruins of a collapsed structure, or drowned in the sea or fell into a conflagration, or died on the same day while one was in one country and the other in another country, is the same, because in all of these cases, and in similar cases, we do not know who it was that died first.

This extraordinarily interesting section from Maimonides' version of the Talmudic law on the subject, a version which will always be regarded as bearing, like the rest of his work, the stamp of authority, teaches us several useful lessons. The first is that the Roman rules as we have described them above were by no means without an echo in that highly intelligent but by no means imitative civilisation. By coincidence, more probably, than as a result of influence, the spirit of the Roman solution is represented here also. But we have the marked additional advantage that the rules apply even though the *commorientes* did *not* die in the same disaster—a rule of great importance, because any set of presumptions we ought to apply must govern such cases as well as those strictly fitting within most of Justinian's examples. The shortcomings of the French rule in this connexion are immediately evident.

Further we notice from the rather technical first section and from the penultimate section that where an injustice, or unmerited enrichment, would result from allowing a presumption of survival, the necessary predecease is presumed, even though different presumptions will be required for different items of property which have, normally, different destinations. There is an equitable distribution of matrimonial property, particularly that which the husband holds as trustee for his wife and property over which she has a charge which matures only if she were to survive him. And there is no point in presuming that the younger survived when the effect would be to make the elder's estate pay the younger's debts. Otherwise, says the Jewish law, one splits the estate of the ascendant between the heirs of both, ignoring the other deceased, i.e. as if each *propositus* was himself the survivor. The rather difficult cases of the mother and son, and grandfather and his daughter's son, illustrate the principle that where the heirs of the descendant or other claimant by virtue of inheritance would have a doubtful claim to the property of the *propositus* if the descendant, etc., *had* actually predeceased, the estate of the *propositus* will pass as if the descendant, etc., had survived, so that those heirs will be excluded. But, on the contrary, where the heirs of the descendant, etc., could have a legal claim had the descendant, etc., predeceased the *propositus*, the descendant, etc., is treated

as having predeceased, but since the doubt remains, the certain claim of the descendant's heirs conflicting with the certain claim of the *propositus*' heirs, the estate will be divided between them, with the result that the descendant's heirs take a share in the descendant's estate (which does not devolve on the *propositus*), *and* a share in the estate of the *propositus* himself.

After this we shall not be surprised to learn that in the Israeli Succession Bill[32] it was proposed to enact that,

> Whenever two or more have died and the prior death of anyone has not been established, the rights in the estate of each shall be dete - mined on the assumption that he was the survivor.

This is a simplification of the rabbinical law, much as the German or Spanish rule is a simplification of the Roman rule.

Islamic Solutions

As so often the Islamic jurists disagree. One school of thought is represented in Ḥanafī, Malikī, Shafi'ī and eastern Ibādī law, while another appears in Ḥanbalī and western Ibādī law. According to the former the existence of the one deceased is ignored in the distribution of the estate of the other; according to the latter we assume the survival of the one while distributing the estate of the other.[33] The only solutions offered are thus the opposed presumptions of simultaneous death and mutual survival. The former fits the basic Roman rule and is equivalent to the present German and Spanish rules. The latter, which seems odd at first sight, is justified upon the reasoning that since priority of death cannot be proved one is not entitled to deprive of his share or slice of the residue a relative whose life continued when the *propositus* died, or whose death *after* that moment cannot be proved. This method is quite naturally in disfavour in Islam since the wife's relations would take her special Quranic share, to which they have, morally speaking, no shadow of entitlement. The rule of mutual survival is one of the ways of achieving the object of the English Wills Act[34] and similar provisions, which enable a descendant to survive

32. Section 9.

33. S. G. Vesey-FitzGerald, *Muhammadan Law*, 157-8. A. A. A. Fyzee, *Outlines of Muhammadan Law*, 1st edn., para .86, 3. N. B. E. Baillie, *Digest of Moohummudan Law* (London, 1865), p. 704. Nawawi, *Minhaj et Talibin*, trans. L. W. C. Van Den Berg and E. C. Howard, London, 1914, 253-4.

34. See n. 3 above.

fictitiously in order to convey a benefit to his heirs, whom the law favours. But it is not necessary to apply so broad and far-reaching a presumption in order to achieve so limited a purpose, and the Anglo-Saxon rule of presuming the survival of the younger is a limited manner of achieving this purpose, since it is assumed that descendants and persons who need and merit the *propositus'* estate will normally be younger, or the heirs of the younger of two *commorientes.* Whether this limited purpose should occupy the whole field is quite another question, and this writer doubts it.

Common-law Solutions and recent Indian legislation

The most fascinating chapter in this story is the development of a *commorientes* rule in England, the Commonwealth, and the United States. India had an original contribution to make which can only be appreciated against the background of this study.

In *Rex* v. *Dr. Hay*[35] a writ of mandamus was issued to the judge of the Prerogative Court to grant letters of administration of the effects of one General Stanwix to his nephew and next of kin, notwithstanding that the general and his daughter had died together in circumstances leaving it uncertain which survived, and the daughter had left next of kin. The mandamus was declared absolute, it being held by the court that the civil law as to the survival of a child if over the age of puberty was not a rule in England. However in *Bradshaw* v. *Toulmin*[36] Lord Thurlow, C., said that if two persons being joint tenants, perished by one blow, the estate would remain in joint tenancy in their respective heirs, instead of permitting the heirs of one to take as if he were a presumptive survivor to the other. This was an example of the application of the Roman fundamental rule, and his decree was not inconsistent with Roman principles on the subject. In *Mason* v. *Mason*[37] where the testator and his son and legatee died in a shipwreck Sir William Grant, M. R., declined to adopt the Roman presumptions of fact; indeed he ruled out presumptions and declared that the claimants to the estates must be put to proof of survivorship. A correction to this viewpoint is to be obtained from *Wright* v. *Netherwood*[38], where the testator, his wife and children disappeared in the same ship. Reference was made to the Digest, to Voet and to Domat. The authority of Zouch was also

35. (1767/8) 1 Black. W. 640=96 E.R. 372.
36. (1784) Dickens 632=21 E.R. 417.
37. (1816) 1 Mer. 308=35 E.R. 688.
38. (1793) 2 E. Salk. 593 n., 2 Phill. Ecc. 266 n.

relied upon,[39] to the effect that no *commoriens* could transmit rights to another. Sir William Wynne said, "With respect to the priority of death it has always appeared to me more fair and reasonable in these unhappy cases to consider all the parties as dying at the same instant of time, than to resort to any fanciful suppositions of survivorship on account of the degree of robustness; and I rather suppose that is what is meant by Dr. Zouch in the passages alluded to." Unfortunately, subsequent students of this decision have failed to realise that the learned judge was not rejecting the civil law, but only rejecting the application of its better-known particular rule. In *Taylor* v. *Diplock*[40], another case not perfectly understood, a man made a will giving his residual personal estate to his wife, whom he appointed his executrix. They both perished in the same ship. Sir J. Nicholl held that the next of kin of the husband were entitled, it being incumbent on the next of kin of the wife to prove her survivorship before they might claim—and this was impossible. It is supposed that this case asserted the absence of a presumption of survival, and indeed the decree is consistent with this. But what the learned judge actually said seems to lead to a different conclusion. He said, "Looking to their comparative strength, there is nothing to take away the ordinary presumption that a man was likely to survive a woman in a struggle of this description." In view of the manner of life of respectable ladies in those days the presumption was well founded. And he continues, "If we resort to the probability of what the deceased would have done (had he had an opportunity of proper disposal of his goods), can it be supposed that he would have allowed the whole of his property to have gone from his own brother and sister to his wife's relations ? But the presumption of law is more worthy the consideration of the court; it is in favour of the parties on whom the law would throw the right. The civil law is in favour of the last possessor." Thus *Taylor* v. *Diplock* supports the view that the court may consider the probabilities of the case, and though there be no evidence of the stronger party's survival, hold that he probably survived, i.e. that judicial doubt on the question of survivorship is removed. The determination is also aided by considering to whom the property would come. Both of these points are perfectly in accord with the Roman law. In *Colvin* v. *H. M. Procurator-General*[40a] a husband and wife died presumably in the upsetting of a boat in the Ganges. The creditors asked for administration. The court said that strictly the representatives

39. The writer has tried to trace the allusions to Zouch. The only passages which seem relevant in the works available to him are in *Cases and Questions* (Oxford, 1652), p. 33, where he cites Dig. XXIII, 4, 26, and p. 122, where he cites D. XXVIII, 6, 34.

40. 2 Phill. Ecc. 261.

40a. (1827) 1 Hagg. Ecc. 92 = 162 E.R. 518.

of the wife ought to have been cited, but as the law presumed that the husband survived, the decree might pass, the creditors' interest in the estate being very substantial. The presumption of the husband's surviving depended, naturally, upon the facts of the case.

In *In the Goods of Selwyn*[41] the husband had appointed his wife his executrix and substituted others in case of her dying in his lifetime. Both spouses were drowned together. Probate was granted to the substituted executors, but the court took care not to follow any presumption based upon the husband's robustness, if any, but proceeded as if both had died at the same moment. This no doubt fitted the case, and is not inconsistent with the civil law. Another drowning in shipwreck was considered in *Satterthwaite* v. *Powell*,[42] where the next of kin of the husband contended that they were entitled to administration the ordinary presumption of law being that the husband survived. The Roman Digest and *Taylor* v. *Diplock* were relied upon. Here again the difficulty was that substantial property was to pass from kindred by blood to kindred by marriage, and that the court, not improperly, objected to. Sir Herbert Jenner said, "....here the next of kin of the husband claims the property which was vested in his wife; that claim must be made out—it must be shown that the husband survived. The property remains where it is found to be vested, unless there be evidence to shew that it has been divested. The parties in this case must be presumed to have died at the same time, and there being nothing to shew that the husband survived his wife, the administration must pass to her next of kin." This is, it is submitted, equally consistent with the civil law. The same confident reliance upon this ultimate authority can be found also in the carefully considered *Sillick* v. *Booth*,[43] which had two problems, one of which does not concern us. After holding that two brothers probably died in a hurricane before their father who died on land, the question to be solved was which of the brothers survived. It was argued on the basis of the previously-cited cases that the law of England had no presumption that one survived the other, but rather that deaths were simultaneous. That is hardly the conclusion which we should be inclined to draw from those authorities, but it is at least a possible reading of them. Sir J. L. Knight Bruce, V.C., as he then was, asserted that "....the two brothers having perished by shipwreck under circumstances of which there is no evidence, it is not necessary to be taken that they died at the same instant. By the

41. (1831) 3 Hagg. Ecc. 748=162 E. R. 1331.
42. (1838) 1 Curt. 705=163 E.R. 246.
43. (1841) 1 Y. & C. C. C. 117=62 E.R. 816.

law of England evidence of health, strength, age, or other circumstances may be given in cases of this nature, tending to the judicial presumption that one party survived the other." This seems to be entirely consistent with the spirit of the civil law, which did not require that both parties should in any case be taken to have died simultaneously when there was evidence from which one could determine what the probabilities were.

A decided change in the English law, and therefore in the law of all countries concerned to administer common law or influenced by the common law, took place with the decision of the House of Lords in *Wing* v. *Angrave*.[44] There the court selected from amongst the previous authorities those cases in which evidence had been forthcoming which supported the survival of a particular *commoriens*, and placed them to one side. Their Lordships positively rejected, in the cases where the deaths of several persons were caused *by one and the same cause*, all presumption of law. There is, say their Lordships, no presumption arising from age or sex as to survivorship; nor is there any presumption that all died at the same time. The question is one entirely of fact, and if evidence does not establish the survivorship of any one the law will treat it as a matter incapable of being determined. Thus, although their Lordships were not dealing with a case of persons dying in different places or by different causes, the possibility of calling upon the Roman fundamental or special presumptions of law were for practical purposes ended. Their understanding of the civil law seems not to have been perfect, but the contention that the civil law rules in their fulness had not been received by the ecclesiastical courts, still less by the common law courts, seems to have been well founded.

Left in this situation, that at common law there was no presumption to aid the devolution of property by testament or intestate succession, a major difficulty presented itself to dependants or other persons morally entitled to expect the property in question who found themselves out of possession and unable to prove by strong likelihoods or by positive indications that their predecessor must have survived. The rather sterile position left by *Wing* v. *Angrave* was echoed in America in *Young Women's Christian Home* v. *French*,[45] *Cedergren* v. *Mass Bonding*,[46] and elsewhere; and it is set out fully in numerous standard treatises on Evidence.[47] When the law of

44. (1860) 8 H.L.C. 183=11 E.R. 397, 403.
45. (1902) 187 U.S. 401: 47 Law Ed. 233.
46. 8th C.C.A. 292 Fed. 5.
47. 9 Wigmore on Evidence (3rd ed.), s. 2532; Lawson on Presumptive Evidence, rules 54-6; Dickson on Evidence (Grierson's ed.), I, s. 130; Taylor on Evidence (12th edn.), ss. 202, 203; Phipson on Evidence (9th edn.), 702; 13 Halsbury L. of E. (Hailsham's edn.), 503.

property was overhauled in England in the legislation of 1925 a presumption was introduced for the first time. By section 184 of the Law of Property Act of that year it was provided:

> 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 occured in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

This rule recommended itself in various parts of the Commonwealth,[48] and was at one time considered for adoption in India.[49] But its reception in England was far from satisfactory. In *In re Lindop*[50] a husband and wife had been killed in the same house by a bomb. Bennett, J., said, as a result of the citation to him of section 184, "I must presume that he died some brief moment before his wife and that during that same brief moment she became entitled to his residuary estate." Therefore it was believed that even when the likelihood was that the two died simultaneously the presumption of law must be applied unless positive proof was forthcoming that one survived the other, or at least that in all probability one must have survived. A further consideration of section 184 took place in *In re Cohn*[51] from which we obtain the useful rule that the statutory presumption is part of the law relating to succession to property, it is part of the *lex domicilii* and is not merely a rule of evidence and as such only applicable as part of the *lex fori*; but we also gather that section 184 would be applied if it were impossible to prove that one survived the other, and if, of course, the property fell to be distributed by English law.

A bombshell was exploded by the House of Lords in the celebrated case of *Hickman* v. *Peacey*,[52] which contains some of the most brilliant judgements from a group of exceptionally talented judges. The decision was by a majority, and it gave great dissatisfaction. It stimulated a rethinking of the whole question in North America, and has had its repercussions

48. See Queensland, Succession Acts Amendment Act, 1942.

49. Clause 114 of the Hindu Code Bill of 1948: see Report of Ambedkar Committee 12 Aug. 1948, published, with the Bill as Appendix, in the proceedings of the Constituent Assembly of India (Legislative), 24 June 1950.

50. *In re Lindop*. *Lee-Barber* v. *Reynolds* [1942] Ch. 377.

51. [1945] Ch. 5.

52. [1945] A.C. 304.

in India. Four persons, two of whom had made wills benefiting some of the others, were killed by the explosion of a bomb bursting in a London dwelling-house in which they were and demolishing it so as to bury them in the ruins. There was no evidence to show whether any of the deceased had survived the others. It was held, notwithstanding the apparent lack of uncertainty as to whether there was any survivor, by Lord Macmillan, Lord Porter and Lord Simonds, the particularly brilliant lawyers, Viscount Simon, L.C., and Lord Wright, dissenting, that in the absence of such evidence the deceased *had* died in circumstances rendering it uncertain which of them survived the other or others within the meaning of section 184, and that accordingly in the administration of their estates the younger should be deemed to have survived the elder. An inference drawn from the facts, that they died simultaneously would not make the section inapplicable and in any case would not be justified on the facts disclosed. The result is that the estates would be distributed upon a hypothesis of uncertainty which the layman could hardly have accepted on the facts. In Lord Simon's view the section ought not to have been applied. He drew the amusing analogy from horse-racing which has become immortal. "A rule of racing which provided that, where the judge was uncertain which of two horses passed the winning post first the younger horse should take the prize, would not prevent the sharing of the prize in a dead-heat." The key to the problem, it is submitted, lay in the words "rendering it uncertain which of them survived the other". So long as there is uncertainty *which* survived, an uncertainty which takes for granted the possibility of survival, it is possible to apply this rule even when it seems very likely that the persons concerned died together.

We may now perhaps return to *Re Rowland*,[53] which we discussed above.[54] It is interesting to note how section 184 was used. The testator had left property to kindred "in the event of the death of (his wife) preceding or coinciding with (his) own decease". The wife made a similar will. They both disappeared in a catastrophe, their vessel having disappeared, it was not known even upon which day. Their Lordships of the Court of Appeal were concerned to construe the wills. Absorbed by the controversy whether the spouses ought not to be taken to have died simultaneously, they did not, apparently, consider the plain words of section 184. It was held (Lord Denning, M.R., dissenting) that the claimants under the testator's will had not proved that the wife died coincidentally with her husband, and that

53. [1962] 2 All E.R. 837 (C.A.).

54. See the discussion at 233 L.T. 295.

therefore the estate passed as on an intestacy to the wife, because under section 184 she was presumed to have survived, being the younger, and under her will to her niece. What is extraordinary about this decision is the unexpected application of the section itself: "in all cases where.... two ....persons have died in circumstances rendering it uncertain....such deaths shall....*for all purposes affecting the title to property*, be presumed to have occurred in order of seniority...." Thus as soon as there was doubt as to the order of deaths the wife should have been held to have survived, whereupon she would take under the husband's will (for she had not predeceased him or died coincidentally with him, by virtue of the statute), and her legatee would have both estates. In view of the fact that the same party would ultimately succeed under either view of the law it would not have been worthwhile to appeal to the House of Lords; but the unsatisfactory method of reasoning deserves comment.

That the statutory rule was far from satisfactory was proved in 1952, when the British Parliament passed the Intestates Estates Act, which, inter alia, gave the surviving spouse by far the largest share in the average estate passing on a partial or complete intestacy. A new subsection had to be inserted into section 46 of the Administration of Estates Act, 1925:—

> Where the intestate and the intestate's husband or wife have died in circumstances rendering it uncertain which of them survived the other and the intestate's husband or wife is by virtue of section one hundred and eighty-four of the Law of Property Act, 1925, deemed to have survived the intestate, this section shall, nevertheless, have effect as respects the intestate as if the husband or wife had not survived the intestate.

We are thus left with a presumption that the younger survived the elder except where the younger happens to be a spouse, where the persons dying are spouses or included spouses, and one spouse died wholly or partly intestate. This lame situation is the best comment on the English statutory rule.[54]

The history of *commorientes* in the United States is somewhat complicated.[55] At one time it was enacted that it should be conclusively presumed that an adult in good health survived a minor child if they died in a common disaster. Florida and Georgia enacted that each person should be treated as having survived the other. Connecticut applied the same rule so far

55. See articles cited at n. 21 above, also C. A. Wright, "Commorientes—survivorship—presumptions," 12 Can. B.R. 503-8 (1936). Also n. 56 below.

as concerned simultaneous deaths of spouses. Ohio very sensibly extended the presumption to cases where there is evidence of survival, but one dies within thirty days of another—a rule which enables the survivor to make suitable dispositions of the property obtained from the other. The Committee on Uniform State Laws in 1936 submitted a draft which included the suggestion that property should pass by will or on an intestacy omitting the other deceased person—a solution equivalent to the presumption of simultaneous death which we found in Roman, Jewish and Isalmic laws in varying strengths. Now most of the jurisdictions have passed the Uniform Simultaneous Death Act.[56] This provides:—

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

2. Where two or more beneficiaries are designated to take successively, by reason of survivorship, under another persons'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.

3. 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.

4. 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.

5. This chapter shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this chapter.

56. Dardano, cited n. 21 above. Also 38 Iowa L.R. 750-762 (1953). 9 U.L.A. 659; Iowa Code, para. 637. 1-8 (1950). Atkinson in *Annual Survey of American Law*, 1951, p. 703.

In view of what has been discussed in this paper the usefulness of these provisions will be obvious. Perhaps no. 2 is the most controversial, but its rough justice is evident.

Canada also experimented with a Uniform Commorientes Act, which all Provinces have adopted except Quebec (which follows the French law). As will be seen, here too a truly simultaneous death may cause many inconveniences, but this is a hazard against which it seems exceptionally difficult to insure the testator. The Canadian uniform statute provides as follows:[57]

The first sub-section enacts section 184 of the English Law of Property Act, 1925, subject to the following :

> (2) The provisions of this section shall be read and construed subject to the provisions of section 161 of the Insurance Act. That section provides that where the person whose life is insured and any one or more of the beneficiaries perish *in the same disaster*, it shall be prima facie presumed that the beneficiary or beneficiaries died first.
>
> (3) Where a testator and a beneficiary under a will die in circumstances rendering it uncertain which of them survived the other, and the will contains provisions for the further disposition of the property bequeathed or devised in case the beneficiary predeceases the testator, then for the purposes of such bequest or devise, the beneficiary shall be presumed to have predeceased the testator.

The last is a more modest arrangement than anything contemplated by the United States uniform statute, which aims to be more thorough. The latter sets up a new presumption, that of mutual survivorship, except for the cases excluded. Canada has not been so ambitious, but the third rule is surely excellent in itself, for it cuts out many quite undeserved legacies. Whether the mutual survivorship rule, which echoes the Jewish law, is fit to take the place of a presumption of survivorship on the part of the younger can hardly be doubted. It has not only the merit of regularity, but also eliminates the anomalies that arise once we assume that the other person's heirs must necessarily have been within the contemplation, or proper objects of the concern, of the *propositus*—so often they are not. The insurance rule is obviously just.

57. See 16 Can. B.R. 43-51 (1938); also *Re Law* [1946] 2 Dom. L.R. 378, commented upon by G. D. Kennedy, " Commorientes. . . . ," 24 Can. B.R. 720-4 (1946).

When in 1956 India came to enact the Hindu Succession Act the Anglo-Hindu law provided very indifferent precedents. The traditional Hindu law had no rule, because in a joint family such questions can cause hardly any embarrassment. In a moderate degree the problem presented itself in *Gopal* v. *Padmapani*[58] where the order of deaths was unknown. Both deaths took place long before and there was no suggestion that they had occurred in a common disaster. It was held that the ordinary presumption must be applied that the elder man died first, for it is consistent with human nature that the generations should die in their natural order and not that a son should predecease his father. In *Kulkarni* v. *Laxmibai*[59] a lad aged 18 and a man aged 60 died in an epidemic on the same day and there was no evidence which died last. Macleod, C.J., held that the probabilities ought to be taken into account, while one should also have an eye to what would be the effect on devolution of property. The younger man, being stronger, may have survived the elder. "That is also a desirable conclusion to arrive at as otherwise the property would go away from the family." This decision took place in 1922. *Wing* v. *Angrave*[60] was not applied, and the decision strongly resembles the decisions in Prerogative Courts about a century earlier.[61] In 1934, after the English legislation had become known even in India it was held in *Neksi* v. *Jwala*[62] that the common law rule as stated in *Wing* v. *Angrave* must be applied. The Indian court had the jurisdiction to apply an English statutory rule under the residuary source of law known as Justice, Equity and Good Conscience,[63] but no advantage was taken of this. Consequently, when two relatives perished in a fire it was held that no presumptions applied, and that claimants to the property of one must show his survival if they claimed that he inherited from the other. The same view was taken a few years later in an earthquake case, *Gopibai* v. *Chuhermal*,[64] and again in *Dipendra* v. *Kuti*[65], a case concerned with a boating disaster in 1944. In the same year, the question was before the Privy Council in *K. S. Agha Mir Ahmad Shah* v. *Mir Mudassir Shah*.[66] Their Lordships simply relied upon *Wing* v. *Angrave*, holding that there was no presumption that the younger survived. They thus negatived the possibility of calling

58. (1913) 18 Ind. Cas. 814, 815 col. 2.
59. A.I.R. 1922 Bom. 347.
60. (1860) 8 H.L.C. 183 (cited above).
61. In particular those cited at nn. above.
62. A.I.R. 1934 Oudh 101.
63. See the article at (1962) 64 Bombay Law Reporter, Journal Section, 129ff, 145ff.
64. A.I.R. 1939 Sind. 234.
65. A.I.R. Cal. 132, 212 I.C. 222.
66. A.I.R. 1944 P.C. 100, 71 Ind. App. 171, [1944] 2 M.L.J. 354.

in the English rule under Justice, Equity and Good Conscience. In *Manni* v. *Paru*,[67] a very recent case from Kerala, Pokkan dealt his father a deadly blow and immediately committed suicide. It was not possible to prove that the son survived the father. Their Lordships declined to consult the English statutory law, and applied the common law, which they found fully explained in *Hickman* v. *Peacey*.[68] Survivorship must be proved like any other fact, and there is no presumption.

However a very different note is struck by the very learned and able judgement in *Manorama Bai* v. *Rama Bai*.[69] There had been a boating accident. One set of people went under the water and their bodies could not be recovered, but another set of people had been struggling and keeping themselves above water and had been netted and brought ashore, of whom one had actually recovered. It was held permissible to draw the conclusion (which their Lordships call a presumption) that death occurred in order of seniority, especially when the younger was of the party some of whom were rescued. In other words, notwithstanding the Privy Council and Calcutta and other cases, which they distinguished, their Lordships found that there was material upon which one could found the decision that there was no uncertainty as to the survival of some members of the party after the deaths of others.

This being the position at Indian law the Hindu Succession Act, 1956, enacted by section 21 :

> Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

The differences from the English rule will be apparent. The most marked is that the statutory presumption, which remains at present untouched by limitation of any kind, is only to be resorted to when there is doubt or uncertainty whether one survived another—i.e. in the case of the couple in the front seat of the car in a head-on collision, no judicial doubt is likely to exist, nor would there be any in the case of the bomb-blast in a room in which the *commorientes* were, unless there were evidence that their situations were different in some significant respect.

67. A.I.R. 1960 Ker. 195.
68. [1945] 2 All E.R. 215.
69. A.I.R. 1957 Mad. 269, 278, 280

We are not yet in a position to see how the section will be applied. In *In the matter of Manabir Singh*[70] the medical evidence suggested that in all probability one spouse survived the other, and Tek Chand, J., in the Punjab High Court, was prepared to hold that she survived. Nevertheless he added a long and learned *obiter dictum* in which he reviewed the history of the common law and continental law, Muhammadan law and the English statute of 1925, s. 184, and concluded that without s.21 of the Act of 1956 no presumption would have been available. But (unknowingly differing from *In re Cohn*[71]) he held that though the deaths took place *before* the section was enacted, the terms of that section must be applied as part of the law of evidence binding upon the *forum*, and so (in a sense) retrospective.

This survey of the common law world would not be complete without reference to Scotland. One would have expected that country to be sympathetic to the fundamental concept of the Roman law. This has not proved to be the case. All the Scottish cases show an indifference for the Roman ingenuity, and adhere obstinately to the principle first stated as such in England that the law knows no presumptions.[72] The English statutory rule of 1925 has not been introduced in Scotland.

Conclusions

It is submitted that our Utopian ruler could do worse than enact the following rules :—

Where two persons die in such circumstances that it is uncertain whether either of them and if either which survived the other, it shall be presumed until the contrary is proved :—

1. where the plaintiff claims a legacy under the will of one without provision for substitution in the event of the legatee, who was the other, not surviving him, that the testator survived the legatee ;
2. where the plaintiff claims benefits under an insurance policy which the insured had assigned to the other, or under which the other was the legal beneficiary, that the insured survived the beneficiary ;
3. where the plaintiff claims a share in the estate of an intestate by representation of a descendant of the intestate who was the other deceased, that the descendant died first and thus the intestate survived his descendant ;

70. A.I.R. 1963 Pun. 66, 72-5.
71. See n. 51 above.
72. See authorities cited at n. 6 and n. 7 above.

4. where the plaintiff claims as heir to the other by virtue of a joint-tenancy held by the two deceased persons, that neither survived the other, so that the share passes to the joint-tenants' heirs ;

5. where the plaintiff claims Estate Duty out of the estates of both deceased persons, that both died simultaneously ;

6. and in all other cases that both persons died simultaneously so that neither survived the other.[73]

It is understood that nothing will prevent the court from accepting evidence on the probabilities of the cases, so that where young and old die together, or otherwise, the conscience of the court may be satisfied that the younger is likely to have survived. But the court might well take a leaf out of the books of the Roman jurists and of old English and Indian cases, namely in taking account of what will happen to the property in suit. The court may well, by exercise of judicial equity, hold that, if the case falls within no. 6 above, the evidence tending to show the probability of the survival of an older or younger or stronger person, is conclusive against the statutory presumption, when the application of the latter will cause property to pass where it most justly should. That simultaneous deaths, and the like, should serve as a lottery from which others may take undeserved benefits, is not consistent with justice by any standard.

J. DUNCAN M. DERRETT

73. Suggestions similar to these were made at 56 Bom. L.R.J., 106. (1954).