LEGISLATION

THE UNIFORM SIMULTANEOUS DEATH ACT IN MISSOURI

INTRODUCTION

On September 10, 1947, the Uniform Simultaneous Death Act, with a few minor changes, became the law of Missouri.[1] The act was drafted by the Commissioners on Uniform State Laws in order to provide workable rules for the distribution of the property of two or more deceased persons when the sequence of their deaths is decisive as regards the rights of those claiming property through them and when there is "no sufficient evidence" of that sequence.[2] The facts of the recent Missouri case of *Stewart v. Russsell*[3] point up the problem which the act is intended to cover. There a woman, her second husband, and her daughter by her previous marriage were found dead of carbon monoxide poisoning under such circumstances that the order of their deaths could not be judicially ascertained without the aid of procedural devices. The woman's first husband brought suit to determine title to a house owned by the woman. It was his contention that, since the daughter survived her mother, title devolved upon him.[4] The basic factual issue to be decided, *i.e.*, whether or not the daughter survived her mother, was clear. The difficulty was that the evidence needed to determine that issue, upon which depended the question of who had the right to the property, was inconclusive. Since the case originated prior to the Uniform Act, the decision was based on the majority common law rule, which will be noted below. But, regardless of what particular rule was adopted in that case, it should be noted that the court in such a situation is at a loss to decide the case consistently with the actual facts because those facts, indispensable to such a decision, are not to be had. If the court is to make any ruling at all, it must of necessity be based on some arbitrary rule.

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1. MO. REV. STAT. §§ 471.010-471.080 (1949).
2. Commissioner's Prefatory Note, Uniform Simultaneous Death Act, 9A U.L.A. 264 (1951).
3. 227 S.W.2d 1011 (Mo. 1950).
4. MO. REV. STAT. § 468.010 (1949).

This note first discusses the rules that were developed prior to the Uniform Act in an attempt to reach a fair result in such cases, and secondly the effect of the Uniform Act on those rules.

I. The Rules Prior to the Uniform Simultaneous Death Act

In cases in which two or more persons perished in a common disaster[5] there was at common law no presumption, either of simultaneous death of the commorientes or of survivorship of one of them. The rule was that the party who claimed to derive title to property by virtue of the survivorship of one of the deceased parties had to prove the fact of survival of that person through whom he claimed, and that if he failed to sustain the burden, his case failed.[6] As Judge Wightman stated in *Underwood v. Wing*,[7] "We may guess or imagine or fancy, but the law of England requires evidence [of the order of survivorship] ...." Missouri followed this common law rule;[8] thus, in the *Stewart* case, because the first husband's claim to the house was dependent on the daughter's having outlived her mother, the burden of proving the daughter's survival was on him. Because he failed to prove that fact to the satisfaction of the court, he lost the case, and the result was that the property descended to the heirs at law of the woman and her second husband.[9]

5. As will be pointed out later, the term "common disaster" is not an accurate term to describe the event that calls any of the rules into operation, but it is used here for the sake of brevity. It is inaccurate because both the common law rule and the Uniform Act have been applied in situations that can hardly be called "disasters" in the sense of public calamities. Examples of this broad application of the two rules in Missouri are Stewart v. Russell, 227 S.W.2d 1011 (Mo. 1050); U.S.Casualty Co. v. Kacer, 169 Mo. 301, 69 S.W. 370 (1902) (where a man and his daughter perished in the sinking of a yacht); Adams v. Gardener, 237 S.W.2d 495 (Mo. App. 1951) (where husband and wife were found dead). For other cases involving events that can hardly be termed disasters and in which the common law rule was applied, see Tracy and Adams, *Evidence of Survivorship in Common Disaster Cases*, 38 MICH. L. REV. 801 (1940). See Uniform Simultaneous Death Act 9A U.L.A. 265-268 (1951) and Supplement, pp. 32-33 for cases of the same type in which the Uniform Act was applied.

6. For collection of cases, see 25 C.J.S. 1069-1071 (1941).

7. 4 De G.M.&G., 633, 657-658, 43 Eng. Rep. 655. 664 (1854).

8. Stewart v. Russell, 227 S.W.2d 1011 (Mo. 1950); U.S. Casualty Co. v. Kacer, 169 Mo. 301, 69 S.W. 370 (1902).

9. Stewart v. Russell, 227 S.W.2d 1011 (Mo. 1950). *Contra: In re* Evans' Estate, 228 Iowa 908, 291 N.W. 460 (1940). There a husband and wife died intestate in an automobile accident, and the issue arose as to who had the right to the wife's estate, the collateral heirs of the wife or the son of

In its practical effect, the common law rule which purported to discard presumptions and to require evidence was equivalent to a presumption of simultaneous death. If this presumption were applied to the facts of the *Stewart* case, the result would be that there would be no time between the deaths of the mother and daughter during which title to the house would vest in the daughter. Since the plaintiff's title depended on the title of the daughter and since she had no title, his claim would necessarily fail.[10] That many courts realized that this was the outcome of the burden of proof rule is indicated by the statement in a large number of the cases to the effect that in the absence of evidence as to survivorship, the property in question will be disposed of as if the deaths were simultaneous.[11] A minority of courts ruled expressly that in cases of death in a common disaster, a presumption of synchronous death would be invoked,[12] but the greater number took pains to point out that there is no presumption to that effect and that it is merely the practice in such cases to distribute the property as if the parties had perished at the same moment.[13]

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the husband by a former marriage. The court held that the collateral heirs of the wife had the burden of proving the absence of other heirs entitled to take in preference to them, which in effect meant that the collateral heirs had to prove the non-survivorship of the husband. Failing to sustain this burden, they lost. Carpenter v. Severin, 201 Iowa 969, 204 N.W. 448 (1925), an earlier Iowa case which followed the general common law rule, was distinguished on the ground that it involved the construction of a will, whereas in this case the disagreement was over an inheritance.

10. See *In re* Wilbor, 70 R.I. 126, 37 Atl. 634 (1897).

11. Young Women's Christian Home v. French, 187 U.S. 401 (1903); Middeke v. Balder, 198 Ill. 590, 64 N.E. 1002 (1902); Carpenter v. Severin, 201 Iowa 969, 204 N.W. 448 (1925); Russell v. Hallett, 23 Kan. 276 (1880); Johnson v. Merithew, 80 Me. 111, 13 Atl. 132 (1888); Cowman v. Rodgers, 75 Md. 403, 21 Atl. 64 (1891); Moore v. Palen, 228 Minn. 148, 36 N.W.2d 540 (1949); Daniels v. Bush, 311 Miss. 1, 50 So.2d 563 (1951); Stewart v. Russell, 227 S.W.2d 1011 (Mo. 1950); In re Wilbor, 70 R.I. 126, 37 Atl. 634 (1897). For other cases, see Note, 43 A.L.R. 348 (1926).

12. Kansas Pacific R.R. v. Miller, 2 Colo. 442 (1874). In a few other cases there are express statements that there is a presumption of simultaneous death along with quotations to the effect that the practice in the absence of evidence is merely to distribute the property as if the commorientes had died at the same instant. The result is that it is difficult to tell which side of this academic point the court was on. See Colovos v. Gouvas, 269 Ky. 752, 108 S.W.2d 820 (1937); Garbee v. St. Louis-San Francisco Ry., 220 Mo. App. 1245, 290 S.W. 655 (1927); Walton v. Burchell, 121 Tenn. 715, 121 S.W. 391 (1907).

13. Middeke v. Balder, 198 Ill. 590, 64 N.E. 1002 (1902); Carpenter v. Severin, 201 Iowa 969, 204 N.W. 448 (1925); Russell v. Hallett, 23 Kan. 276 (1880); Johnson v. Merithew, 80 Me. 111, 13 Atl. 132 (1888); Daniels v. Bush, 211 Miss. 1, 50 So.2d 563 (1951); Stewart v. Russell, 227 S.W.2d

The burden of proof rule was subject to two chief criticisms. In the first place, it begged the question. The dilemma of deciding what to do with the property arose because of the impossibility of ascertaining which decedent predeceased the other, and yet the rule in effect required the party who claimed on the basis of the survivorship of one of the commorientes to prove that survivorship, a demand for the impossible.[14] The second defect in the rule was shown in the famous English case of *Wing v. Angrave*,[15] in which its strict application did violence to the clear intention of the testator. There a Mrs. Underwood by her will appointed certain property to her husband, subject to some interests of her children, with the proviso that "in case my said husband should die in my lifetime," the property was to go to William Wing. Her husband's will contained substantially the same provisions. Both testators perished in the same storm at sea, and William Wing claimed the property of both of them under the substitutional gifts clauses. The House of Lords ruled that the burden of proof was on Wing to show that one of the spouses died in the other's lifetime and that, being unable to show this, he could not take under either will. On the question of intention of the testators, the Lords felt that the only intention in both wills was that the gifts to Wing were dependent on the death of one of them in the lifetime of the other. The American courts on similar facts refused to follow this decision, ruling that where the intention was sufficiently expressed that the substitute legatee should take in the event *that the other bequests should fail*, that intention should not be defeated on the ground that an accidental wording in the will shifted the *onus probandi* to the substitutional legatee.[16] Thus in a case in which the testator devised property to her son and provided that "in the event of my becoming the survivor . . . of my son" then the property was to go to the Young Women's Christian Home, and the testator and her son died under circumstances affording no evi-

1011 (Mo. 1950); *In re* Wilbor, 20 R.I. 126, 37 Atl. 634 (1897). For arguments against this approach, see Wislizenus, *Survival in Death by Common Disaster*, 6 ST. LOUIS L. REV. 1 (1925) and Whittier, *Problems of Survivorship*, 16 GREEN BAG 237 (1904).

14. Commissioner's Prefatory Note, 9A U.L.A. 264 (1951).

15. 8 H.L. Cas. 183, 11 Eng. Rep. 397 (1860).

16. Young Women's Christian Home v. French, 187 U.S. 401 (1903); St. John v. Andrews Institute, 191 N.Y. 254, 83 N.E. 981 (1908); Fitzgerald v. Ayers, 179 S.W. 289 (Tex. Civ. App. 1915).

dence as to the order of their deaths, it was held that the property should go to the Home.[17] The court felt that these words showed that the testator did not intend to die intestate, that she wanted the Home to take if the devise to her son should be ineffectual, and that this intention should prevail in spite of the fact that the provision describing the condition under which the Home was to take said "in the event of my becoming the survivor . . . of my son" instead of saying "if my son should not survive me, then I give and bequeath my property to the Home."[18]

Discontent with the common law rule was evidenced in other ways.[19] In 1925, Parliament enacted a statute which set up the arbitrary presumption that in common disaster situations, the "deaths shall . . . be presumed to have occurred in order of seniority, and, accordingly, the younger shall be deemed to have survived the elder."[20] In the United States a considerable number of legislatures passed statutes which adopted substantially the arbitrary presumptions of survivorship of the Napoleonic Code.[21] That Code provided that if persons entitled to inherit from one another perish in the same accident so that it is not possible to ascertain which of them died first, the eldest shall be presumed to have survived if those who perished were

17. Young Women's Christian Home v. French, 187 U.S. 401 (1903).

18. *Id.* at 417, 418.

19. In Supreme Council of Royal Arcanum v. Kacer, 96 Mo. App. 93, 69 S.W. 671 (1902), the court said: "The wisdom of the common law in never indulging a presumption as to which of several persons who perished in the same disaster survived the longest has been unduly vaunted; for the civil law has recourse to that means of settling disputes concerning ownership of property only in instances where there is no proof, and then it becomes absolutely necessary to determine the ownership by some rule more or less arbitrary. The presumptions of those continental codes . . . are more apt to hit the truth than others, because they are based on attributes of age and sex which for the average strength of individuals, and their ability to prolong lives in shipwrecks or other disasters in which strength may be useful in the struggle to live. While the common law explicitly rejects all presumptions and insists on proof in every case, it implicitly accepts one; . . . that the property shall be disposed of as though all the deceased persons through whom the litigants claim died at the same instant, unless there is proof to show otherwise has all the consequences of a presumption of simultaneous death." *Id.* at 100, 69 S.W. at 673.

20. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 184.

21. CAL. CODE CIV. PROC. art. 1963, §40 (1931); LA. CIV. CODE arts. 726-729 (1870); MD. LAWS c. 108 § 168 (1920); MONT. REV. CODE ANN. § 10-606 (40) (1935); NEV. COMP. LAWS § 9047.07 (40) (1938); ORE. COMP. LAWS ANN. § 2-407 (41) (1940); WYO. REV. STAT. c. 88, art. 40, § 4008 (1931). For other statutory solutions prior to the Uniform Act, see GA. CODE § 113-906 (1933) and OHIO GEN. CODE ANN. § 10503-18 (1938).

under fifteen years of age; that if they were all above sixty, the youngest shall be presumed to have survived; that if all those who died were in the fifteen to sixty year old classification, the male shall be presumed to have survived provided the age difference was not over one year; and that if of the same sex, the younger shall be presumed to have survived.[22]

These rules also had drawbacks. The English rule made the decisive factor age, which is clearly not the most important evidentiary element in deciding which commorient survived.[23] The civil law presumptions sometimes militated against human nature—for example, when a man and his wife, both being between the ages of fifteen and sixty and there being no more than one year's difference in their ages, drowned in the sinking of a ship. It seems reasonable to assume that the man would try to prolong the life of his wife even at the cost of sacrificing his own, but the civil law presumed conclusively that the husband lived longer.[24]

With these considerations in mind, the provisions of the Uniform Act can now be evaluated.

II. The Distribution of Property

The first section of Missouri's Uniform Simultaneous Death Act provides:

> 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, as determined by a court of competent jurisdiction, the property of each person shall be disposed of as if he had survived except as provided otherwise in this law.[25]

The first observation is that, although the provision does not by its terms contain a presumption of simultaneous death as a method for dealing with the problem, its application, with one modification, achieves the same effect.[26] However, the presumption is clearly a rebuttable one, as is indicated by the qualifying clause "and there is no sufficient evidence that the persons have

22. Chapman, *Presumptions of Survivorship*, 62 U. of Pa. L. Rev. 585 1914.

23. Conway and Bertsche, *The New York Simultaneous Death Law*, 13 Ford. L. Rev. 17, 20 (1914); Tracy and Adams, *supra* note 5 at 801.

24. Wigmore, Evidence § 2532a (3rd ed. 1940).

25. Mo. Rev. Stat. § 471.010 (1949).

26. See Sauers v. Stolz, 121 Colo. 456, 218 P.2d 741 (1951). There the statute is treated as adopting a presumption of simultaneous death.

died otherwise than simultaneously, as determined by a court of competent jurisdiction. . . . " For the purposes of clarity in presentation, the discussion of when this limiting clause is applicable will be deferred until the end of the note.

The facts of the *Stewart* case[27] form a good basis for illustrating the truth of the first mentioned proposition in a situation in which neither of the decedents has made a will. With the application of the presumption of coinstantaneous death, there would be no time during which title to the mother's home could vest by descent in the daughter. Similarly, there would still be no time for such vesting if the mother's property is to be distributed as if she had survived. In both situations, the claim of the first husband, based on the survivorship of the daughter, fails. Since the common law rule was that in the absence of evidence as to the order of death the property was to be distributed as if all parties died at the same time, it would appear that in cases of intestacy the new enactment is merely a codification of the practice under the common law rule.[28]

Although there are no Missouri cases in point, it seems clear that the same conclusion would be true if a testator and a beneficiary under his will were the commorientes. Under the practice engaged in prior to the Uniform Act, if the beneficiary were not a relative within the meaning of the anti-lapse statute,[29] or if he were a relative but left no lineal descendants, the devise or legacy would lapse,[30] there being no time during which it could vest in the beneficiary, and, therefore, those claiming through the beneficiary would lose. Disposing of the property as if the testator outlived the devisee or legatee also would result in there being no time for the title to pass to the devisee or legatee. If the devisee were a relative under the anti-lapse statute and if his heirs were lineal descendants, then the question as to whether the heirs of the devisee would be able to

27. Stewart v. Russell, 227 S.W.2d 1011 (Mo. 1951).

28. *In re* Di Bella's Estate, 100 N.Y.S.2d 763 (Surr. Ct. 1950); *In re* Cruson's Estate, 189 Ore. 537, 221 P.2d 892 (1950).

29. MO. REV. STAT. § 468.310 (1949) provides as follows: "When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real or personal, as such devisee would have done in case he had survived the testator."

30. PAGE, WILLS § 1414 (3rd ed. 1941).

take under the will[31] by virtue of the anti-lapse statute would depend primarily on whether the court interpreted the language of the anti-lapse statute, "and such devisee shall die before the testator," as creating a condition precedent to the rights of the devisee's heirs. The two decisions on this issue of construction are conflicting. In *Carpenter v. Severin*,[32] a case involving an anti-lapse statute very similar in wording to the Missouri code provision, the Supreme Court of Iowa ruled that such a clause did spell out a condition precedent to the rights of the devisee's heirs and that, since they failed to sustain the burden of proving its occurrence, their claim failed. However, in New York which has an anti-lapse statute that is in substance the same as the Missouri code provision,[33] the rule is that to deny the successors of the beneficiary the property simply because the beneficiary died contemporaneously with the testator instead of having died in the testator's lifetime would be to violate the spirit of the statute.[34] This approach recommends itself as being the more reasonable of the two, and Missouri should not refrain from adopting it merely because the wording in the statute in *Carpenter v. Severin* is more similar to the Missouri code section than the New York anti-lapse provision. However, it should be noted that, no matter whether the common law rule or the formula of the Uniform Act is applied to this particular situation, the outcome, for the reasons given at the beginning of this paragraph, will be the same, *i.e.*, against the heirs of the devisee. The additional problem as to whether they still might take depends on the meaning to be given to the anti-lapse statute.

There is, however, one set of facts in which the application

31. In Stolle v. Stolle, 66 S.W.2d 912 (Mo. 1933), the court said that the lineal descendant of the devisee predeceasing the testator does not derive title from or through the devisee but directly from the testator by purchase.

32. 201 Iowa 969, 204 N.W. 448 (1925).

33. New York Decedent Law, Section 29 provides as follows: "Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive said testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

34. *In re* Macklin's Will, 177 Misc. 432, 30 N.Y.S.2d 706 (Surr. Ct. 1941).

of the rule of the Uniform Act will supersede certain *reasoning* used at common law as the basis for a particular result. That is the case in which the testator makes a gift over in the event that he survives the primary beneficiary and then both testator and primary beneficiary die in a common disaster. A case in point is *Young Women's Christian Home v. French.*[35] The facts of that suit describe a situation in which the testator had provided for a gift over to the Home in the event that she became the survivor of her son, the primary beneficiary. She and her son died under circumstances affording no evidence as to the order of their deaths. Under the strict common law rule, the devise would have lapsed because neither could the son's successors have proved that he outlined his mother nor could the Home have established that the mother survived. Consequently, the property would have descended to the heirs of the testator. The use of a presumption of simultaneous death would have achieved the same result since there would have been no time during which the estate could pass to the son, and the Home would not be able to overcome the presumption by showing that the testator survived. However, the court in that case refused to permit the property to pass by intestacy to the heirs of the testator, on the ground that the testator showed clearly her intention that the Home was to take in the event that the gift to the son should fail.[36] Had the formula of the Uniform Act been applied to the facts, there would have been no need to decide the case on the ground noted above, since the act provides that the property of each commorient "shall be disposed of as if he had survived. . . ."[37] The testator would have been deemed to have survived as regards her property, and thus the estate would have gone to the Home under the will. In effect, then, the Uniform Act dispenses with the need of employing the above ground as the reason for allowing the substitute beneficiary to take.

Despite that one minor variation, it can be safely concluded that, from the point of view of who is to get the property in dispute, the adoption of the Uniform Simultaneous Death Act has not changed the law in common disaster cases.[38] A compari-

35. Young Women's Christian Home v. French, 187 U.S. 401 (1903).
36. *Id.* at 417, 418.
37. Uniform Simultaneous Death Act, 9A U.L.A. § 1 (1951).
38. See note 28 *supra.*

son of the result achieved by applying both rules to the *Stewart* case, *supra,* indicates clearly that such a conclusion is true as regards intestacy cases in Missouri. The discussion of the problem raised when the relationship of the commorientes is testator-devisee indicates that the same conclusion applies to that aspect of the subject as well.

However, it would seem that the fact that the new law contains an implied presumption of simultaneous death has rendered the ruling in the Missouri case of *Abrams v. Unknown Heirs of Rice*[39] obsolete. There the bodies of a husband and his wife were found in the bathroom of their home, and the evidence introduced related to only the fact that one was nude and the other was not and to the relative positions of their bodies. The trial judge said: "I do find that they both died simultaneously, and in the same common disaster, and determine the question as if both died at the same moment."[40] The Missouri Supreme Court upheld this finding by the trial court. If the Supreme Court really intended to say that the evidence was sufficient to show synchronous death, then, in view of the difficulty in proving the factual issue involved, its decision cannot be easily justified on the ground that it was based on an adequate quantum of proof.[41] With the implied presumption of contemporaneous death, the need for straining the facts in order to reach a desired result, as was apparently done in that case, will be obviated since the presumption itself will tilt the balance in that direction.

III. The Provision Regarding Successive Beneficiaries

The second section of Missouri's version of the Uniform Simultaneous Death Act provides as follows:

> 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, as determined by a court of competent jurisdiction, the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries

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39. 317 Mo. 216, 295 S.W. 83 (1927).
40. *Id.* at 219, 295 S.W. at 84.
41. See Wislizenus, *supra* note 13 at 1; Note, 13 Mo.L.Rev. 230 (1948).

> and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.[42]

There is considerable difficulty in apprehending the exact meaning of this section. One set of facts which has been given as an example of a situation which this provision might have been intended to cover is as follows: A devises land to B for life, remainder to C if living at B's death, but if C does not survive B, then to D in fee. B, C, and D die under circumstances from which the order of their deaths cannot be determined.[43] At common law, the heirs of C could not prove that C survived nor could the heirs of D prove that C did not outlive B. The result would be a deadlock, and the land would revert back to the heirs of the testator contrary to his intention. It might very well be said that this provision of the Uniform Act is applicable to such a situation and that the result of its operation would be that one-half of the property should go to the heirs of C and one-half to the heirs of D. The heirs of B, of course, would have no rights since B's estate was only for life. The only question as to the value of this hypothetical case as an example of what set of facts the above quoted section is supposed to cover is centered around the word "successively." Can it be fairly said that the above limitation provides that C and D take "successively"? It would seem that a more exact description of their respective rights would be "alternately." Several states apparently realized the lack of clarity in the meaning of "successively" and have inserted the phrases "or alternately" and "or alternate" after the words "successively" and "successive" in their version of the Uniform Act.[44]

Another instance where this provision might apply is as follows: X by will, deed, or trust instrument provides that his land is to go to A and B for their joint lives, the remainder in fee to go to the survivor of them. A and B then die under circumstances from which the order of their deaths cannot be judicially ascertained.[45] Before the Uniform Act, the limitation

42. MO. REV. STAT. § 471.020 (1949).
43. The above is in substance the same example as that given by Dean Wigmore for a prior draft of this Section. See 1939 HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 194.
44. KAN. GEN. STAT. § 58-702 (Supp. 1947); MASS. ANN. LAWS c. 190A, § 2 (Supp. 1950); WASH. REV. STAT. ANN. § 1307-2 (Supp. 1943).
45. Note, 13 MO. L. REV. 230 (1948).

providing for the remainder in fee would have failed because neither the successors of A nor B could prove that the person through whom they claimed survived. The result would have been that the estate would revert to the grantor or his heirs. If this set of facts is covered by the statutory provision under discussion, its application would give one-half of the estate to the heirs of A and one-half to the heirs of B. However, as in the last hypothetical situation, this set of facts is subject to the argument that A and B would take the fee alternatively and not successively and that thus this section cannot be invoked. It is true that both A and B would have life estates before one of them would be entitled to the fee and that in this sense the survivor takes successively, but such a construction of the facts seems rather contrived. The meaning of the word "successively" still remains as the factor inhibiting the possible use of this section.

A third disposition of property which might fall under the scope of this section is the case where X by will, deed, or trust agreement grants land to A for life, remainder to B and his heirs, but if B dies leaving descendants, then to B's descendants in fee whenever B may die, whether before or after A's death. B has one married daughter who has no issue by her marriage. B makes a will devising the property to C, and then dies in a common disaster with his daughter. C claims the land by virtue of B's will, and the husband of B's daughter attempts to claim through his wife. Under the common law rule it seems clear that the husband would have the burden of proving the survivorship of his wife (B's daughter) because it is only in that way that his contention can be sustained. Necessarily failing to sustain this burden, he would lose, and the property would go to C under B's will. Under the new rule, if applied, one-half of the property would go to the husband of B's daughter and one-half to C under B's will. Still, however, there is the very forceful argument that, if there had been no problem as to who survived between B and his daughter, C would have taken to the exclusion of the daughter's husband or vice versa and that thus the "successive" beneficiaries were really "alternate" beneficiaries. In turn, this would mean that this provision could not be used.

On the basis of the above considerations, it may be concluded

that there is great difficulty in envisaging a situation to which the last mentioned contention could not be well made. Because of that fact, the utility of this provision is, at best, questionable. It is submitted that the additions of the phrase "or alternately" after the word "successively" and the phrase "or alternate" after the word "successive" would greatly improve Missouri's version of this section by removing the ambiguity now present in it.

IV. The Provision Applicable to Joint Tenants

Section 471.030 of the Missouri Act reads as follows:

> Where there is no sufficient evidence that two joint tenants or tenants by entirety have died otherwise than simultaneously as determined by a court of competent jurisdiction, 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.

Prior to the Uniform Act, there was only one American case where tenants of either type had perished under circumstances from which the sequence of their deaths could not be determined.[46] In *McGhee v. Henry*,[47] where a husband and wife, tenants by the entireties, had died in the same fire, the court ruled that the estate descended as a tenancy in common and that the two classes of heirs were each entitled to one-half of it. Dicta in the Missouri case of *Barnett v. Couey*[48] indicate that Missouri is in accord with this ruling. There one tenant by the entirety had killed the other tenant, and the question arose as to whether the heirs of the wrongdoer, who had committed suicide after the murder, were entitled to the whole of the estate by virtue of the murderer's survivorship. In its discussion, the court said:

> If James Washington [the murderer] and Cora Washington [the victim] had died simultaneously, then obviously James

46. In the early English case of Bradshaw v. Toulmin, 2 Dick. 635, 21 Eng. Rep. 417 (1784), Lord Thurlow stated that if joint tenants perish by one blow, the jointly held estate will remain in their respective heirs as joint tenants. Blackstone, on the other hand, believed that a tenancy in common would result. 2 Bl. Comm.* 180.

47. 144 Tenn. 548, 234 S.W. 509 (1921).

48. 224 Mo. App. 913, 27 S.W.2d 757 (1930).

> Washington could not be the widower of Cora, and defendant [the administrator of James' estate] would not be entitled to more than one-half of the funds in question.[49]

Later in the same case the court made the further statement:

> Under the peculiar circumstances here present, neither divestiture of interest nor survivorship exists in contemplation of law as to either [of the tenants]. The fund [property] should go just as provided where there is a common calamity and both tenants die simultaneously. . . . the husband could not qualify as the legal surviving widower. Therefore there is no survivor directly entitled to take and the fund descends as if it were formerly held as tenants in common to be distributed according to the statute of descent.[50]

It will be noted that the application of the new rule to the facts of the *McGhee* case would not lead to a different result. As regards one-half of the estate, the husband would be deemed to have survived, and thus his heirs would be entitled to that half. The successors of the wife would get the other half on the same principle. Thus at the outset it may be concluded that from the point of view of the distribution of the estate, the Uniform Act represents a codification of the common law rule.

The question has been raised as to whether the scope of this section is limited to joint tenancies and tenancies by the entireties or whether it covers situations involving joint ownership with the right of survivorship.[51] The recent Missouri case of *Adams v. Gardener*[52] seems to answer that query. There the controversy centered around who had prior right to a sum of money in a safe deposit box rented by a husband with his wife as deputy. The husband and wife died commorient, and the respective heirs of each claimed the property. The evidence disclosed that the couple owned their homestead as tenants by the entireties and that they had a joint bank account, which included cash and certain savings bonds payable to the husband or wife. Prior to the rental of the box in dispute, the couple had told a friend that they kept a large sum of money in their house. The friend warned them of the danger of such a practice and advised

49. *Id.* at 921, 27 S.W.2d at 761.
50. *Id.* at 923, 27 S.W.2d at 762.
51. Note, 9 OHIO ST. L. J. 648 (1948).
52. 237 S.W.2d 495 (Mo. App. 1951).

them to rent a safe deposit box in which to place their money. Following the friend's suggestion, they rented the box in the above manner, presumably because it was the next best thing to renting the box under a joint deposit agreement, which practice was discouraged by the bank officials. During the interval between the rental of the box and their deaths, the husband opened the box ten times and the wife once. Three separate portions of the total sum, which amounted to $7020, were found in the box enclosed in two envelopes and in plain wrapping paper, and none of these bundles were identified. On the basis of these facts, the Kansas City Court of Appeals inferred that the two had treated the money as jointly owned and upheld the trial court's judgment, which under the Uniform Act gave one-half of the cash to each of the two groups of heirs. Thus mere joint ownership is sufficient in Missouri as a basis for invoking the act when the joint owners die under circumstances from which the order of their deaths cannot be ascertained.

In addition, it seems clear that if a case were to arise in Missouri in which one tenant by the entirety (or joint tenant) killed the other tenant by the entirety (or joint tenant) and in which there was no evidence of who survived, the property would be distributed under the act in the same manner as it would be distributed if there were no crime involved. In New York the problem may well arise as to whether such a situation will constitute an exception to the statutory rule because the courts of that state have ruled that the heirs of the felonious tenant have no right to any of the estate, much less one-half of it.[53] That such an exception will probably not arise in Missouri is indicated in *Barnett v. Couey, supra,* where the court said that as regards the distribution of the property involved, the two factual situations were the same and that each group of heirs was entitled to one-half of the estate.[54]

53. Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y. Supp. 176 (4th Dep't 1935). See Conway and Bertsche, *supra* note 23 at 17.

54. See Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948). In both the *Grose* case and the *Barnett* case, the facts showed who was the survivor, and thus the statement made in the text that the two fact situations would be dealt with in the same manner is based on dicta. However, in Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951), where one tenant killed the other, and there was no evidence as to who survived, the Florida Supreme Court ruled that the heirs of each tenant were entitled to one-half of the estate. Thus Florida has ruled clearly that the two sets of cir-

This particular provision has been criticized on the ground that its wording places too much emphasis on the legal significance of the term "joint tenancy" and fails to take into account the equities that may exist as between the respective tenants.[55] An illustration of this defect is seen in the case where A and B (not husband and wife) take title to Blackacre as joint tenants,[56] A having paid seven-eighths of the purchase price and B only one-eighth. On the death of A and B under circumstances giving no evidence of survivorship, the property would be disposed of under the formula of the act equally among the successors of A and B. The argument is that this result is unfair to A's heirs in view of A's having contributed the greater amount to the purchase price. In England there is a doctrine to the effect that, even though tenants who have not paid the same amounts toward the purchase price hold equal legal interests, there is a resulting trust to each in proportion to his contribution.[57] If the Uniform Act were the law in England, this provision would seem very unfair because it would deprive the heirs of A, on the death of A and B in a common disaster, of the benefit of a doctrine that would entitle them to a distribution according to the equitable interests involved. However, in the United States, where prior to the Uniform Act no such doctrine had been developed and thus the interests of each joint tenant were still deemed to be equal regardless of the inequality of payment,[58] the act itself can only be criticized because it uses, of necessity, a legal concept that does not recognize the equities as between the parties. The new formula itself does not deprive the heirs of the joint tenant who contributed more money of any rights that they had before the Act. The defect is actually in the basic legal concept itself rather than in the Uniform Act.

However, in the case of the death in a common accident of tenants by the entireties, it is possible, though not probable, that

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cumstances will not result in different distributions of the property involved.

55. Conway and Betsche, *supra* note 23 at 17.

56. Section 442.450 of the 1949 Revised Statutes of Missouri provides: "Every interest in real estate granted or devised to two or more persons, other than husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy."

57. Lake v. Gibson, 1 Eq. Cas. Abr. 291, 21 Eng. Rep. 1052 (1729); 2 TIFFANY, REAL PROPERTY § 418 (3rd. ed. 1939).

58. 2 TIFFANY, *op. cit. supra*, note 57 § 418.

in Missouri a strict application of the statute in one situation could produce inequities. In this jurisdiction, there is a doctrine based on the statute providing for separate property for married women[59] to the effect that where a husband without the written consent of his wife invests her separate money in real estate and takes title thereto in the names of himself and his wife, the wife or her heirs,[60] in spite of the fact that such a deed on its face establishes a tenancy by the entireties,[61] are entitled to attack the deed in equity with evidence showing the amount of the wife's payment. If the wife or her heirs prevail, the court of equity will then declare a trust in favor of the wife or her heirs in the proportion that the money of the wife bears to the full amount of the purchase money.[62] Thus when out of the eighteen hundred dollars paid for the property, sixteen hundred and fifty dollars was the money of the wife, improperly used by the husband, and when the wife predeceased the husband, it was ruled that the surviving husband held an undivided eleven-twelfths of the land in trust for the use of the heirs of the wife and the remaining one-twelfth in his own right in fee.[63] Would the operation of the new formula in a similar factual setting mean that the heirs of the wife, if she were to perish in a common disaster with her husband, would be deprived of the benefit of this rule? In view of the prior Missouri decisions on the issue of the legal effect of a deed to the two spouses under such circumstances, an affirmative answer to the above question would mean that the act could be, with reason, called unfair, but since the same Missouri cases indicate clearly that the court will look beyond the fact of the deed to determine the real character of the estate, such a construction of the Uniform Act seems highly improbable.[64] Rather, it is reasonable to presume that the Missouri courts will continue so to temper the general

59. MO. REV. STAT. § 451.450 (1949).

60. Jones v. Elkins, 143 Mo. 651, 45 S.W. 262 (1898). There the heirs of a wife who predeceased her husband were allowed to sue for her equitable share.

61. Milligan v. Bing, 341 Mo. 648, 108 S.W.2d 108 (1937); Moss v. Ardrey, 260 Mo. 595, 169 S.W. 6 (1914).

62. Donavon v. Griffith, 215 Mo. 149, 114 S.W. 625 (1908); McLeod v. Venable, 163 Mo. 545, 63 S.W. 849 (1901); Jones v. Elkins, 143 Mo. 651, 45 S.W. 262 (1898).

63. Jones v. Elkins, 143 Mo. 651, 45 S.W. 262 (1898).

64. See note 62 *supra*.

concept of tenancy by the entireties and thereby temper the act itself.

In summary, it may be concluded that this section of the new enactment represents a codification of the rule developed before its adoption. In addition, the *Adams* case[65] demonstrates that the Missouri courts will not limit the effect of the act to situations where the express term "joint tenancy" or "tenancy by the entireties" is involved. Rather they will extend the operation of the section to situations where the evidence shows that the commorientes treated the property as jointly owned. Lastly, there is adequate basis for the prediction that in the case where the husband uses his wife's separate property without her written consent in order to buy real estate and takes title to the land in both of their names and then both spouses die in a common disaster, this section will not be strictly applied in Missouri. Instead the case will be decided on the basis of the equities that exist as between the spouses.

V. The Provision Concerning the Insured and the Beneficiary

The fourth section of the Missouri Act 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 as determined by a court of competent jurisdiction, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.[66]

At common law, when the insured and the designated beneficiary of an insurance or fraternal benefit policy died in the same accident, and the beneficiary's interest was conditioned on his survival of the insured, the same approach was employed to decide who had the right to the proceeds as was used in the cases involving the devolution of property under the intestacy laws or under a will. There was no presumption of survivorship or synchronous death, and the decisive issue in each case concerned who was to have the burden of proof of survivorship, the second beneficiary or the representatives of the insured or of

65. Adams v. Gardener, 237 S.W.2d 495 (Mo. App. 1951).
66. Mo. Rev. Stat. § 471.040 (1949).

the first beneficiary.[67] The determination of this particular question turned on the interpretation of the respective rights of the parties under each contract. These constructions fell into two general groups.

The approach used in Missouri prior to the Uniform Act was seen in the leading case of *United States Casualty Co. v. Kacer.*[68] There the insured took out two insurance policies on his life and named his daughter as beneficiary. No right to alter the beneficiary was reserved in the policy, but the indemnity for loss of life was made payable to "Miss Florence Yocum, daughter, if surviving, if not, to the legal representatives of the insured."[69] The insured and his daughter died in a yacht accident, and there was no evidence as to the order of their deaths. The court ruled that since no power of divestiture had been provided for, the primary beneficiary (the daughter) had a vested right in the policy and the money to become due under it. The clause quoted above was construed to be a condition subsequent, the proof of which would divest the beneficiary's interest, and the burden of establishing this condition was on the legal representatives of the insured. In another Missouri decision arising out of the same set of facts but involving a fraternal benefit certificate, the burden of proof was switched to the heirs of the primary beneficiary on the ground that, since the by-laws of the order provided for displacement of the beneficiary at the will of the insured, the daughter had no vested interest in the proceeds but a mere expectancy which became effective only on proof of her survivorship.[70]

67. Miller v. McCarthy, 198 Minn. 497, 270 N.W. 559 (1936); Fleming v. Grimes, 142 Miss. 522, 107 So. 420 (1926); MacGowin v. Menken, 223 N.Y. 509, 119 N.E. 877 (1918). For a collection of cases, see note, 113 A.L.R. 881 (1938).

68. 169 Mo. 301, 69 S.W. 370 (1891). *Accord:* Cowman v. Rodgers, 73 Md. 403, 21 Atl. 64 (1891). Two cases went further than the *Kacer* case, holding that the burden was on the representatives of the insured where the insured had reserved the right to change the beneficiary and where the policy provided that, if the beneficiary should die before the insured, the interest of the beneficiary shall vest in the insured. See Watkins v. Home Life Ins. Co., 137 Ark. 207, 208 S.W. 587 (1919); Roberts v. Hardin, 179 Ga. 114, 175 S.E. 362 (1934). Maryland and Arkansas have now adopted the Uniform Simultaneous Death Act. ARK. STAT. ANN. tit. 61, § 124-130 (1947); MD. ANN. CODE GEN. LAWS art. 35, §§ 89-96 (Cum. Supp. 1947).

69. United States Casualty Co. v. Kacer, 169 Mo. 301, 69 S.W. 370 (1891).

70. Supreme Council of Royal Arcanum v. Kacer, 96 Mo. App. 93, 69 S.W. 671 (1902).

However, the decision in *United States Casualty v. Kacer, supra, i.e.*, that the burden of proving the survivorship of the insured was on the heirs of the insured, was followed in only a minority of states. The majority common law rule was that whatever rights, whether denominated vested or otherwise,[71] that the beneficiary had under the policy, his outliving the insured, at least in cases where the insured had reserved the right to change the beneficiary, was a condition precedent to his right to the proceeds. Thus the onus of establishing the happening of this condition was on the representatives of the first beneficiary.[72] Several courts held that the burden was on the beneficiary's heirs when the insured had reserved in the policy the right to alter the named beneficiary and where there was a clause to the effect that the proceeds were payable to the beneficiary only if he (the beneficiary) survived, otherwise to the representatives of the insured.[73] The presence of the last mentioned clause in the policy was the chief ground used by other tribunals in reaching the same result.[74] But regardless of the rationale of each decision, the practical outcome was that the money was payable to the heirs of the insured.

It will be observed that in all the insurance cases noted above, there was a clause in the policy to the effect that the insurance was payable to the first beneficiary, if surviving, otherwise to someone else. This similarity suggests one very important fact: that the dispute as to who has the prior right to the insurance money can arise only in situations where the survival of the beneficiary is a prerequisite to his rights to the proceeds. Otherwise, there is obviously no problem. Thus in a case where the interest of the beneficiary is not dependent on his living longer than the insured, it is apparent that the representatives of the

71. There was considerable difference of opinion in the cases as to what was the exact nature of the primary beneficiary's interests. *Compare* Watkins v. Home Life Ins. Co., 137 Ark. 207, 208 S.W. 587 (1919) *with* Colovos v. Gouvas, 269 Ky. 752, 108 S.W.2d 820 (1930).

72. See note 67 *supra.*

73. Miller v. McCarthy, 198 Minn. 497, 270 N.W. 559 (1936); Fleming v. Grimes, 142 Miss. 552, 107 So. 420 (1926); Supreme Council of Royal Arcanum v. Kacer, 96 Mo. App. 93, 69 S.W. 671 (1902); MacGowin v. Menken, 223 N.Y, 509, 119 N.E. 877 (1918).

74. Sovereign Camp, W.W. v. McKinnon, 48 F.2d 383 (1931); Colovos v. Gouvas, 269 Ky. 752, 108 S.W.2d 820 (1937); Masonic Temple Ass'n v. Hannum, 120 N.J. Eq. 183, 184 Atl. 414 (1936); Baldus v. Jeremias, 296 Pa. 313, 145 Atl. 830 (1929).

insured would be in no position to contest the right of the heirs of the beneficiary to the proceeds of the policy if the insured and the beneficiary were to die in a common disaster. The case of *Diehm v. Northwestern Mutual Life Ins. Co.*[75] seems to be an example of such a set of circumstances. There the insurance company wrote a policy on the life of one Wesler for the benefit of his wife and his children by her. The contract further provided that the proceeds on proof of death of the insured were to be paid "to the said beneficiary or their executors, administrators or assigns. . . ." and that "in the case of the death of the said beneficiary before the death of the person whose life is assured the amount of assurance shall be payable at maturity to the heirs or assigns of the said person whose life is assured."[76] The plaintiff was the representative of certain grandchildren of the insured. The grandchildren were the issue of a daughter of the insured who was living at the time that the policy was issued but who had predeceased her father. He argued that his wards were entitled to their mother's share of the assurance money, and the court upheld his contention on the ground that the mother had a vested interest in the proceeds which went to the heirs on her death. As regards the two contradictory clauses quoted above, the court ruled that the intention expressed by the provision that the money should be paid to the beneficiaries or their executors, administrators or assigns prevailed over the effect of the clause which gave to the heirs of the insured the interest of any beneficiary who predeceased the insured. It is apparent from this opinion that the daughter's survivorship was not deemed a prerequisite to her heirs' right to the proceeds, and it seems unreasonable to say that the court would have reached a different result if the daughter had perished in a common disaster with her father instead of having died before him. The problem in both situations, *i.e.*, the effect of the daughter's failure to outlive her father, is still the same.

What will be the impact of the new law on these common law rules? In those jurisdictions which adopted the majority rule, it is apparent that the act will leave the law unchanged on the question of whose heirs get the proceeds of the policy in ques-

75. 129 Mo. App. 256, 108 S.W. 139 (1908).
76. *Id.* at 260, 108 S.W. at 140.

tion.[77] Under the burden of proof method in those states, the heirs of the insured received the money. The same result will be forthcoming with the application of the presumption that the insured outlived the primary beneficiary since there will be no time under the presumption during which the title to the proceeds will vest in the beneficiary so as to constitute a part of his estate at his death. If the proceeds are not part of the beneficiary's property, his heirs will have no right to them. However, in Missouri the act will alter the outcome in situations where the insured has not in the policy provided for the right to change the beneficiary. In the *Kacer* case, *supra,* the heirs of the beneficiary got the money in such a factual setting, but with the Uniform Act, the heirs of the insured will win since the insured will be presumed to have survived. It is submitted that the new enactment produces a result more in line with the probable intention of the insured. It would be rather unreasonable to presume that the insured would have wanted the heirs of the beneficiary to take the proceeds of the policy in preference to his own successors in case the beneficiary could not take.[78]

In addition, with respect to the particular question raised by the *Diehm* case, *supra,* much can be said to sustain the proposition that in a situation where there is a provision that the policy is payable to the beneficiary or his executors, administrators, or assigns and the beneficiary and insured die simultaneously in the contemplation of the law, the identical decision would be reached under the new formula that was reached in the *Diehm* case. There is considerable evidence to the effect that the act does not even apply in cases where the beneficiary's right to the proceeds is not contingent on his survivorship of the insured.[79] The terms of the section do not expressly say that its application is so limited, but two factors indicate that

77. See VANCE, INSURANCE § 118 (3rd ed. 1951).

78. See Fleming v. Grimes, 142 Miss. 552, 107 So. 420 (1926); Supreme Council of Royal Arcanum v. Kacer, 96 Mo. App. 93, 69 S.W. 671 (1902); Masonic Temple Ass'n v. Hannum, 120 N.J. Eq. 183, 194 Atl. 414 (1936); Matter of Burza, 151 Misc. 577, 272 N.Y. Supp. 248 (Surr. Ct. 1934).

79. See Miller v. McCarthy, 198 Minn. 497, 500, 270 N.W. 559, 561 (1936) where the court observed: "The policy is payable to Florence [the beneficiary of the policy who died in a common accident with the insured], not to Florence or the representative of her estate." See also Conway and Bertsche, *supra* note 23 at 17.

such is the case. Under an earlier draft of the act, there was a section covering situations, "where the persons perishing are so related to each other under the terms of a contract that the disposition of property depends upon their relative times of survival."[80] As an example of when this provision would be invoked, Dean Wigmore gave a hypothetical case in which the rights of the beneficiaries of an insurance policy were dependent on their outliving the insured.[81] It does not seem reasonable to assume that the Commissioners, just because they later made a specific provision for insurance policies where before there had been none, had thereby changed their conception of the problem. This consideration, plus the fact that the purpose of the act is to solve the problem arising when the question of survivorship is the important factor as regards the distribution of the property, indicates strongly that the insurance provision applies only when the answer to that question is decisive.[82] On the basis of these factors, it seems clear that, in the case in which the policy is payable to the beneficiary or "his executors, administrators, or assigns," the new act should not then apply and the heirs of the beneficiary shall have the prior right.[83]

VI. THE SCOPE OF THE STATUTE

Since the Uniform Act is brought into operation only when there is no sufficient evidence that the parties involved died otherwise than simultaneously, we may inquire as to the legal meaning of the word "simultaneously." Ohio has a statutory provision applicable to the common disaster problem which says that as far as the distribution of property is concerned, when the surviving party in a common disaster situation dies as a

80. 1939 HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 211.

81. *Id.* at 194.

82. Commissioner's Prefatory Note, Uniform Simultaneous Death Act, 9A U.L.A. 264 (1951).

83. See VANCE, INSURANCE § 115 (3rd ed. 1951). Similarly, it would seem that the Act would not apply in other factual settings where the survival of the beneficiary is not a condition precedent to his right; for example, where the beneficiary is in reality the party who contracts for an insurance policy on the life of another person. Bradshaw v. Mutual Life Ins. Co., 187 N. Y. 347, 80 N.E. 203 (1907). *But see* Thompson v. Northwestern Mutual Life Ins. Co., 161 Iowa 446, 143 N.W. 518 (1913), where on substantially the same facts the court held that the secondary beneficiaries rather than the heirs of the primary beneficiaries were entitled to the proceeds even though the primary beneficiary procured the policy.

result of the same accident within thirty days of the first decedent, the property of the first decedent shall be disposed of as if he had survived the second.[84] The Commissioners seem to have had the same idea in mind when they wrote into a prior draft of the act a provision to the effect that in order that a survivor be entitled to take from the person predeceasing him, the survivor must have had a "clear period of consciousness" during the interval between deaths.[85] This phrase was omitted from the final version of the act after having been criticized for its vagueness,[86] but Dean Wigmore contended that a provision of this type is more likely to be in line with the probable intention of the property owner.[87] His contention was that the ancestor or testator certainly would not have intended the property to go to the next of kin of his heir or devisee simply because the heir or devisee breathed a few moments longer than he (the ancestor or testator) did.

On the other hand, the New York rule is that if the evidence is adequate to show that one death occurred one second after the other, then the property shall be distributed to the heirs of the survivor.[88] The Missouri Supreme Court applied the same rule in *Taylor v. Cawood.*[89] There a father, who based his claim to his wife's estate on the survivorship by his infant child of his wife, was allowed to prevail when the evidence proved that the child lived a few minutes after the mother's death. Thus in Missouri the new enactment cannot be invoked if there is sufficient evidence to show that one commorient lived a very short time after the other.

What are the relative merits of these two general rationales? Dean Wigmore's argument seems much more in line with the probable intent of the decedent whose property is to be distributed. However, it is understandable why the "clear period of consciousness" test was omitted from the final draft of the Uniform Act; its vagueness would make for difficulty in prac-

84. OHIO GENERAL CODE ANN. § 10503-18 (Page, 1935).
85. 1939 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 211.
86. *Id.* at 212.
87. 9 WIGMORE, EVIDENCE § 2532a (3rd ed. 1940).
88. *In re* Fowles' Will, 22 N.Y. 222, 118 N.E. 611 (1918); *In re* Di Bella's Estate, 100 N.Y.S. 2d 263 (Surr. Ct. 1950).
89. 211 S.W. 47 (Mo. 1919).

tical application. There remains the approach used in the Ohio statute. Such a rule might be questioned on the grounds that the power of the legislature to set up presumptive rules of evidence is qualified

> in that the fact upon which the presumption or inference is to rest must have some relation to or natural connection with the fact to be inferred, and that the inference of the existence of the fact to be inferred from the existence of the fact proved must not be purely arbitrary or wholly unreasonable, unnatural, or extraordinary.[90]

The Ohio statute seems to fly directly in the face of this limitation because in spite of the fact that it is definitely established that one party survived, if the survivor died as a result of the same accident within thirty days of the first decedent, then the first decedent is presumed to have survived for the purpose of the distribution of the first decedent's estate. But the answer to this apparent conflict is that the legislature would not be setting up a rule of evidence but rather a rule for the distribution of property, an area over which it does have power.[91] It seems reasonable to say that the ancestor or testator would probably not have wanted the successors to his heir (or devisee) to take his property because his heir (or devisee) outlived him for a brief moment; rather, he probably would have desired in that event that his (the ancestor's or testator's) *other* heirs (or devisees) would take the deceased heir's share. This would seem to be especially true in the case where a testator has provided for a gift over in the event that the devisee predeceases him. There the testator at least has indicated that he has thought about the problem and that he deems the survivorship of the beneficiary an important element in the beneficiary's right to take. On these grounds, then, it is submitted that a statute along the lines of the Ohio provision would be a valuable supplement to the Uniform Act.

The definition of the phrase "no sufficient evidence" should also be considered here since that phrase provides the basis for rebutting the implied presumption of simultaneous death and thus limiting the operation of the act. However, to cover adequately the subject of what amount and type of evidence has been re-

90. City of St. Louis v. Cook, 359 Mo. 270, 221 S.W.2d 468 (1949).
91. Irving Trust Co. v. Day, 314 U.S. 556. 562 (1942); State *ex rel.* McClintock v. Guinotte, 275 Mo. 298, 204 S.W. 806 (1918).

quired to prove survivorship would go far beyond the scope of this note. Consequently, only a brief discussion will be made, and the reader will be referred to an exhaustive article on that particular point.[92]

At common law there was a spectrum of variation in the amount of evidence required to prove survivorship. One extreme was seen in the case of *Pell v. Ball*,[93] where the court said that "where there is any evidence whatever, even though it be but a shadow, it must govern in the decision of the fact." A different view is found in the statement that:

> it is not sufficient that the circumstances of the case be consistent with respondent's theory [i.e., that one party survived]. They must be inconsistent with any other reasonable theory equally deducible therefrom.[94]

The case of *Stewart v. Russell, supra,* shows that Missouri followed the idea expressed in the second quotation. There the deaths resulted from the escape of gas from a defective water heater. The expert witnesses for the plaintiff testified that they were of the opinion that the daughter survived because the autopsies performed on the three decedents showed that the body of the daughter had a smaller percentage of carbon monoxide in her blood than the other two persons. However, the defendants' expert witnesses disputed the conclusion that the difference in the percentage of carbon monoxide in the blood was decisive on the question of who had survived, and in view of this disagreement among the experts, the court said that it could not decide the fact of survivorship on that evidence alone. The court further pointed out that the ascertainment of the fact depended on a number of other factors, including the respective times that the decedents entered the gas-filled rooms and the relative amount of exercise that each decedent had after entering, and that since there was no evidence on those questions, it was impossible to form any reasonable conclusion as to survivorship.[95]

On the other hand, two Missouri cases indicate what standard was employed to prove survivorship prior to the new enactment. In *Warren v. Aetna Life Insurance Co.*,[96] a man and his wife,

92. Tracy and Adams, *supra* note 5 at 801.
93. 1 Cheves Eq. 99, 103 (S.C. 1840).
94. Estate of Wallace, 64 Cal. App. 107, 113, 220 Pac. 682, 684 (1923).
95. To the same effect, see Abrams v. Unknown Heirs of Rice, 317 Mo. 216, 295 S.W. 83 (1927).
96. 202 Mo. App. 1, 213 S.W. 527 (1919).

who were employees on a steamboat, perished when the boat capsized in a storm. Two witnesses testified that they saw the wife alive in the river approximately one and one-half minutes after the boat turned over, and there was uncontradicted testimony that the husband's body was underneath the ship's hull until the boat was righted. The court ruled that the wife's survivorship was established by "preponderance of the testimony."[97] In *Taylor v. Cawood*[98] the rights of the claimants depended on whether an infant, after being completely born, survived its mother, who died in the process of childbirth. There, on the basis of testimony by three doctors that they heard the baby make a sound a minute or two after its birth plus the testimony of a nurse that she detected a faint heartbeat in the child the same length of time after the birth, the court ruled that a prima facie case that the baby survived had been made and that it was supported by "substantial evidence."[99]

At this point, it should be noted that, since the phrase "sufficient evidence" does not by its very terms adopt the generally accepted descriptions of the various burdens of proof, such as "preponderance of the evidence" or "clear and convincing" or "beyond a reasonable doubt," it would seem that the courts in construing the phrase would not be bound to equate it to any one of the common descriptive wordings. Rather, it would seem to be within their discretion to say that the phrase sets up a new and different standard of proof if they felt that such was the case. Whether the change in the wording would really mean that in practice there would be a qualitative difference in the evidence that was "sufficient" and that which constituted a preponderance is questionable,[100] but this fact would not prevent the courts' saying that the two definitions connote different standards. If the courts should take this view, *i.e.*, that the phrase does set up a unique requirement of proof, then it follows that the decisions prior to the Uniform Act would not be of much help in future cases in deciding what evidence was sufficient because they were not decided on that basis. However, such an approach does not seem likely if only because it would leave the courts without a reference point from which to commence their

97. *Id.* at 15, 213 S.W. at 530.
98. 211 S.W. 47 (Mo. 1919).
99. *Id.* at 50.
100. See 9 WIGMORE, EVIDENCE § 2498 (3rd ed. 1940).

consideration of the legal meaning of the phrase. Rather, it is probable that the phrase will be interpreted in relation to those phrases in general use before the Uniform Act. It is well then to attempt to ascertain which of the accepted standards will most closely approximate the meaning of the phrase "no sufficient evidence."

It will be noted that in the *Warren* case, the evidence was described by the court as constituting a "preponderance of the testimony." In *Taylor v. Cawood*, the court said that the infant's survivorship was established by "substantial evidence." In view of the fact that the term "sufficient evidence" is defined in *State ex rel. Sterling v. Shain*[101] as signifying "that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt,"[102] an interesting question is raised as to whether, if two identical cases were to arise under the new enactment, the same proof would be considered "sufficient." The *Sterling* case, involved an action in equity to set aside a default judgment entered against plaintiff in an earlier suit because of the alleged negligence of the circuit clerk in not making the answer of the plaintiff (who was the defendant in the case where the default judgment was given) a matter of record, and the court ruled that the negligence of the clerk must be established by evidence that will satisfy the reasonable doubt test. The court also said that the above definition described the same degree of proof as that required to set aside a judgment because of fraud committed in the procurement of such judgment, *i.e.*, the evidence must be so cogent, clear, strong and convincing as to leave no reasonable doubt of such fraud in the minds of the chancellor.[103] No matter which of the above definitions is employed to describe the phrase "sufficient evidence," it seems clear that both are customarily used to characterize a higher degree of proof than "preponderance of the testimony."[104] Similarly, in another Missouri case involving a suit to set aside a judgment obtained by fraud,[105] the

101. 344 Mo. 891, 129 S.W.2d 1048 (1939).

102. *Id.* at 897, 129 S.W.2d at 1051. See also Kenney v. Hannibal & St. Joseph R.R., 70 Mo. 243 (1879).

103. State *ex rel.* Sterling v. Shain, 344 Mo. 891, 897, 129 S.W.2d 1048, 1051 (1939). This apparently is the usual quantum of proof required in such equitable actions. See 9 WIGMORE' EVIDENCE § 2498 (3rd ed. 1940).

104. 9 WIGMORE, EVIDENCE § 2497-2498 (3rd. ed. 1940).

105. Terminal R. R. Ass'n of St. Louis v. Schmidt, 349 Mo. 890, 163 S.W.2d 772 (1942). The court based its statement on State *ex rel.* Sterling v. Shain, 344 Mo. 891, 129 S.W.2d 1048 (1939). The term "substantial

phrase "substantial evidence" has expressly been ruled not to describe as great a quantum of proof as the phrase "sufficient evidence." Thus a literal application of the definition of the *Sterling* case could mean that proof of survivorship by a mere preponderance or by substantial evidence would not be adequate.

However, there are very forceful arguments against such a construction of the phrase. In the first place, *State ex rel. Sterling v. Shain* is clearly distinguishable on its facts; it involved no problem of survivorship. It is entirely possible that a different definition of the phrase "sufficient evidence" would be employed in an action to set aside a default judgment than would be used in a common disaster case. Secondly, although the Missouri decisions above on the question of the quantum of proof required to prove survivorship did not specifically deal with this question, they do indicate that the doctrine of stare decisis will not work in favor of construing the phrase in the Uniform Act according to the definition given to it in the *Sterling* case. Lastly, the Appellate Court of Illinois has interpreted the phrase to mean nothing more than a mere preponderance of the testimony and has expressly rejected the contention that it describes that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt.[106] Thus it seems unlikely that the Missouri courts will adopt the *Sterling* interpretation. Whether they will construe the phrase in the same way that the Appellate Court of Illinois did is, of course, uncertain, but in view of the statements made in Missouri decisions prior to the Uniform Act concerning the required degree of proof, it seems probable that Missouri will follow the Illinois ruling.

Before leaving the question of what evidence of survivorship is sufficient, we should note that the Missouri version of the Uniform Simultaneous Death Act is different from the draft as adopted by the Commissioners on Uniform State Laws in that the Missouri law designates that the sufficiency of the evidence

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evidence" has been defined as "evidence from which the triers of fact reasonably could find the issue in harmony therewith." State v. Gregory, 339 Mo. 133, 96 S.W.2d 47 (1936); Walter v. Alt, 348 Mo. 53, 152 S.W.2d 135 (1941).

106. Prudential Ins. Co. v. Spain, 339 Ill. App. 476. 90 N.E.2d 256 (1950). See also Sauers v. Stolz, 121 Colo. 456, 218 P.2d 741 (1950), where the court said: "The presumption of simultaneous death of the parties was not intended to take the place of competent positive and direct evidence, and the fact of survivorship requires no higher degree of proof than any other fact in the case." *Id.* at 458, 218 P.2d at 742

of survivorship shall be determined by "a court of competent jurisdiction."[107] The term "court of competent jurisdiction" has been defined in another connection as "a court of general jurisdiction, whether federal, state or territorial."[108] It does not seem that such an interpretation would be descriptive of the kind of court contemplated by the Uniform Act because that construction would oust the power of the probate courts, which by statute have jurisdiction in cases involving the devolution of property.[109] In addition, where the property in dispute is the proceeds of an insurance policy and the amount of money involved is within the statutory limits prescribed for magistrate court jurisdiction, the magistrate courts would have power to try the case.[110] It is clear that the circuit courts are also courts of "competent jurisdiction." They have exclusive original jurisdiction in civil cases which are not cognizable before the probate courts and magistrate courts,[111] and have appellate jurisdiction from the judgments and orders of those two courts.[112] Their power also includes concurrent jurisdiction with the magistrate court when the sum demanded exceeds fifty dollars.[113]

In still another way, unrelated to the above limitations, the scope of the Uniform Act is cut down. This limitation is suggested in the case of *Garbee v. St. Louis-San Francisco Ry.*[114] There an infant died with his mother and father when one of defendant's trains struck the automobile in which all three were riding, and the administrator of the infant brought suit for the child's death. Plaintiff's complaint alleged that the child, mother, and father were all killed at the same time. This averment was necessary since if either the mother or the father or both survived the deceased infant, the cause of action vested in the survivor or survivors and the action could not then be maintained by the child's administrator. Defendant contended that since there was no presumption of synchronous death to aid the plain-

107. Uniform Simultaneous Death Act, 9A U.L.A. 265-268 (1951). See also MO. REV. STAT. §§ 471.010-471.040 (1949).
108. Stewart v. Hickman, 36 F. Supp. 861 (W.D. Mo. 1941).
109. MO. REV. STAT. § 481.020 (1949).
110. MO. REV. STAT. § 482.090 (1949).
111. MO. REV. STAT. § 478.070 (1949).
112. *Ibid.*
113. *Ibid.* All the Missouri cases concerning the distribution of the estates of commorientes were tried at one stage or another in the circuit courts.
114. 220 Mo. App. 1245, 290 S.W. 655 (1927).

tiff, the burden devolved on him (plaintiff) to prove that all three died at the same instant. The court conceded for the purposes of argument that defendant's position on the law was valid, but then proceeded to rule that the great impact of the collision, the fact that the automobile was knocked a considerable distance from the crossing where the accident occurred, and the fact that the record showed that the *dead bodies* were put on the train when it backed up constituted substantial evidence that the three decedents had perished simultaneously. Would the clause of the Uniform Act which provides in effect that the property of each commorient shall be distributed as if he had survived mean that, if a similar case were to arise after the new act, the plaintiff could sustain his right to sue for the child's death on the ground that as regards the child's property the child is deemed to have survived? The application of the act to this factual situation would certainly give a stronger ground for sustaining the child's administrator's right to sue than ruling on the basis of the evidence above that the three died at the same split-second and that therefore the administrator of the infant could sue. In view of the difficulty of proving such a fact, the evidentiary factors used in the *Garbee* case to establish it seems inadequate at best.[115] However, the first clause of the new enactment applies only when the devolution of property depends on the issue of survivorship, and it has been ruled in Missouri that an action for wrongful death is not a part of the decedent's estate.[116] Such a decision would seem to make it clear that the Uniform Act could not be used to aid in solving the problems raised in such cases when there is no evidence as to who survived.

Still another aspect in which the scope of the new act is limited is found in the fact that the clause expressly requires that the order of death of two or more persons be the source of the problem. The case of *Durrant v. Friend*[117] is illustrative. There a testator bequeathed some chattels to certain legatees. He then insured the chattels and took them with him on a voyage. The testator and chattels were both lost at sea, and the question arose as to whether the legatee or the executors of the estate had the

115. See Note, 13 Mo. L. Rev. 230 (1948).
116. Demattei v. Missouri, Kansas, Texas R.R, 345 Mo. 1136, 139 S.W.2d 505 (1940); Donelson's Estate v. Gorman, 239 Mo. App. 300, 192 S.W.2d 29 (1946).
117. 2 De G. & S. 343, 64 Eng. Rep. 1145 (1852).

right to the insurance proceeds. If the testator had perished before the chattels, then the interest in them would have vested in the legatee, who would in turn have been entitled to the insurance proceeds. But if the testator had died after the chattels were lost, the benefit of the policy would have passed to the executors. The court ruled for the executors on the ground that the testator had died at the same instant that the chattels had been destroyed and that thus the legatees never had an interest in the chattels. In such a factual setting, the word "persons" would preclude the operation of the statute.

An express provision in the new act gives the basis for another way in which the scope of the statute is cut down. Section 471.060 provides that the law,

> 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 law.[118]

This section shows that the act was not intended to set up an unchangeable rule of property but was rather to apply only in the absence of an appropriate legal instrument showing the property owner's real state of mind.[119] However, in order that there should be no question of the instrument's efficacy, one caveat should be observed. It is that the event which will bring into operation the provision aimed at preventing the application of the statute should not be described as a "common disaster." In the first place, such a term might well give rise to the argument that the decedents did not die in a "disaster" in that they did not die in a public calamity[120] and that thus the provision excluding the statute does not apply. The second reason for not using the term "common disaster" is that the problem of survivorship which the provision was aimed at solving might arise even though the parties did not die as the result of the same

118. MO. REV. STAT. § 471.060 (1949). Another express limitation on the operation of the Missouri version of the Uniform Simultaneous Death Act is Section 471.040, which provides: "This law shall not apply to the distribution of property of a person who has died before it takes effect." This provision, although important, is self-explanatory and for that reason was not included in the text. See Stewart v. Russell, 227 S.W.2d 1011 (Mo. 1950).

119. For a case construing a will provision intended to cover the possibility of the testator's and the devisee's dying under circumstances from which the order of their deaths could not be ascertained, see *In re* Fowles' Will, 222 N.Y. 222, 118 N.E. 611 (1918).

120. See Tracy and Adams, *supra* note 5 at 801.

accident. The question of which party lived longer will become important not only when the time of death of each party in different events are both unknown but also where the time of death of one of the decedents is established and the relative time of death of the other in another event or place is not known. Yet if the phrase "common disaster" were used, the clause intended to preclude the statute could not be employed because it could not be said that the parties in those circumstances died in the same accident.

Similarly, the operation of the act, although subject to the above limitations, should not be applied only to those cases where the deaths of the parties were caused by the same force or unfortunate event. The history of the new act hows that the Commissioners did not intend to have the statute so limited.[121] The terms of the statute say that it is to apply in cases 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."[122] Such words can hardly be construed to mean that they apply only to common disaster situations. Rather, they cover other factual settings where property rights depend on the order of death and there is no sufficient evidence of that sequence. Thus the act should be invoked where the ancestor perishes in a train wreck in one state and his heir drowns in another state and there is inadequate proof of the order of their respective demises.

In addition, a strong argument can be made that the new statute offers a basis for solving the problem raised in the case of *In re Buck's Estate.*[123] There a beneficiary under his uncle's will had disappeared approximately one year before his uncle died. After waiting a period of more than seven years, after which the common law presumption of death of the legatee arose, the mother of the legatee brought suit to have the legacy paid to her. The establishment of the survivorship of the beneficiary over his uncle was necessary to the mother's case because if the beneficiary had predeceased the testator, the legacy would have adeemed. Since in Missouri the presumption of death from seven years' absence extends only to the fact of death and not to the

121. See Comment, 7 MD. L. REV. 330 (1943) and 1938 HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 277.
122. MO. REV. STAT. § 471.010 (1949).
123. 204 Mo. App. 1, 220 S.W. 716 (1920).

time of death,[124] neither side had the benefit of a presumption as to exactly when the legatee had perished. No evidence as to that factual issue was introduced, but the court ruled on the basis of the presumption of the continuance of life and the presumption against suicide that the beneficiary survived his uncle and that thus the mother was entitled to the legacy. It seems clear that there was no sufficient evidence that the nephew had survived his uncle.[125] Furthermore, it can be argued that there was no sufficient evidence that the parties died otherwise than simultaneously on the grounds that that clause is just another way of describing the problem raised when there is inadequate evidence of who outlived whom. On this rationale, the Uniform Act would have been applicable to the facts of *In re Buck's Estate*, if it had been the law at that time, and would have led to a different result. Since under the formula of the act, the property would have been distributed as if the testator had survived, the legacy would have adeemed and the mother's claim would have failed. Therefore the adoption by the courts of this extended interpretation of the new enactment would mean a change in this aspect of the law.

On the other hand, there are arguments that the Uniform Simultaneous Death Act should not receive such a broad construction. The act under discussion and the Uniform Absence as Evidence of Death and Absentee's Property Act were originally parts of the Uniform Presumption of Death Act.[126] On the basis of this fact, it might be contended that since the two proposed acts were first drafted together, the Commissioners intended that the operation of each one should be limited strictly to the factual situation set forth by its wording. Some support for this contention may be found in the fact that the Absentee's Property Act has a section in its general provision concerning the disposition of money from insurance policies of the absentee which says:

> Where the survival of a named beneficiary is not established the provisions of this Act shall apply as if the proceeds of the insurance were a part of the estate of the absentee.[127]

124. Ferril v. Kansas City Life Ins. Co., 345 Mo. 774, 137 S.W.2d 577 (1939); Hancock, Adm'r v. American Life Ins. Co., 62 Mo. 26 (1876).

125. Thayer, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 337 (1898).

126. 1937 HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 236.

127. Uniform Absence as Evidence of Death and Absentee's Property Act, § 10(3), 9 U.L.A. 1 (1951).

The contention could be made that since the Commissioners made this specific provision in the Absentee's Property Act to cover the problem raised when the beneficiary's survival is not established, they intended to preclude the operation of the Uniform Simultaneous Death Act. However, such evidence on the question of intent seems meager at best, and the first argument made for not applying the new act to the situation outlined in *Re Buck's Estate,* would surely not prevail in Missouri, since Missouri has not adopted the Uniform Absence as Evidence of Death and Absentee's Property Act. Perhaps because the history of the adoption of the Missouri Uniform Simultaneous Death Act indicates nothing as to what the legislators wanted the act to mean,[128] the court in its interpretation would consider the expressions of intent by the Commissioners, but the above evidence could hardly be considered adequate grounds for reaching a particular result.

The problem then becomes one of judicial construction of the terms of the act, which in turn means in substance deciding what the phrase "and there is no sufficient evidence that the persons died otherwise than simultaneously" means. The court might say that the terms of the act limit it to those situations in which the probability is that the decedents died within a very short time of each other but there is inadequate evidence of the order of death. This would seem to rule out the set of facts involving the question of whether an absentee survived another decedent (or absentee) since the probability there is that the parties did not die within a short time of each other. But this construction seems rather unreal. The broad application mentioned above recommends itself as being the more reasonable.

CONCLUSION

From the above discussion several observations may be made:

1. The new enactment represents a codification of the generally accepted common law rules used in common disaster cases. In Missouri that proposition is true so far as the devolution of the property of commorientes is concerned, but the insurance provision of the Uniform Act has changed the law as it was annouced in *United States Casualty Co. v. Kacer* with

128. JOURNAL MO. HOUSE, 64th Gen. Ass. 207, 242, 776, 1017, 1106 (1947); JOURNAL MO. SEN., 64th Gen. Ass. 83, 97, 329, 541, 584, 596, 601, 614, 940, 978, 1010, 1252, 1256, 1271, 1285 (1947).

regard to the disposition of the proceeds of an insurance policy.

2. The case of *Adams v. Gardener* indicates that the Missouri courts will apply the joint tenancy provision to cases where the parties who died simultaneously in the contemplation of the law treated the property as jointly owned as well as to the two types of relationships to which the provision is expressly directed.
3. The provision with regard to the disposition of property limited to successive beneficiaries is of doubtful utility, from the point of view of practical application, and could be improved by the additions of the phrase "or alternately" after the word "successively" and the phrase "or alternate" after the word "successive."
4. The new act will probably leave the law of Missouri unaltered in at least four important respects:

   (a) In spite of *State ex rel. Sterling v. Shain,* the quantum of evidence required to prove survivorship of one of the decedents and thus to preclude the operation of the statute will probably be something closely akin to "preponderance of the evidence."

   (b) Establishing by sufficient proof that one of the decedents outlived the other by only a few moments will be adequate grounds for allowing the survivor to take from the person predeceasing him. However, it is submitted that the adoption of a statute along the lines of the Ohio statute discussed above would be a valuable supplement to the Uniform Act.

   (c) When the issue of which decedent of a group of related decedents died first is determinative of the question of which administrator of all the representatives of the decedents will be entitled to sue for wrongful death, the act probably will not be applicable since in Missouri an action for wrongful death is not a part of the decedent's estate and since the act applies only when the devolution of *property* depends on the question of survivorship.

   (d) The doctrine that the court will declare a trust in favor of a wife or her heirs on proof that the husband has used the wife's separate property without her written consent to buy real estate and has taken title to the property in both of their names will not apparently be changed if the husband and wife

should die in a common disaster and the act should then become applicable. The past decisions have shown that the Missouri courts will rule on the basis of the contributions made by each tenant instead of deciding according to the apparent tenancy by the entireties evidenced by the deed. It seems reasonable to say that this modification of the strict operation of the legal rules in this particular factual situation will be applied when there is a problem of survivorship as well as when there is not.

5. Where there is a provision in an insurance policy to the effect that its proceeds are payable to the beneficiary or his executors, administrators or assigns, considerable evidence can be marshalled to sustain the proposition that then the new statute will not apply.
6. When the question arises of whether or not a party absent for seven years has survived another person, the terms of the new act seem clearly to provide a basis of decision, since in those circumstances as well as when the parties die as a result of the same force, "there is no sufficient evidence that the persons died otherwise than simultaneously."

A. E. S. SCHMID