# ARTICLES

## THE CONCEPT OF *COMMORIENTES* IN FRENCH AND RUSSIAN INHERITANCE LAW

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*The article is devoted to the consideration of the concept of commorientes in French and Russian inheritance law. The commorientes are individuals, entitled to inherit, reciprocally, to each other and considered to have died at the same moment, from the inheritance's point of view. The commorientes do not inherit reciprocally. The work focuses on how French and Russian law determine the notion of commorientes. Inheritance rules, regarding the commorientes in France and Russian Federation from the beginning of the 19th century are analysed; subsequently, their current versions in force in the French Civil Code and the Russian Federation Civil Code are compared. Particular attention is paid to the issue of the time of the inheritance opening. In the Russian legislation this issue has not been unambiguously resolved for a long time. The article presents the evolution of the Russian and French rules on inheritance after the commorientes. In French law, presumptions of survival have been in effect for many years, allowing to determine the sequence of deaths of people who died as a result of the same event. The article contains the rules of the current legislation in France and in the Russian Federation, as well as suggestions for their improvement.*

*Keywords: inheritance; inheritance opening time; commorientes (comourants); presumptions of survival; Russian inheritance law; French inheritance law.*

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## Introduction

One of the nuclear concepts in inheritance law is that of "inheritance opening time." It is only at the time of inheritance opening that the possibility arises to establish the group of persons entitled to inheritance, the estate composition and its value, the conditions governing its acceptance or refusal, applicable laws, and other juridically relevant facts.

With regards to establishing the group of persons entitled to inheritance, they are to be necessarily alive at the time of inheritance opening. However, situations are possible, in which persons boasting reciprocal inheritance rights (spouses and offspring, or wife and husband, for instance), die in such circumstances as to make it impossible to establish the order of their deaths. The question thus arises of determining how inheritance will be attributed in such cases.

French and Russian inheritance rules forward this question to the notion of *commorientes* (*comourants*). The *commorientes* are individuals entitled to inherit reciprocally from each other and considered to have died at the same moment from the inheritance's point of view. The *commorientes* do not inherit reciprocally.

Notwithstanding, French and Russian law determine, differently, the situation to be considered as *commorientia*. Further, substantial reform of the applicable rules has been carried out in both countries recently.

In this paper, inheritance rules, regarding the *commorientes* in France and Russia, from the beginning of the 19th century, will be analysed; subsequently, their current versions in force, in the French Civil Code and the Russian Federation Civil Code, will be compared.

## 1. Inheritance Rules Regarding the *Commorientes* in Russian Law

### *1.1. Inheritance Rules Concerning the Time of the Inheritance's Opening from 1835 to 2002*

Russian inheritance rules, including those concerning the time of the inheritance's opening, were established by the pre-revolutionary legislation – the Collection of Laws of the Russian Empire,[1] in force between 1835 and 1918.

Article 1222 of the Collection of Laws of the Russian Empire (from now on, "the Collection of Laws"), Volume X, had established that "inheritance is opened: 1) by natural death of the estate's owner, and 2) by deprivation of the whole of his estate rights." The Collection of Laws did not specify the time of inheritance opening – whether the day of decease or the moment of decease of the *de cujus*. However, in the Senate's report, it has been said that the inheritance rights are opened and pertain to the inheritors "since the moment of decease of the departed."[2]

Russian pre-revolutionary legislation did not rule any presumption of survival for the case of impossibility to establish the order of deaths of the *commorientes*.

On the contrary, the French Civil code of 1804 ruled presumptions of survival allowing to establish a sequence of deceases in the case of the impossibility to establish the order in which they had occurred in reality. Pondering the rules in Articles 720 through 722 of the French Civil Code, Duvernois noted:

> There is therein more arbitrary than it might be supposed, and probably less than it should be set. Only the general ending position of this theory of *commorientes* is not wanting at opportunity, as it is established that the inheritance of the deceased is governed by this presumption, which opens the inheritance …[3]

In the Project of the Russian Civil Code of 1905, effort was made, so as to eliminate the uncertainty as to the moment of death, of persons deceased in close temporal consecution. Article 1353 of the said Project set that

> Only the individual in life in the time of inheritance opening may be an *ab intestato* inheritor. Whenever it is not proved who, out of two or more

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[1] The Collection of Laws of the Russian Empire was the official collection of legislative acts of the Russian Empire.

[2] *See Исаченко В.В.* Законы гражданские (Свод законов, т. X, ч. I) [Vasily V. Isachenko, *Civil Laws (Collection of Laws, Vol. X, Part I)*] 398 (Petrograd: Publication of the bookstore "Law," 1916).

[3] *See Дювернуа Н.Л.* Чтения по гражданскому праву. Т. 1 [Nikolai L. Duvernois, *Readings on Civil Law. Vol. 1*] 317 (4th ed., St. Petersburg: Printing House Stasyulevich, 1902–1905).

> individuals entitled to inherit reciprocally from each other, has deceased in the first place, all of them will be presumed to have died simultaneously.[4]

Unfortunately, the Project of the Russian Civil Code was never adopted. The Decree of 27 April 1918, of the Central Executive Pan-Russian Committee, enforcing the abolition of inheritance, entered into force in 1918.[5] The right of inheritance was subsequently re-established by the publication of the Decree of 22 May 1922, of the Central Executive Pan-Russian Committee, "On the Fundamental Rights of Ownership Acknowledged by the RSFSR, Protected by its Laws, and Protected by the Courts of the RSFSR." This document allowed limited rights of ownership to the citizens, comprising "the right to inherit by testament, and by the lawful spouses and their direct offspring, up to a total estate value amounting to 10,000 gold roubles."[6]

Specific rules for inheritance were integrated into the Civil Code of the Russian Soviet Federal Socialist Republic of 11 November 1922 (from now on, "the RSFSR Civil Code of 1922"), entered into force on 1 January 1923. A note to Article 418 of the RSFSR Civil Code of 1922 states:

> They may only be inheritors those alive at the time of decease of the estate's owner, as well as the children conceived by him during his life and born after his death.

The RSFSR Civil Code of 1922 thus set the time of inheritance opening to be the time of decease, not to the day of decease. Contemporary legal doctrine also underlined the moment of inheritance opening to be "the time of death of the deceased individual." However, no consequence was pointed out for the case of simultaneous decease of individuals, inheriting reciprocally from each other. This question was not decided by the Decree of the Presidium of the USSR Supreme Council of 14 March 1945 "On *Ab Intestato* and Testamentary Inheritors,"[7] which established new rules on the entitlement to the inheritance, enlarging the set of entitled individuals.

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[4] *See* Гражданское уложение: Проект Высочайше учрежденной Редакционной комиссии по составлению Гражданского уложения. Т. 1 [*Civil Code: Draft of the Highest Established Drafting Commission for the Preparation of Civil Code. Vol. 1*] (St. Petersburg: Publication of the bookstore "Law," 1910).

[5] *See* Собрание узаконений. 1918. № 34. Ст. 456 [Collection of Laws, 1918, No. 34, Art. 456].

[6] *See* Собрание узаконений и распоряжений Рабочего и Крестьянского Правительства. I отдел. 1922. № 36. Ст. 423 [Collection of Laws and Orders of the Worker and Peasant Government, Department I, 1922, No. 36. Art. 423].

[7] *See* Указ Президиума Верховного Совета СССР от 14 марта 1945 г. «О наследниках по закону и по завещанию» // Ведомости ВС СССР. 1945. № 15. Ст. 2 [Decree of the Presidium of the USSR Supreme Council of 14 March 1945. On the Heirs by Law and by Will, USSR Supreme Council Bulletin, 1945, No. 15, Art. 2].

The lack of clear rules, concerning the *commorientes,* resulted into practical problems in the application of the law. For instance, a case concerning inheritance, the *Evstratov* case, was laid before the Plenum of the USSR Supreme Court. The central issue was, once established the time of inheritance opening, to decide whether individuals deceased as a consequence of the same event could inherit from each other or not. The facts were as follows: in August 1948, as a consequence of an accident, Dmitry Varlamov, his wife and his sister died. However, the wife and the sister of Varlamov died first, two days before Varlamov himself did. In October 1948, the father of Varlamov's wife, Mr. Evstratov, sued for acknowledgement of his right of inheritance to the estate of his deceased daughter, pointing out that in the meanwhile the whole Varlamov estate was acquired by Mr. Varlamov's brothers, Pavel and Grigory Varlamov.

The matter had already been examined by the lower levels of jurisdiction. The court of first instance had considered the inheritance not to have occurred, Mr. Evstratov being thus entitled to inherit the estate of his daughter. The appeal court, however, made a decision on the grounds of Dmitri Varlamov having deceased the last of the Varlamov family – his wife and sister being deceased before him –, consequently declaring Pavel and Grigory Varlamov the only rightful heirs to the Varlamov estate. The appeal court thus considered the reciprocal inheritance to have taken place – that is, the transfer of the estate from his wife and sister to Dmitri Varlamov, who deceased last.

The Plenum of the USSR Supreme Court, in its Judgment of 29 February 1952, stated that

> The whole set of circumstances pertaining to the Varlamov accident exclude the possibility of applying such a presumption of inheritance, and any decision on the case made on the ground of such a presumption would be purely formal and incorrect.

Hence, the Plenum of the USSR Supreme Court judged the facts as if Varlamov was deceased on the day of the accident, and not at his actual time of decease. The Judgment further recommended the courts to follow this approach in order to determine the time of inheritance opening.[8]

Thus, the Plenum of the USSR Supreme Court considered simultaneously deceased (*commorientes*) the citizens whose decease had taken place as a result of the same accident, even if it was established that they had died on different calendar days.

In 1957, the Plenum of the USSR Supreme Court, in its Ruling of 10 April 1957 No. 2 "On Judicial Practice in Inheritance Cases," stated that

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[8] *See* Судебная практика Верховного Суда СССР. 1952. № 6. С. 10–11 [6 Judicial Practice of the USSR Supreme Court 10 (1952)].

The time of inheritance opening is the day of decease of the *de cujus*.[9]

The time of reference was not hence the moment of decease (hour, minute), but the day of decease of the citizen. Unluckily, this Ruling did not furnish any explanation on the persons of the *commorientes*.

In 1961, Fundamentals of Civil Legislation of the USSR and Union Republics were adopted.[10] However, even if the notion of "time of inheritance opening" was used in its Section VII, "Inheritance Law," it was not explicitly defined.

A more detailed regulation on inheritance was laid upon the adoption of the Civil Code of the Russian Soviet Federal Socialist Republic of 1964, which entered in force on 1 October 1964[11] (from now on, "the RSFSR Civil Code of 1964").

According to Article 528 of the RSFSR Civil Code of 1964,

The time of inheritance opening is the day of decease of the *de cujus* …

However, the issue of the *commorientes* was still not resolved by this regulation. The Judgments of the Plenum of the USSR Supreme Court of 1 July 1966 No. 6[12] and of 26 March 1974 No. 2[13] added no other precisions on this matter.

The issue was further complicated by the fact of the express wording of Article 530 of the RSFSR Civil Code of 1964, stating that the time of inheritance opening would not be the day, but the moment, of decease, of the *de cujus*. Article 530 of the RSFSR Civil Code of 1964 established:

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9 *See* Постановление Пленума Верховного Суда СССР от 10 апреля 1957 г. № 2 «О судебной практике по делам о наследовании» // СПС «КонсультантПлюс» [Ruling of the Plenum of the USSR Supreme Court No. 2 of 10 April 1957. On Judicial Practice in Inheritance Cases, SPS "ConsultantPlus"].

10 *See* Закон СССР от 8 декабря 1961 г. «Об утверждении Основ гражданского законодательства Союза ССР и союзных республик» (вместе с Основами законодательства) // Ведомости ВС СССР. 1961. № 50. Ст. 525 [USSR Law of 8 December 1961. On the Approval of the Fundamentals of Civil Legislation of the USSR and Union Republics (together with the Fundamentals of Legislation), USSR Supreme Council Bulletin, 1961, No. 50, Art. 525].

11 *See* Гражданский кодекс РСФСР // Ведомости ВС РСФСР. 1964. № 24. Ст. 407 [RSFSR Civil Code, RSFSR Supreme Council Bulletin, 1964, No. 24, Art. 407].

12 *See* Постановление Пленума Верховного Суда СССР от 1 июля 1966 г. № 6 «О судебной практике по делам о наследовании» // СПС «КонсультантПлюс» [Ruling of the Plenum of the USSR Supreme Court No. 6 of 1 July 1966. On Judicial Practice in Inheritance Cases, SPS "ConsultantPlus"].

13 *See* Постановление Пленума Верховного Суда РСФСР от 26 марта 1974 г. № 1 «О применении судами РСФСР норм Гражданского кодекса о наследовании и выполнении Постановления Пленума Верховного Суда СССР от 1 июля 1966 г. № 6 «О судебной практике по делам о наследовании»» [Ruling of the Plenum of the USSR Supreme Court No. 1 of 26 March 1974. On the Application and on the Implementation by the Courts of the Ruling of the Plenum of the USSR Supreme Court of 1 July 1966 No. 6 "On Judicial Practice in Inheritance Cases"] (Mar. 2, 2020), available at https://www.ппвс.рф/1974/postanovlenie-plenuma-vs-rf/N01-ot-26.03.1974.html.

> Inheritors may be: inheritors *ab intestato* – living citizens at *the moment* of decease of the *de cujus*, as well as his offspring born after his decease …

The doctrine offered different approaches in dealing with the issue of citizens deceased the same day.

Yu. Kalmykov esteemed that it was necessary, in this matter, to concentrate on Article 528 of the RSFSR Civil Code of 1964 and to consider those citizens as being *commorientes*, thus excluding them from reciprocal inheritance.[14] This approach was mirrored by jurisprudence. For instance, the Judgment of the Judiciary Council for Civil Law Affairs of the USSR Supreme Court of 15 January 1987 sustained the following legal doctrine:

> Whenever the spouses are deceased on the same day (disregarding the hour of their decease), they will not inherit the one from the other.[15]

V. Makarova sustained the opposite doctrine, stating:

> Even if, according to Article 528 of the Civil Code, the day of decease of the *de cujus* determines the time of inheritance opening, we cannot possibly ignore Article 530 of the Civil Code, which takes into account the citizen's inheritors alive, not on the day of the inheritance opening, but at the moment of decease of the *de cujus*. Consequently, the individual, having survived the *de cujus*, is to be considered his inheritor.[16]

### *1.2. Concept of Commorientes in the Russian Federation Civil Code*

On 1 March 2002, the Third Part of the Russian Federation Civil Code[17] entered into force. Paragraph 1 of Article 1114 of the Russian Federation Civil Code established the time of the inheritance opening to be "the day of decease of the *de cujus*," Article 1116 of the same Code stated that citizen, "being alive the day of inheritance opening," are entitled to inherit.

Thus, the legislator has eliminated the contradictions between the wordings of the RSFSR Civil Code of 1964's articles on the matter. Furthermore, it has been specified (para. 2 of Art. 1114 of the Russian Federation Civil Code) that

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[14] *See Калмыков Ю.Х.* Вопросы применения гражданско-правовых норм [Yuri Kh. Kalmykov, *Issues of Application of Civil Law*] 214 (Saratov: Publishing House of Saratov University, 1976).

[15] *See* Бюллетень Верховного Суда СССР [*Bulletin of the USSR Supreme Court*] 32–36 (Moscow: USSR Supreme Court, 1987).

[16] *See* Советское гражданское право. Т. 2 [*Soviet Civil Law. Vol. 2*] 431 (O.A. Krasavchikov (ed.), 2nd ed., Moscow: Higher School, 1973).

[17] *See* Гражданский кодекс Российской Федерации (часть третья) от 26 ноября 2001 г. № 146-ФЗ // Собрание законодательства РФ. 2001. № 49. Ст. 4552 [Russian Federation Civil Code (Part Three) No. 146-FZ of 26 November 2001, Legislation Bulletin of the Russian Federation, 2001, No. 49, Art. 4552].

> Citizens, having died on the same day, are considered to be deceased simultaneously, and do not inherit one from another. In this case, the inheritors of each one will be entitled to their respective inheritances.

As we can see, the key date of the inheritance was the day of decease. Due to the territory of the Russian Federation spanning across several time zones, current legal practice has established it to be determined by the local time zone.[18]

Dates in the calendar are determined by the ordinal of the calendar's day, the ordinal of the month, and the ordinal of the civil year; a calendar's day is a 24 hour period, including the points in time corresponding to 00 hours, 00 minutes and 00 seconds, as well as to 24 hours 00 minutes 00 seconds, as per local time.

Let us assume that the wife and husband were deceased in different time points of the same calendar day: the husband is deceased at 00:05 and the wife, at 23:55, for instance. These persons would be considered as *commorientes* and would not inherit one from another. If we suppose, however, that the husband is deceased at 23:55 and the wife ten minutes later, at 00:05 – therefore, on a different calendar day – they would not be *commorientes*, and thus an inheritance would take place: the wife, deceased later, would be entitled to inherit her husband. Her unexercised right to her husband's inheritance would have been then transferred to her own inheritors.

Should we further assume a different group of persons were entitled to her inheritance due to the existence of an offspring of a previous marriage, such children would find themselves in a favourable position, as they would have received their mother's rights to her spouse's inheritance, that is: they would be entitled to inherit part of the estate of a person with which they would not have any ties of kinship (their mother's husband).

Following this interpretation, one problem still arises: whenever citizens, inheriting one from another, find themselves in different time zones (one living in the Western part of the country, the other living in the Eastern part) and their decease is simultaneous, both times of decease coincide perfectly; however, as a consequence of the local time offset, they would be considered to be deceased on different calendar days and, consequently, not to be *commorientes* in the sense of Article 1114 of the Russian Federation Civil Code.

The inheritance succession of persons deceased on the same day has been substantially reformed through adoption of the Federal Law of 30 March 2016 No. 79-FZ,[19] entered into force on 1 September 2016.

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[18] *See* Постановление Пленума Верховного Суда Российской Федерации от 29 мая 2012 г. № 9 «О судебной практике по делам о наследовании» // Российская газета. 2012. 6 июня. № 127 [Ruling of the Plenum of the Russian Federation Supreme Court No. 9 of 29 May 2012. On Judicial Practice in Inheritance Cases, Rossiyskaya Gazeta, 6 June 2012, No. 127], para. 16.

[19] *See* Федеральный закон от 30 марта 2016 г. № 79-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации» // Собрание законодательства РФ. 2016. № 14. Ст. 1909 [Federal Law No. 79-FZ of 30 March 2016. On Amending Some Legislative Acts of the Russian Federation, Legislation Bulletin of the Russian Federation, 2016, No. 14, Art. 1909].

This Law modified paragraph 2 of Article 1114 of the Russian Federation Civil Code. According to the new wording of this rule,

> Citizens, having died on the same day, are considered to be deceased simultaneously, and do not inherit one from another *if the time of decease of each of those citizens is impossible to establish*. In this case, the inheritors of each one will be entitled to their respective inheritances.

Hence, whenever it is possible to establish the time of decease, of persons having died the same day, is different, these persons will not be considered to be *commorientes*. The *de cujus* having died later, will be entitled to inherit the one having died before him, and he will transfer his claim on the latter's inheritance to his own inheritors.

Whenever it remains impossible to establish the order of the moment of decease, of citizens having died on the same calendar day, these citizens will still be considered as *commorientes* and, therefore, will not inherit one from another.

This approach has much in common with the approach established by the present version of the French Civil Code, the main difference being Russian law not laying specific rules for the consideration of death in the same event. Furthermore, the dispositions of Article 725-1 of the French Civil Code are applied, even when the concerned persons have died on different calendar days, but of order in their time of decease is impossible to establish.

## 2. Theory of *Commorientes* in French Law

### *2.1. Challenges of the 2001 Reform*

The *commorientia* is governed by Article 725-1 of the French Civil Code which establishes, in its two first phrases ("*alinéas*"), that

> whenever any two persons, the one being entitled to inherit the other, die on the same event, the order of their decease is to be established by any means,

and that

> should it be impossible to establish this order, the estate of each of both is to be transmitted by inheritance, without the other being entitled to inherit.

This Article, introduced into French legislation in 2002, consecrates an essential legal shift. Indeed, while French legislation in force from 21 March 1804 to 30 June 2002[20] established presumptions of survival allowing inheritance between *commo-*

[20] Art. 720: "Si plusieurs personnes respectivement appelées à la succession l'une de l'autre, périssent dans un même événement sans qu'on puisse connaître laquelle est décédée la première, la

*rientes*, since 1 July 2002[21] a presumption of perfectly simultaneous decease precludes transfer of rights of inheritance between *commorientes*.

It is in the context of this legal shift that the reference to the event causing decease – which constitutes the most notable difference with Russian law in force – is to be explained. As a matter of fact, the introduction of this clarification by the legislator may be understood in the light of the rules previously in force, and it does not represent any contribution of substance to presently applicable law. Before 1 July 2002, whenever any two persons entitled to inherit each other died at the same time, two scenarios were possible: 1) whether they were deceased at the same event; 2) or they were deceased at the same time, but in different circumstances. On the first scenario, the theory of *commorientes* established presumptions of survival that were to be applied, whereas on the second scenario the simultaneously deceased could not inherit one from another.

Since 1 July 2002, however, any difference between these two scenarios is of no consequence, as whenever two persons entitled to inherit from each other die without the possibility of the order of decease to be established, their estate will be transferred to the inheritors of each separately, without the other being entitled to inherit.

Such legal shift is remarkable, and commands the inquest of some insight as to the cause of suppression of the presumptions of survival established by the theory of the *commorientes*. In turn, this requires a previous exposition of the system set by Articles 720 through 722 of the French Civil Code, which allowed establishing the order of decease through the means of the legal presumptions of survival.

First and foremost, according to Article 720, these legal presumptions of survival concerned only persons being deceased in the same event. As it was, these

présomption de survie est déterminée par les circonstances du fait, et, à leur défaut, par la force de l'âge ou du sexe."

Art. 721: "Si ceux qui ont péri ensemble avaient moins de quinze ans, le plus âgé sera présumé avoir survécu.

S'ils étaient tous au-dessus de soixante ans, le moins âgé sera présumé avoir survécu.

Si les uns avaient moins de quinze ans, et les autres plus de soixante, les premiers seront présumés avoir survécu."

Art. 722: "Si ceux qui ont péri ensemble, avaient quinze ans accomplis et moins de soixante, le mâle est toujours présumé avoir survécu, s'il y a égalité d'âge, ou si la différence qui existe n'excède pas une année.

S'ils étaient du même sexe, la présomption de survie qui donne ouverture à la succession dans l'ordre de la nature doit être admise; ainsi le plus jeune est présumé avoir survécu au plus âgé."

[21] Art. 725-1 C. civ.: "Lorsque deux personnes, dont l'une avait vocation à succéder à l'autre, périssent dans un même événement, l'ordre des décès est établi par tous moyens.

Si cet ordre ne peut être déterminé, la succession de chacune d'elles est dévolue sans que l'autre y soit appelée.

Toutefois, si l'un des codécédés laisse des descendants, ceux-ci peuvent représenter leur auteur dans la succession de l'autre lorsque la représentation est admise."

presumptions rested on strength and age, and were supposed to answer to the expected resistance of different individuals to the same danger. Thus, whenever father and son died simultaneously, but in different events, these presumptions were of no use: as both situations of risk of death were different, comparing the resistance to be exerted by each of the two individuals would have been pointless.

Furthermore, this article established that legal presumptions of survival concerning deceases in a same event were only to be applied on a subsidiary basis, as they yielded to fact-based presumptions of survival,[22] which were to be considered firstly. Fact-based presumptions of survival were to be freely valued by trial judges, who presumed one *commorientes* or the other to have survived longer according to the facts about which they had certain knowledge.[23] Only in the absence of these fact-based presumptions were the legal presumptions of survival – based on resistance, as determined by gender and age – to be applied. French presumptions were thus of a subsidiary nature, as it clearly stands out of the preparatory works for the French Civil Code as well as of the text of the French Civil Code itself. This subsidiary nature is also widely accepted by legal doctrine,[24]

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[22] Art. 720 C. civ. *in fine*: "la présomption de survie est déterminée par les circonstances du fait, et, à leur défaut, par la force de l'âge ou du sexe."

[23] The criteria used by trial judges may be linked to the event causing decease; ex: Cass. req., 21 avril 1874, S.1874.I.349. By this judgment, the Cour de cassation dismissed the appeal of the Cour d'appel de Rennes, which had dismissed the legal presumptions, favouring the fact-based presumptions, in a case in which a mother and her daughter were carried away by seawaves out to the sea, a testimony having established that the mother, which stood closer to the chasm, was swept away by a first wave, only a second one having carried away the daughter. Cass. civ. 1ère, 21 janvier 1960, Bull. cass. I n° 47 p. 37. Legal presumptions of survival yielded in this case to fact-based presumptions in a case in which a family being deceased during a bombardment, the elders were found with their heads crushed by debris, whereas the body of their child, not presenting any significant wound, allowed for the supposition of his physical exhaustion as cause of decease, or to the personal qualities of the deceased (this question is the object of discussion by legal doctrine: legal authors do not agree on the personal qualities apt to be taken in consideration by trial judges. *See*, for instance, Charles Demolombe, *Traité des successions. T. 1* 131 (2nd ed., Paris: Auguste Durand, 1862); Antoine M. Demante, *Cours analytique de Code civil. T. 3* 18 (Paris: Plon, 1885); Théophile Huc, *Commentaire théorique et pratique du Code civil. T. 5* 35 (Paris: Cotillon, 1893); Désiré Dalloz, *Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence en matière de droit civil, commercial, criminel, administratif, de droit des gens et de droit public. T. 41* 179 (Paris: Bureau de la jurisprudence générale, 1856).

Certain personal qualities unrelated to age and gender are, however, admitted quite easily, as, for example, personal skills. Cass. civ., 6 mars 1928, S.1928.I.297. In this case, the Cour de cassation overturned the judgement of the Cour d'appel de Madagascar, which ressorted to legal presumtions, whereas "le tribunal de 1ère instance de Tananarive a[vait] déclaré que la dame Duleroy était décédée la première; qu'il fondait sa décision sur diverses circonstances du fait, notamment sur ce que la dame Duleroy, malade, s'était évanouie lors de son embarquement dans la chaloupe, qu'elle ne savait pas nager, n'avait pas de ceinture de sauvetage, qu'elle ne pouvait pas s'entretenir de biscuits comme ses enfants qui, solides et bien constitués, et sachant nager, avaient été munis de ceintures de sauvetage").

[24] *See* Jacques de Maleville, *Analyse raisonnée de la discussion du Code civil au Conseil d'État. T. 2* 193 (2nd ed., Paris: Garnery Laporte, 1807); François Malpel, *Traité élémentaire des successions ab intestat* 29 (Toulouse: J.-M. Corne, 1824); Charles B.M. Toullier, *Le droit civil français, suivant l'ordre du Code: ouvrage dans lequel on a tâché de réunir la théorie à la pratique. T. 4* 58 (3th ed., Brussels: Ad. Stapleau, 1820);

as well as by jurisprudence.[25] The theory of *commorientes*, in force in France until 2002, was rarely applied due to the limits posed by the conditions required for its application.

The legislator delivered further precisions on these age- and gender-based presumptions through Articles 721 and 722 both.

Article 721 classified the *commorientes* according to three age categories: 1) individuals under the age of 15 years; 2) individuals aged 15 to 60 years; 3) individuals over 60 years old – and established presumptions of survival relating the first and third categories, as well as within each one of them.

By its side, Article 722 governed the cases in which the *commorientes* fell under the second age category (15 to 60 years) both. A gender-based criterion was herein established in order to specify the hypothesis of survival within this second group: whenever the *commorientes* belong to the same gender, the survival of the youngest was to be presumed, whereas if they were of different gender, the survival of the male was to be presumed, should the difference of age between them be less than a year.

Thus, the French Civil Code foresaw explicitly only four out of six possible combinations.[26] Two hypotheses were left to court interpretation: 1) that of individuals

Claude E. Delvincourt, *Cours de Code civil. T. 3* 165 (Brussels: P.J. De Mat, 1825); Charles Aubry & Frédéric-Charles Rau, *Cours de droit civil français. T. 1* 180 (Strasbourg: Lagier, 1839); Alexandre Duranton, *Cours de droit français suivant le Code civil. T. 6* 39 (4th ed., Paris: G. Thorel, 1844); Victor-Napoléon Marcadé, *Élémens du droit civil français ou explication méthodique du Code civil*. *T. 3* 17 (3rd ed., Paris: Cotillon, 1847); Adolphe M. Du Caurroy, *Commentaire théorique et pratique du Code civil. T. 2* 278 (Paris: Thorel, 1851); Dalloz 1856, at 179; Demolombe 1862, at 124–125 and even Émile Acollas, *Manuel de droit civil, commentaire philosophique et critique du code Napoléon, contenant l'exposé complet des systèmes juridiques. T. 2* 38 (2nd ed., Paris: Germer-Baillière, 1874); Demante 1885, at 18 & 21; Huc 1893, at 35; Gabriel Baudry-Lacantinerie & Albert Wahl, *Traité théorique et pratique de droit civil: Des successions. T. 1* 80 (2nd ed., Paris: Librairie de la société du recueil général des lois et des arrêts, 1899); Ambroise Colin & Henri Capitant, *Cours élémentaire de droit civil français. T. 3* 372 (4th ed., Paris: Dalloz, 1925).

[25] This subsidiary nature punctuates the judgements of the Cour de cassation. *See*, for instance, Cass. req., 21 avril 1874, S.1874.I.349: "la présomption de survie est déterminée par les circonstances de fait et, à leur défaut seulement, par la force de l'âge et du sexe suivant les règles établies par les art. 721 et 722, C. civ."; Cass. civ. 1ère, 24 janvier 1951, Bull. cass. I n°32 p. 25: "la présomption de survie est déterminée par les circonstances de fait dépendant de l'appréciation des juges du fond et, seulement à leur défaut, par la force de l'âge et du sexe suivant les règles établies par la loi"; Cass. civ. 1ère, 25 janvier 1956, Bull. cass. I n°46 p. 35: "dans l'impossibilité où elle s'est déclarée de déterminer l'ordre des deux décès par les circonstances, la cour d'appel s'est prononcé à bon droit pour la survie du fils …"; Cass. civ. 1ère, 22 octobre 1957, Bull. cass. I n°450 p. 363: "après avoir exactement énoncé que la présomption de survie, établie par les articles 720 et 722 du Code civil … n'est que subsidiaire …"; Cass. civ. 1ère, 21 janvier 1960, Bull. cass. I n° 47 p. 37: "La présomption de survie établie par les articles 720 à 722 du Code civil et fondée sur la force de l'âge et du sexe n'est que subsidiaire."

[26] Legal presumptions of survival, according to Articles 721 and 722 of the French Civil Code between 1804 and 2002.

aged under 15 deceasing together with those aged 15 to 60 years – consequently leaving out many cases of in which parents and offspring were deceased in the same event; and 2) that of individuals aged over 60 years deceasing together with those aged 15 to 60.

One of the reasons for the abandonment of the theory of the *commorientes* lay in the lawmaker's silence on this point. Indeed, the incompleteness of the theory was present in the criticism formulated by law professionals,[27] by contemporary legal doctrine,[28] by the Civil Code Reform Commission[29] and, foremost, it was invoked as one of the reasons for the reform of 3 December 2001.[30]

However, the incompleteness of the theory of *commorientes* was not apparent in legal doctrine immediately after the promulgation of the French Civil Code. This criticism would take shape progressively, inviting the reader to analyse the evolution

| | **age < 15 years** | **15 years < age < 60 years** | **age > 60 years** |
|---|---|---|---|
| **age < 15 years** | The oldest (721, al. 1) | **?** | The youngest (721, al. 3) |
| **15 years < age < 60 years** | | 1) Different gender, same age => male<br>2) Same gender => the youngest (722) | **?** |
| **age > 60 years** | | | The youngest (721, al. 2) |

27 *72ème congrès des notaires de France, La dévolution successorale, Deauville 1975* 129 (Paris: Defrénois, 1975); Rapport annuel de la Cour de cassation 58 (1984).

28 A. Lucas, *Une théorie moribonde: la théorie des comourants*, JCPN 163 (1977): "une théorie qui ne compte plus un seul partisan …"; F. Lucet, *Les présomptions de survie des comourants ne concernent pas une personne de moins de quinze ans et une autre de plus de quinze ans et de moins de soixante*, D. 225 (1992): "Les critiques adressées aux art. 720 s. c. civ., notamment en raison du caractère incomplet des présomptions de survie qui y figurent, réunissent la doctrine en bel ensemble"; F. Bicheron, *Les derniers feux de la théorie des comourants – Cour de cassation, 1re civ. 8 février 2005*, AJ Fam. 151 (2005): "ce systèmé était incomplet … Ce refus d'appliquer la théorie des comourants s'inscrit dans un courant doctrinal majoritairement hostile à ces présomptions légales"; I. Corpart, *L'éphémère survivance de la théorie des comourants*, D. 2055 (2005): "cette théorie était très critiquée par la doctrine …"; as well as the mentions to the widespread inheritance law hand books made by the aforementioned authors.

29 *Avant-projet de code civil présenté à M. le Garde des sceaux, Ministre de la justice par la Commission de réforme du code civil, deuxième partie, livre II* 43 (Paris: Recueil Sirey (Melun, Impr. administrative), 1961).

30 *See* especially rapport n°378 de M.N. About, fait au nom de la commission des lois, déposé le 13 juin 2001: "En premier lieu, le texte abandonne la théorie des comourants instituée par le Code civil et qui est vivement critiquée parce qu'elle repose sur des présomptions de survie artificielles et *incomplètes* …"; rapport n° 40 de M. Jean-Jacques Hyest, fait au nom de la commission des lois, déposé le 24 octobre 2001: "En premier lieu, le texte abandonne la théorie des comourants inscrite aux articles 720 à 722 actuels du code civil. Cette théorie est vivement critiquée parce qu'elle repose sur des présomptions de survie artificielles, *incomplètes* et archaïques."

of the interpretation[31] of Articles 721 and 722 of the French Civil Code. The end of the 19th century is the pivotal period during which a reversal in the conception of the *commorientes* was operated, that was to be later developed during the whole 20th century and ultimately consecrated at the beginning of the 21st century. Indeed, the specialists' opinion on the theory of the *commorientes* seems to be completely reversed – mainly on the matter of its complete- or incompleteness.

### *2.2. The Broad Interpretation of Articles 720 f. of the French Civil Code*

During more than seventy years, the theory of the *commorientes* did not appear to be incomplete. An analysis of the educational works, published up to 1870, shows that private law specialists deemed the system to be implicitly complete and adopted an extensive interpretation of the presumptions of survival established by the Civil Code. However, this interpretation was not homogeneous. Whereas – according to a minority doctrinal trend – the articles in the Code should be completed by resorting to the "natural order" ("*ordre de la nature*") – which, as per the redactor's intention, would imply the youngest surviving the oldest – a majority trend preferred the criteria of gender and age as a means of extending the legal presumptions.

The first commentary to the French Civil Code, written by Maleville, is an example for the extensive interpretation of legal presumptions following the "natural order" criterion. On his commentary to Article 721 of the French Civil Code, he points out that the presumptions would differ according to the various hypotheses envisioned by this rule.[32] As much as the criteria of gender and age would lead the presumptions laid by its two first paragraphs, it would be the criterion of "natural order" to underlie the presumption formulated by paragraph 3 of Article 721. This mention to the "natural order" would echo Article 722 *in fine*, as it completes there a gender-based presumption of survival. Thus, and even if Maleville did not pronounce himself on the hypothesis for which the rules of the Code remain silent, an extensive interpretation based on the "natural order" clearly emerges out of his reasoning. Malpel surpasses Maleville – if not in his interpretation, at least in his explicit formulation of the solutions he envisions for the cases not explicitly ruled by the Code. He favours the "natural order to be followed whenever the legislator has not formally manifested his will to the contrary."[33]

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[31] During the period covering the whole 19th century to the beginning of the 20th century, the theory of *commorientes* provided a subject for only few monographs, barring two academic works: Pierre Cavellat, *Des comourants: étude de législation et de jurisprudence françaises* (Rennes: Impr. Réunies, 1928) and Jean-Louis Foursans-Bourdette, *La théorie des comourants en droit romain* (n. d.). Furthermore, the interpretation of Articles 721 and 722 of the French Civil Code during this period is mainly operated through a study of private law handbooks, of judgments of the Cour de Cassation and through commentaries on the latter.

[32] Maleville 1807, at 193.

[33] Malpel 1824, at 33.

Chabot de l'Allier premises' are similar to those of Maleville. He identifies the strength of age as the criterion underlying the presumptions of survival formulated by the first two paragraphs of Article 721, and ascertains the criterion of the "natural order" to lead them on Articles 721, paragraph 3 and 722 *in fine*, stating that, failing an age-based presumption of survival, "the general presumption, which follows the natural order" is to be preferred.[34] Following to Chabot's admission of this premises, it could be supposed that he would have concluded, according to this general presumption based on "natural order," the younger to be intended to survive the older in case of legislative silence. However, none of that. In fact, when he takes the case of a person aged under 15 years deceasing together with an individual aged 15 to 60 years, he adopts a strength-of-age-based presumption. Consequently, both criteria ("natural order" and strength of aged) coexist in Chabot d'Allier's work, but they are not rigorously applied. So would it be in the later commentaries' authors: in many of them, the criterion of "natural order" even disappears, leaving its place to that of strength of age and gender.[35]

The extensive interpretation, based on the strength of age and gender, became thus dominant.[36] Legal authors, on the basis of this only criterion, rule through logical deduction the presumptions to be applied to the cases not explicitly considered by the Code.

The disappearance of the presumption based on "natural order" of the field of application of Article 721, paragraph 3, allowed them to develop, through analogical interpretation, the criterion of strength of age in order to resolve the *commorientiae* not considered by the legislator. Once this analogical reasoning was introduced, they developed further logical procedures in order to complete Article 721, paragraph 3, the only one not based on an explicit notion. By taking *a fortiori* argumentation of this very rule, some authors deduced that, if the person aged under 15 years was presumed to survive those aged over 60, the same should be said about those aged between 15 and 60. By taking an *a contrario* interpretation of the same rule, other

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[34] Georges A. Chabot de l'Allier, *Commentaire sur la loi des successions, formant le titre premier du livre troisième du Code civil. T. 1* 48 (5th ed., Paris: Nève, 1818).

[35] The criterion of strenght is the only one mentioned by Aubry & Rau 1839, at 180: "il est à présumer que le plus fort a survécu au plus faible. Le degré de force se détermine soit d'après l'âge, soit, dans certains cas, d'après le sexe." In the brief considerations they consecrate to the *commorientes*, they do no mention to the natural order. Should we want to know in which measure these authors adopted an extensive or restrictive interpretation, we should count but on hints allowing to suppose them to be followers of the second trend – between those hints, the fact that they conceive Articles 720 through 722 as exceptions to Article 135 of the Civil Code, *cf.* p. 79. The third edition of their work seems to accommodate to this trend. The question of the concourses of decease not considered by law is not explicitly dealt with, but these authors convey their position through an abrupt statement: "les présomptions légales … ne sont pas d'interprétation extensive": *cf.* Charles Aubry & Frédéric-Charles Rau, *Cours de droit civil français. T. 1* (3rd ed., Paris: imprimerie et librairie générale de jurisprudence, 1856).

[36] Toullier 1820, at 59; Delvincourt 1825, at 165; Duranton 1844, at 38; Marcadé 1847, at 19; Du Cauroy 1851, at 281; Dalloz 1856, at 179; Demolombe 1862, at 132 and even Acollas 1874, at 38.

authors inferred that those aged under 15 were not presumed to survive those aged between 15 and 60.

It would thus seem that the development of the main trend of the extensive interpretation by legal doctrine of the presumptions of survival rested on the substitution of the natural order criterion by that of the strength of age, as underlying Article 721, paragraph 3 of the Civil Code. However, it shall be pointed out that, whatever criterion were to be preferred, the solutions were identical for any *commorientia* of a *de cujus* aged more than 60 with a *de cujus* aged between 15 and 60. Be it on the basis of strength of age or on that of natural order, the younger were presumed to survive their elders. Consequently, the Cour de cassation admitted on a regular basis the extensive interpretation of the presumptions of survival in these kinds of cases. The Cour de cassation first adhered to this interpretation in the judgment of 6 November 1895.[37]

On the contrary, solutions diverged when it came to the *commorientia* of a *de cujus* aged under 15 and a *de cujus* aged between 15 and 60. Indeed, according to the criterion of strength, the elder, supposed to be sturdier, were presumed to survive, whereas on the grounds of the natural order, the younger are always supposed to survive their elders.

The extensive interpretation of the presumptions of survival, dominant trend until the 1870's, competed with a trend towards restrictive interpretation, which would slowly build up adhesion to the point of becoming itself dominant in the long term.

### *2.3. The Narrow Interpretation of Articles 720 f. of the French Civil Code*

The first proper criticisms to the system of Code-established legal presumptions of survival aiming to determine the order of decease had a relatively early apparition on specialised literature. Indeed, some criticism – even if qualified – to the presumptions of survival appeared as early as in Tuillier's works,[38] open hostility against these rules being manifest in Vazeille, who commented on Article 720 not to have "a taste for presumptions and [that he] would like to find on the Code, rather than Articles 720, 721 and 722, only the rule established by Article 135."[39] Notwithstanding,

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[37] Cass. req. 6 novembre 1895, S. 1897.I.9: "Attendu que le sieur Gaudon âgé de 76 ans et sa fille âgée de 51 ans étant couchés dans la même chambre … ont été assaillis pendant leur sommeil et assomés sans résistance à l'aide d'un coutre de charrue, qu'il n'a pas été possible d'établir, en fait, lequel des deux avait succombé le premier … la fille, dans la force de l'âge, était présumée avoir survécu à son père entré depuis longtemps dans la période du déclin."

[38] This author states that even if the presumptions of survival established by the Civil Code are not infallible, they allow to reach an equitable solution in all cases. Toullier 1820, at 70–71: "Ces présomptions sont à la vérité incertaines; elles peuvent être souvent contraires à la vérité des faits … en ne les établissant pas, les successions des personnes appelées à se succéder et décédées dans le même événement auraient dans tous les cas été déférées d'une manière contraire à la justice…"

[39] François-Antoine Vazeille, *Résumé et conférence des commentaires du Code civil, sur les successions, donations et testamens. T. 1* 4 (Clermont-Ferrand: Thibaud-Landriot, 1837): [je] "ne goûte pas les présomp-tions et aimerais à ne trouver dans le Code, au lieu des art. 720, 721 et 722 que la règle de l'article 135."

on his commentary to Article 721, he favoured an extensive interpretation of the presumptions of survival that he himself had criticised when commenting on Article 720, even if insisting in his reproach:

> The presumption based on greater strength seems to be more rational to us; still, we would prefer, in this particular instance, the general rule established by Article 135. Should it not be rather applied here, where no special rules can be invoked?[40]

More than forty years later, Acollas shows a similar position on this matter.[41]

However, we deem the restrictive interpretation of the theory of *commorientes* to be born only with Laurent. Indeed, this author starts from the rule "exceptions are to be strictly interpreted" ("*les exceptions sont d'interprétation stricte*") and he takes it to its final consequences when it comes to the hypothesis not specifically foreseen by the Code:

> There are two hypotheses unforeseen by the law … Inasmuch as these cases remain unforeseen by law, our principle is to be applied: no written rule – no legal presumption.[42]

This opinion thrived between legal authors: it is followed by Huc,[43] then by Baudry-Lacantinerie and Wahl, who state in their synthesis of Civil Law that

> … an objection of substance is to be made against this double solution: a legal presumption is extended farther of the cases for which it was estab-

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[40] Vazeille 1837, at 7–8: "la présomption attachée au plus haut degré de force est plus rationnelle mais nous préférerions encore la règles générale de l'art. 135. Ne doit-elle point s'appliquer ici où l'on ne trouve pas de règles spéciales?"

[41] Acollas 1874, at 39; Demante 1885, at 18. This scholar's statements do not lack of some ambiguousness, as he first states that "there is no difficulty to decide, before the legislative silence, that the man on the flower of age will be presumed to survive the child and the elder" ("*il n'y a aucune difficulté à décider, dans le silence de la loi, que l'homme dans la force de l'âge sera présumé avoir survécu à l'enfant et au vieillard*"), then affirming: "we think otherwise that its application, as well as that of any legal presumption, shall be strictly confined to the letter of law and that, instead of being extended by analogy to any unforeseen case, the rule of reason and law proclaimed by Articles 135 and 136 should be upheld" ("*nous pensons, au reste, que leur application, comme en général, celle de toutes les présomptions égales, doit se renfermer strictement dans les termes de la loi, et qu'au lieu de les étendre par analogie aux cas non prévus, on doit s'en tenir à la règle de droit et de raison proclamée par les articles 135 et 136*"). This author never pronounces himself explicitly on the *conmorientiae* not foreseen by the Code; the fact of his latter statement being made after his commentary to Articles 721 and 722 and before his refusal to the extension of these presumptions out of the field of the *ab intestato* inheritance only makes the contradiction worse.

[42] François Laurent, *Principes de droit civil français. T. 8* 617 (Paris: A. Durand & Pedone-Lauriel, 1873): "Il y a deux hypothèses que la loi ne prévoit pas … Puisque la loi ne prévoit pas ces cas, il faut appliquer notre principe: pas de texte, pas de présomption légale."

[43] Huc 1893, at 36.

> lished; and yet, a widespread principle holds that legal presumptions are not susceptible of extension,[44]

concluding that

> … whenever it would be impossible to establish the order of the *commorientes*' decease, their time of decease should be considered to be the same.[45]

This position then spread among the great treaties of civil law, such as those of Planiol,[46] Colin and Capitant,[47] Josserand.[48]

It should be noted however that both Mazeaud and the Cour de cassation held a more qualified opinion on the issue: they admit extensive interpretation in the case of *commorientia* between individuals aged between 15 and 60 years and those aged over 60, but they refuse it when it comes to that of individuals aged under 15 and those aged between 15 and 60.

The jurisprudence of the Cour de cassation relative to the *commorientes* is relatively scarce, and judgments directly concerning *commorientiae* not explicitly foreseen by the legislator are extremely rare. Indeed, this jurisdiction would first judge a case regarding a *commorientia* involving individuals aged under 15 years and those age between 15 and 60 only 6 May 1928. The facts of the case involved a shipwreck in which mother and offspring died: thus, the Cour de cassation was only bound to pronounce itself about the subsidiarity of legal presumptions.

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44 Baudry-Lacantinerie & Wahl 1899, at 84: "il y a une objection grave contre cette double solution: on étend ainsi une présomption légale en dehors des cas en vue desquels elle a été établi; or c'est un principe certain que les présomptions légales ne sont pas susceptible d'extension…"

45 Baudry-Lacantinerie & Wahl 1899, at 95: "dans tous les cas où il sera impossible … de déterminer l'ordre dans lequel se sont produits les décès des comorientes, il faudra les considérer comme étant mort au même instant."

46 Marcel Planiol, *Traité élémentaire de droit civil conforme au programme officiel des facultés de droit. T. 3* 522 (2nd ed., Paris: Cotillon, 1903): "Tout ceci aurait pu rester sans inconvénient sous l'empire du droit commun, mais il a plu au législateur d'édifier sur un cas particulier toute une série de présomptions légales, connues sous le nom de théorie des comourant" and "Pour tout simplifier, la loi n'avait qu'à ne rien dire." Thirty years later, the eleventh edition of this same work still held the same opinions, word by word: *cf.* Marcel Planiol & Georges Ripert, *Traité élémentaire de droit civil conforme au programme officiel des facultés de droit. T. 3* 385 (11th ed., Paris: Librairie générale de jurisprudence, 1939).

47 Colin & Capitant 1925, at 372.

48 Louis Josserand, *Cours de droit civil positif français. T. 3* 430 (3rd ed., Paris: Sirey, 1940): "nous renvoyons, pour le détail de cette réglementation artificielle et byzantine, aux articles 721 et 722 qui édifient ainsi une théorie dite des comourants; théorie qui n'a pas même le mérite de prévoir toutes les éventualités, car les textes qui l'instituent n'envisagent pas le cas où, parmi les victimes, l'une se trouvait dans la période moyenne, alors que d'autre se situaient dans les périodes extrêmes de la jeunesse ou de la vieillesse. Plus défectueuse est cette réglementation et plus s'impose son interprétation restrictive; d'ailleurs, elle se ramène à une série de présomptions; or c'est une directive très sûre que les présomptions légales sont de droit étroit..."

Notwithstanding, on this occasion, and following the report by Ambroise Colin, the 1st Hall of Civil Law ("*1ère Salle Civile*") of the Cour de cassation decided to clearly establish its position, by stating that

> … even admitting the possibility of an interpretation of these dispositions as comprehending the cases in which the *commorientes* are aged both under 15 and between 15 and 60, the contested judgment, by deciding on those grounds, violated the wording of the rule of law at stake.[49]

This solution was later explicitly confirmed through a judgment concerning the decease of a father, aged 42, and his three children, aged 11 through 17 years, on a road accident. By judgment of its 1st Hall of Civil Law, the Cour de cassation dismissed the appeal against the decision of the Appeal Court of Nancy, on the grounds that

> … no strict-law presumptions established by Articles 721 and 722 – then in force and later abrogated by the Law No. 2001-1135 of 3 December 2001 – was applicable to the situation of the *commorientes*, given their respective ages …[50]

No influence on this judgment by the law of 2001 is to be supposed, considering the widespread opposition already raised at that point of time against the theory of the *commorientes*.

## Conclusion

1. According to the Civil Code of the Russian Federation, citizens who died on the same day are considered as commorents if "it is impossible to establish the moment of death of each of these citizens." By *commorientia* in French law, the time of death is to be appraised mainly as a means to evaluate the sequence of deaths: therefore, the chronological order of deaths is take as key notion.

At first glance, the aforementioned provisions of the civil codes of Russia and France seem to be identical in meaning. Differences are found when the need arises to apply the norms to specific life situations. Suppose relatives die in a car accident. At the same time, it was not possible to establish the time of death of

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[49] Cass. civ., 6 mars 1928, S. 1828.I.297: "en admettant même que ces dispositions puissent être considérées comme comprenant l'hypothèse où les comourants sont âgés les uns de moins de 15 ans et les autres de plus de 15 ans et de moins de 60 ans, l'arrêt attaqué, en statuant comme il l'a fait, a violé le texte de loi susvisé."

[50] Cass. civ., 8 février 2005, 02-18767: "aucune des présomptions de droit strict édictées aux articles 721 et 722 du Code civil, alors en vigueur et abrogés par la loi n° 2001-1135 du 3 décembre 2001, n'était applicable à la situation d'ensemble des comourants, eu égard à leurs âges respectifs …"

each of the citizens, but it is known which of the relatives died earlier and who later. Literally following the wording of paragraph 2 of Article 1114 of the Civil Code of the Russian Federation, we conclude that such citizens will be *commorientes* because of the absence of fixing the moment of death of each of the citizens. Meanwhile, the provisions of Article 725-1 of the French Civil Code lead us to the opposite conclusion: since the sequence of occurrence of death of citizens is established, such citizens will not be *commorientes*.

The formulation enshrined in the French Civil Code on the need to establish a "sequence" of the death of citizens seems more accurate. In this regard, we propose to make changes to paragraph 2 of Article 1114 of the Civil Code of the Russian Federation, stating it as follows:

> Citizens who died on the same day are considered to be heirs at the same time for the purposes of hereditary succession if the sequence of the deaths of such citizens cannot be established.

This wording would largely reflect the approach suggested by the pre-revolutionary civilists in Article 1353 of the Project of the Civil Code.

2. According to Article 725-1 of the French Civil Code, citizens are considered *commorientes*, one of whom could inherit after another, and whose death occurred within the same event (provided that the sequence of death of citizens is not established). Thus, if citizens died within the framework of the same event even on different calendar days, they nevertheless are considered *commorientes*, unlike the provisions of the Civil Code of the Russian Federation.

Russian law proceeds from the fact that citizens who die on the same calendar day are recognized as *commorientes*, provided that the moment of death of each citizen is not established. Therefore, if citizens die on different calendar days, commorienism under Russian law, unlike French, is excluded. At the same time, the Civil Code of the Russian Federation does not establish the requirement that citizens die as a result of the same event.

3. The French Civil Code would keeps as to he sequence of simultaneous death outside the framework of the same event. This legislation fail to establish the sequence of their death. It seems that in this case the French legislator could take the approach laid down in the Civil Code of the Russian Federation. If it is established that citizens die on the same calendar day, they should be recognized as *commorientes* (provided that the sequence of death of such citizens cannot be established).

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