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Recent Decision

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his account with the amount to be collected. The Federal court denies the plaintiff a preference over the general creditors on the ground that there had been no increase in the assets of the bank and to grant a preference would be an injustice to the general creditors. However, if the bank upon charging the account of the person from whom the collection was made, had taken that amount of money from its cash funds and set it aside for the plaintiff it would seem hard to deny that a trust would be created. Should not, then, the wrongful failure of the bank to separate this money from its cash funds be considered as a mixing of trust money with its own money? Can any distinction be made between a case where a bank wrongfully receives money and mixes it with its cash funds, and a case where a bank wrongfully fails to separate money from its cash funds? It would seem that in both cases the bank should be treated as having wrongfully mixed trust money with its cash funds. No injury would be done to the general creditors by this result. If the bank had carried out the transaction in the proper manner it would have separated from its cash the amount charged to the account of the depositor from whom the collection was made. In this event the amount available to the general creditors would be reduced by the amount claimed by the plaintiff. Therefore, there would seem to be no injustice to the creditors to give the plaintiff a preference for the amount of his claim, provided the cash on hand in the bank was, at all times from the charging of the depositor from whom the collection was made until the closing, of the bank, equal to or greater than the amount of the collection. If the cash on hand should at any time fall below the amount of the collection the plaintiff should be given a preference only to the extent of the lowest amount reached.

John A. Berry.

RECENT DECISION

COMMON DISASTER—PRESUMPTION OF SURVIVORSHIP—SUFFICIENCY OF PROOF.—A husband and wife were found shot in their home, both having met death at about the same time. The first officer on the scene found the husband's body colder than that of his spouse. Award of insurance money was made to the wife's


21 In 82 A. L. R. 97 cases from the following jurisdictions are cited as allowing a preference under similar facts: United States (C. C. A. 5th), Arkansas, Florida, Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Oklahoma, Oregon, Utah, Wisconsin, and Wyoming. Cases from the following jurisdictions are cited as contra: United States (cases from several circuits), Idaho, New Jersey, North Carolina, Pennsylvania, South Carolina, South Dakota.
RECENT DECISION

estate on the ground that she had survived her husband. Held, that the award was supported by the evidence. Clarke v. Bryson, 29 Pac. (2d) 275 (Cal. 1934).

The principal case brings to the surface many interesting problems and they will be treated in order. Into the limelight of interest is thrust the conflict between the civil law and the common law on the subject of presumption of survivorship when there is a common disaster, the civil law insisting that its alluring and intriguing schemes founding presumptions on differences in age, health, sex and physical strength, are sound public policy, and the common law countering with its stolid but just as insistent declaration that there is no presumption of survivorship in such case when that fact is unascertainable. Throughout this discussion, it is assumed that what is meant by a common disaster is, as Bouvier phrases it, "where several persons happen to perish together by the same event, such as the burning of a house, a trainwreck, the sinking of a ship, a battle, etc., without any possibility of ascertaining who died first." Bouvier, Law Dictionary (Rawles' 1914 Revision) 778. The difficulty raised by these common disasters, and the one with which the courts frequently have to cope, arises when the persons perishing are respectively entitled to inherit from each other, as is the situation in the case of a mutual will, or when one is the insurance beneficiary of the other, contingent upon his survivorship. It is often said that under the civil law there is no presumption that all died simultaneously, while under the common law there is no presumption of survivorship, and this fact, if claimed, must be proved. Modern Woodmen of America v. Parido, 335 Ill. 239, 167 N. E. 52 (1929). In the absence of a statute, of course, the common law will prevail and survivorship will have to be proved. As the statutes in the great majority of the states on the matter adopt the common law, the problem in those states becomes narrowed down to consideration of the quantum of proof necessary to satisfy the burden imposed on the party asserting survivorship. It is to be lamented, in the humble opinion of this writer, that but two states, namely, California and Louisiana, have seen fit to reenact the civil law in this respect, for in our age of high speed, congested travel and living, the probability of mass calamities is increased countess fold, and courts are frequently placed in embarrassing situations when the proof of survivorship is unobtainable.

The principal case is especially interesting in that it arises in California, one of the two states, as was pointed out above, which have reenacted the civil law by statute. The California statute is instructive. It provides that when two persons perish in the same calamity and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from strength, age, and sex, and that if both be over fifteen and under sixty years of age, the male is presumed to have survived; or if both be under the age of fifteen years, the older is presumed to have survived; or if both be over sixty years of age, the younger is presumed to have survived; or if one be under fifteen and the other above sixty years of age, the former is presumed to have survived; or if one be under fifteen, or over sixty years of age, and the other between those ages, the latter is presumed to have survived. Code of Civil Procedure (1929) § 1963.

It should be noted that this statute goes even further than the civil law which indulged in like presumptions only as to parents and children. Death, 17 C. J. 1180. It should further be commented on that the principal case did not benefit from the presumptions set forth by the statute. There was involved here a "particular circumstance," namely, the difference in temperature between the bodies of the man and woman which was held sufficient to justify an inference that the man had predeceased. An examination of the cases is convincing that the great number of common law states would not regard such proof as sufficient to validate a finding of survivorship. For example, in a very recent
case, the Surrogate Court of a county in New York held that where both man and wife died in their home from illuminating gas asphyxiation, evidence tending to show that the body of the wife was warm and that of the husband was cold when the bodies were found, was insufficient, in the absence of proof of other facts, to establish survivorship of the wife. *In re Burza's Estate*, 272 N. Y. S. 248 (1934). However, that mere difference in temperature may be enough to satisfy the burden under some circumstances is indicated in an Ohio case in which it was held that the inference that the wife had died first was not justified when considered with the fact that her body was very thinly clad and that she had lost a great amount of blood, whereas the husband had been shot but once, had bled but little, indicating a quick death and had been fully clothed. *Evans v. Halterman*, 165 N. E. 869 (Ohio 1928). In this case, despite the fact that the wife's body was colder, the circumstances surrounding her death rebutted any inference that she had predeceased her husband, and in fact the court was satisfied that the evidence was sufficient to support a finding that she had survived, despite the fact her body was colder. While the conclusion is entirely conjectural, it is possible the court might have ruled otherwise if these circumstances had not been present. However, in the great number of common law jurisdictions, as above indicated, the mere difference in temperature would be insufficient. It is commonly ruled that slight circumstances, as to survivorship are insufficient to meet the burden of establishing survivorship. *Hilderbrandt v. Ames*, 66 S. W. 128 (Tex. Civ. App. 1901). Given but a slight circumstance, as the difference in temperature of the bodies would constitute, the testimony of experts, medical or otherwise, would have to be disregarded. For in the absence of definite facts and circumstances, the testimony of experts is sheer speculation. *In re Englebirt's Will*, 171 N. Y. S. 788 (1907). But from what has already been stated, it is observable that where there is some particular circumstance or set of facts from which survivorship can be inferred, the aid of presumptions is unnecessary in the common law jurisdictions as well as those applying the civil law. Although the party asserting the fact has the burden of its proof, survivorship may be ascertainable. This is true of the mutual killings, suicide pacts and double murders that frequently occur, for medical testimony of the nature of the wounds, amount of bleeding, probability of immediate or lingering death can in such cases be given, and courts are prone to find survivorship on such evidence. Thus in *In re Martinson's Estate*, 214 N. W. 469 (Minn. 1927), evidence and medical testimony of the above nature was held to amply justify a special verdict that the wife had survived the husband. The party alleging survivorship must sustain his burden by affirmatively establishing the preponderance of evidence or he will fail, for the other party is never bound to disprove the asserting party's allegation. Evidence, 10 R. C. L. 896. Different courts will require different degrees of proof. For instance, in Pennsylvania, it is held that the fact of survivorship in a common disaster may be shown by circumstances sufficient to satisfy the reasonably well-balanced mind. *Baldus v. Jeremias*, 145 Atl. 820 (Pa. 1929). This variation of the well-known "reasonable man" doctrine is indicative of the test commonly adopted, but it is unnecessary to prompt the reader that the "reasonable man" is a vacillating creature and will not be convinced by the same set of facts in all jurisdictions.

It is in the more strictly designated common disaster, as the conflagration, or the sinking of a ship, that proof of survivorship, no matter how tenuous, is impossible because of the fact that it is unascertainable. To illustrate the circumstances the courts find themselves confronted with, it is but necessary that a single case be cited. A man and wife perished in a sinking at sea and survivorship was, as is common in such cases, unascertainable. An insurance policy stipulated that the proceeds would be payable to the other if living at the time