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SURVIVAL IN DEATH BY COMMON DISASTER.

When property rights depend on the relative time of the death of persons, and there is no direct evidence to determine the order of such deaths, the law must have some criterion for adjudication of such rights. To take a simple illustration: Father and son, sole members of the immediate family, go together to sea in a vessel that is not heard of after departure. Considering disposition of the father's estate, if the son survived, it went to him, and on his subsequent death to his heirs, which might be relatives on his mother's side. But if the son died before the father, the estate would go to the relatives of the latter, necessarily excluding relatives of the mother of that son.

In the case of conflicting claim to such a father's estate between claimants on the theory that the son had survived, against those who asserted the prior demise of the son, the decision will be wholly governed by the ruling as to where the burden of proof rests, and in the assumed absence of all evidence, that question can only be settled by a presumption of law. It will not do to simply say that the burden rests on those who are forced into a court as plaintiffs to assert their claims. This would leave those who happened to hold any property of the deceased in a position where they could successfully resist all claimants on either theory for want of direct evidence of survivorship, one way or the other, essen-

tial for either claim. The presumption must go further; it must in some way lay down a rule by which the succession rights to property of persons perishing in a common disaster is determined. The law cannot leave the property to the first occupant which it virtually would do, if it declared itself unable to settle the conflict.

The Roman law, largely followed by modern Europe, indulges in presumptions of survivorship by tests depending on age and sex of the lives involved. They are somewhat elaborate and are supposed to cover every imaginable situation. It is not necessary to mention them all. It will be enough to illustrate by the rule that a person between fifteen and sixty years of age is assumed to have survived one below or above that limit. Viewing such cases in the mass, it is pretty clear, under human experience, that in a heavy preponderance of them the presumption would meet the actual facts, if we could know them, though in any single case, considered by itself, it may seem an attenuated ground for settling property rights. Thus, the Roman law, recognizing the logical necessity of some decisive presumptions, adopts the best it can find based on human experience as furnishing a test easily applicable in all cases, and as producing results which accord in most of the cases with the facts undiscoverable by direct evidence. It is not perfect, but it is the best that can be done.

English and American law repudiates these presumptions of the Roman law as unsubstantial and fanciful. The propriety of that course of our law is here called in question, as are many of the results reached under our system.

It is said in most of our cases that there is no presumption one way or the other as to survivorship. But this does not mean that the court would have to throw out both sets of claimants as being incapable of passing on their respective rights owing to total want of proof (or presumptions). A definite decision is made under our theory as well as under that of the Roman law. If the court is to act at all, there is, in the absence of evidence, an iron necessity for *some* presumption.

Illustrating by the above mentioned simple case of death of father and son in shipwreck, the court in distributing the father's estate would say: There is no presumption that the son survived the father, hence those claiming through the son have no interest in the father's estate, which goes clearly to the father's distributees. In other words, the estate is distributed as if the son had died before the father. However, there is no general legal presumption that the son died before the father, as is clear when we consider distribution of the son's estate. Here the father, if he survived, would have taken the whole estate, but there is no presumption of the father's survivorship, so the estate is distributed as if the father had died before the son. The only possible reconciliation of these conflicting presumptions, or, if you will, absence of presumptions, in the cases of the father's and son's estates is the presumption that neither survived the other; that both died at precisely the same moment. That this is the actual position of our law is freely admitted in several well considered cases.

While death of both at the same instant is possible, it is certainly very exceptional. Thus we reject the Roman presumption, based on a balance of probabilities, as fanciful, but decide succession rights on the presumption of a fact which we know is false, save under extraordinary circumstances.

First, proclaiming that there is no presumption whatever, ignoring that there can in the nature of things be no decision of the situation without *some* presumption, we finally assume, as our test for distribution, a state of facts that is barely possible. As a logical matter the standpoint of our courts on this topic does not seem impressive.

We have as yet taken into consideration only the simplest situation, where the conflicting claims depended on inheritance in case of intestacy. However capricious and inadequate to justice our English theory, that all the deaths involved occurred at the same instant of time, may be, it at least furnishes a definite solution of easy application.

But the question of survivorship must often be determined when the right to the property involved depends on some

written document. It may be the construction of a will or deed, or of some form of insurance. Here the first step is to determine where the burden of proof rests under the provisions of that document, and the result may depend on quite accidental phrasing.

To illustrate in wills: Suppose the will of X, long since dead, had devised realty to A in fee, provided that if B survived A, the title should devolve to B in fee. Let A and B die with no evidence as to which survived the other. The solution here is clear, as in the case of intestacy. The claimants under B must establish the fact that B survived A, and as they fail to do so, the property remains with A's heirs or devisees. Let us now suppose the testator, instead of the provision as above, had devised the property to A for life with remainder to B in fee, provided, however, that if B died before A, then A should take the fee. Here A's heirs have a right to the fee only in the event that they show affirmatively that B died before A. Since they cannot make that showing, and the English law presumes that A and B died together, so that B did not die before A, B's heirs take to the exclusion of A's. In both forms of the will the intent was the same. A form of expression that may be called almost adventitious results in changing the burden of proof. The conflicting judgments under the two forms of gift rest on artificial reasoning. The mind refuses to accept as just these conflicting results turning on the verbal form of gifts that in substance are identical. Under the Roman law the presumption based on preponderance of probabilities in the average would have definitely determined whether A or B survived. The question of burden of proof would not have to be examined, and the result would be the same under either form of will.

When the conflict arises between claimants as beneficiaries of insurance policies, there are, of course, all the questions concerning construction of these policies that there are in the case of wills. But additional factors complicate the problem. If the insurance money is payable to "A if surviving the insured, if not to B," then if A and the insured die together,

the question as to the policy at first blush seems the same that would have arisen under the identical provision of a will. But in these two cases, before the death of the testator or the insured, A's relation to the will may be very different from his relation to the policy, from which difference opposing results may follow. Under the will during the testator's life, A has no rights whatever; nothing but an expectancy which the testator may terminate at his discretion. A's right begins at the testator's death under the terms of the will; that right depends on the fulfillment of the condition. If that cannot be shown (or presumed), A's right never attaches. In the case of an insurance policy however, under the holding in most states, the named beneficiary has a vested right, when the policy issues, of which he can be deprived only by his consent, or under the provisions of the policy. In such state of the law it is possible, perhaps even plausible, to interpret clauses in varying language to the effect that if A, the first named beneficiary, does not survive the insured, then the fund shall go to B, as being a mere provision for divestiture of the vested rights of A. The condition is not precedent to the vesting of A's rights, as it clearly would be in a will; but subsequent to the acquisition of a vested right, which is good unless the event which defeats that right is shown. On this theory under identical language the claimants under the named beneficiary, whose survivorship cannot be determined, fail in the case of a will, but recover in the case of an insurance policy. Mere common sense, when not aided by the dark lantern rays of technicality, will see but little reason for such a distinction. It must be added that many, if not most, cases repudiate or ignore the distinction, which, however, has firm lodgment in the decisions. Nor is our appreciation of law as based on inherent natural justice strengthened when we learn that the ruling concerning insurance applies only to strict insurance, and does not apply when the policy is issued by a fraternal organization. In the latter case, as is held generally — perhaps without exception — the insured can change the beneficiary at will, and the named beneficiary has no vested interest, as in regular insurance.

This distinction is well illustrated in two Missouri cases. Harry C. Yocum and his daughter, Florence, perished with all aboard on his yacht in the Gulf of Mexico. Mr. Yocum had regular insurance on his life payable to "Miss Florence Yocum, if surviving, if not, to the legal representatives of the insured." He was also insured in the Royal Arcanum, a benevolent organization. There he also named his daughter as the beneficiary and the laws of the order (a part of the contract) provided that in the event of the death of the beneficiary (Miss Yocum) before the decease of the member (Mr. Yocum), the insurance should be paid to relatives in an order fixed by those rules. The regular insurance case between Miss Yocum's representatives and her father's was decided in favor of those claiming under the daughter, on reasoning above given (*U. S. Casualty v. Kacer*, 169 Mo. 301). Subsequently the Royal Arcanum case reached the Court of Appeals (*Supreme Council v. Kacer*, 96 M. A. 93) and was there decided in favor of the nieces of Mr. Yocum and against the claimants through Miss Yocum, *i. e.*, against those claiming on the theory of her survivorship. The thoughtful and valuable opinion of the Court of Appeals specifically points out that it in no wise conflicts with the prior opinion of the Supreme Court. It is fairly clear that if Mr. Yocum had left a will worded like the regular insurance, the representatives of the daughter would not have taken, in contrast with the insurance case, and in harmony with the Royal Arcanum case.

Here, too, the authorities are not unanimous. In the recent Arkansas case of *Watkins v. Insurance Co.*, 208 S. W. 577, the Court recognized that the interest of the named beneficiary, who died with the insured, was not vested, but held, nevertheless, that he had such interest as gave him a *prima facie* right, which threw on those contesting his right the burden of proving that the beneficiary died before the insured, which could not be done. So the representative of the first named beneficiary recovered in direct conflict with the ruling in the last mentioned Missouri case.

There are other complications. For instance, there may be successive beneficiaries, as, to the wife, if she survives, if not, to the children. Under our law, if the wife cannot be

shown to have survived, the children take. But suppose the whole family, husband, wife and children, die together. Do the representatives of the children still take, or does the fund go to the estate of the deceased father and husband, as creator of this trust, on the theory that none of the beneficiaries can make out a case? There is no direct decision and the reasoning of the courts would lead to conflicting results.

It is not in the scope of this article to discuss such questions. The suggestion of some of the intricacies to which our system leads is made as argument for the propriety of adopting something like the Roman law doctrine of presumptions which cuts under all such troubles.

The English and American doctrine as to survivorship, which in form repudiates all presumptions and by the logic of necessity acts on the absurd presumption that the parties involved died at the same instant, not only establishes an arbitrary rule which has no relation to natural justice, but it furthermore forces a technical investigation as to the burden of proof, turning often on meticulous examination of words or phrases which were used in wills, deeds or contracts with no thought of application to the facts in controversy. Such a solution of a difficult situation is not immoral, but is *unmoral*. The result in a given case may be right or wrong, as it would be if the determination were by throw of dice. In both cases the method of reaching the conclusion is wanting in ethical elements.

The presumptions of the Roman law, resting on human experience, give us the consolation of feeling that in the great majority of cases the finding must correspond with the unascertainable fact. The method has at least the merit of deciding the case on a positive finding as to the crucial fact. Moreover, by thus going to the root of the matter in definitely fixing the survivorship, one way or the other, it dispenses with that examination of hair-splitting discriminations concerning burden of proof which so much complicate these cases under our system. Under these Roman law presumptions, either A died first, or B died first. The fact is before the court, however it got there, and from that fact the decision follows.

Presumptions, of course, have their place only in the total absence of evidence as to the order in time of the deaths involved. Thus in *Will of Abram Ehle*, 73 Wis. 445, a lone farm house was consumed with all its inmates, three generations of one family. Examination of the ruins, with the location of the bodies, and other surrounding circumstances, satisfied the court as to the order of the deaths without occasion for any presumptions.

Where there is such other evidence, the presumptions arising from age, sex and physical condition, though in themselves inadequate, may be used to eke out the case.

“Considerations of age, sex, etc., are resorted to in connection with other circumstances as a matter of evidence from which a certain conclusion may be legitimately inferred.” *Smith v. Croom*, 7 Fla. 81, l. c. 144.

Indeed, it may be noted that the courts in a few cases have shown an inclination in cases of strong contrast in the condition of the lives involved to give effect to mere presumptions. Thus in *Caye v. Leach*, 8 Met. 371, the Court said it might if required presume that a grandfather had survived his grandchild of tender years, but declined to presume that the intervening generation, the daughter of that man and mother of that infant, had survived her father, then seventy years of age, which was the vital point in the case. But such obiter remarks, of which there are but few, cannot be considered as materially affecting the established holding that our law rejects these presumptions of the Roman law.

A few selected cases will illustrate the results brought about under our law, and the trouble in arriving at them.

In *Russell v. Hallett*, 23 Kan. 276, a night flood of a creek drowned a woman with the two infant children of her first marriage. Mother and children owned in varying interest realty derived from the first husband. If the mother survived the children, all interest in the realty would vest in her, and on her death pass to her second husband. If either child survived the mother, the whole interest would have vested in the mother of that mother, grandmother of the sur-

living child. The decision, on the basis that all died at the same moment, awards the mother's interest to the second husband and that of the children to the grandmother. This may be fair as the award of an extrajudicial arbitrator, but is unsatisfactory as a legal proposition. In fact, either mother or children survived and the property should go as a whole accordingly.

In *Johnson v. Merithew*, 80 Me. 111, one W. Jr. with his three children left Scotland for Havana in February, 1880. The vessel was never heard of after departure. If W. Jr. died after all his children, W. Sr., his father, was his sole heir. Believing himself such heir, the father quitclaimed his son's realty to the defendant in the case in September, 1880. If W. Jr. was then dead, the deed passed title; if not, the deed conveyed nothing. On the theory that the survival of the children could not be shown, the right of those claiming through them was not allowed; but, on a doctrine not bearing on our present topic, the Court found that the son might be presumed to be dead in six months after leaving Scotland, so making his father his heir, and validating the quitclaim deed given by him in September. The presumptions of the Roman law would have led to the same result.

Young Women's Christian Home v. French, 187 U. S. 401, well illustrates the uncertainties that may arise from the phraseology of a will. In that case the testatrix bequeathed her property to her son with an income therefrom to her husband for life. Then follows the provision that in the event of the death of the son before the decease of either the testatrix or her husband, the property shall go to a trustee for the husband for life, and then to the Home; in the event that the testatrix should become the survivor of both husband and son, then to the Home. The husband died first; and then mother and son together at sea without anything to determine which survived the other. The claimants were the Home, as ultimate beneficiary, those entitled if the son had survived, and the representatives of the testatrix on the theory that no case could be made out for any claimant under the will. The court of first instance awarded the property to the Home. The appellate court (18 App. D. C. 9)

gave it to the representatives of the son, and the U. S. Supreme Court (187 U. S. 401) rendered the final decision for the Home. For the son it was contended as against the Home that under the terms of the will the Home could not take until it showed that the son had died before the mother. For the mother's distributees it was further claimed that the claimants under the son must show that he survived his mother. It must be conceded, I think, that this interpretation is correct if we read the clauses merely in the strict grammatical sense. The U. S. Supreme Court held that the testatrix' intention could be deduced from the terms of the will, though not put in express words, and that this intention was that the Home should take if the prior provisions failed from any cause. The discussion of *Wing v. Angrave*, 8 H. L. 183 (to be hereinafter mentioned), it seems to me, falls short of showing that that English ruling on this matter of construction is in accord with the holding in the Home case. But that discussion does not properly fall within the limits of this article. We refer to this *Home* case and hereafter to the *Wing* case as showing how the burden of proof may be shifted by construction resting on language which was drawn without the event in view and therefore bearing on it only by chance. Under the presumption of the Roman law, no such question as to burden of proof would arise. The presumption that the son survived the mother—which is in probable accord with fact—would have cut out the need of discussion.

Newell v. Nichols, 12 Hun. 604. The wreck of the Schiller in 1874 gave rise to this interesting litigation. Elizabeth Walter died in 1870, leaving a will declaring several trusts, of which we may limit ourselves to one. It was for her daughter Mary for life; at her death to heirs of her body then living; in default thereof, to appointee of that daughter; in default of such heirs of her body or such appointment, to testator's heirs then living; and in default of such heirs to designated legatees. There were trusts substantially similar for son, for husband and of the residuum.

Mrs. Walter left surviving her mother, her husband and two infant children, Mary and Joseph. All four perished in

the Schiller, without any evidence as to the order in which death ensued. Under the foregoing provisions concerning Mary's trust, the full interest would have gone at her death to Joseph, if he survived, and on his death to his distributee. In 12 Hun. 604, the ultimate remaindermen in the will were given this trust estate on the ground that other claims were rested on the allegation that one of the children survived the other, which could not be proved. The Court of Appeals fully endorsed that view (75 N. Y. 78), but its opinion is worthy of special notice as dealing with a peculiar matter of fact in the case. It is this: If the infant Joseph survived the infant Mary, Joseph took absolutely the Mary trust, one-fourth the estate, and on his death it went to his distributees. If, on the other hand, Joseph died before Mary, then the Joseph trust, which was also one-fourth of the estate, would go to Mary absolutely, and on her death to her distributees. But the distributees of Mary and of Joseph are obviously the same persons; one-fourth of the estate, therefore, must go to these distributees of the children, whichever of them died first. The only logical (as distinguished from legal) way of avoiding the result is to say that neither infant survived the other. The Court held that these distributees were, nevertheless, entitled to nothing because neither of the claims could, by itself, be established. The same conclusion was reached in *Wing v. Angrave*, 8 H. L. 183, of which we speak at the end of this article. Here the fact is noted that the law rejects a claim established by logic which would be accepted by science and by general common sense.

A leading case of insurance is *Fuller v. Linzee*, 135 Mass. 468. Husband, wife and three children perished together at sea. His life was insured first for his wife. Should she die before him, the amount shall be payable to the children. Linzee, as administrator of both husband and wife, collected the insurance for whom it may concern, and is sued by those claiming through the wife, claimants under children not being in court. Since the wife's survivorship could not be shown, the decision was adverse to those claiming through her, which is enough to dispose of the case. But the Court goes further,

holding that the claimants through the children must also fail and that the husband is entitled to the estate as a resulting trust.

“Assuming that it can be determined in this proceeding that no survivorship of any of the family after any other one can be proved, and that it appears that no claim under the policy can be sustained upon the right of the wife or of any child, then we think that whatever beneficial interest remained in the policy would be that resulting to the estate of the husband, who had procured the policy and paid the premiums and had an interest in the life insured.”

In this case, if the wife survived, of course, she took. On the other hand, if she died first, it would seem that the children (or their estates) took, even though they did not survive. There is at least no express condition for their survival. If this be correct construction of the contract, either the wife or children took. The ruling, in that view, rejects both claims, one of them bound to be true save for the extravagant assumption of death at the same precise moment, simply because it cannot be shown which of them is true.

McGown v. Menken, 223 N. Y. 509, is a recent case, arising out of the destruction of the *Lusitania*. Mr. and Mrs. Tesson, husband and wife, perished there together. His life was insured, and the fund was payable upon his death to his widow, if living; if not, then to his executors, administrators and assigns. Mr. Tesson had the right to change his beneficiary as he desired. On the general doctrine the fund went to the administrator of the insured, as the survivorship of the wife could not be established. The decision adverts to the *Kacer* case, 169 Mo. 301, which distinguished between cases under wills and under insurance policies, but says that it cannot adopt the reasoning, and further points out that the wife's right was not vested even under that authority, since Mr. Tesson could change his beneficiary.

As pointed out in a prior paragraph, the Missouri Supreme Court in *U. S. Casualty v. Kacer*, 169 Mo. 301, distinguished claims under wills from those under insurance policies on the ground that in the latter case the first named

beneficiary had what partook of the nature of a vested interest on issuance of the policy, and in the later case of *Supreme Council v. Kacer*, 96 M. A. 93, the Court of Appeals held that this ruling as to insurance policies did not apply to fraternal organizations, since there the beneficiary's interest was not vested. *Males v. Woodman*, 30 Tex. Div. App. 184, makes the same ruling.

But the law is not finally settled as to fraternal organizations. In *Watkins v. Insurance Co.*, 208 S. W. 587 (Arkansas), a father named his son as beneficiary of insurance. The policy provided:

“If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured.”

The father could change beneficiary at discretion. Father and son together were shot from ambush and nothing indicated which survived. The decision was in favor of those claiming under the son as against those claiming under the father. This was not rested on construction of the language used in the policy, but on the holding that the named beneficiary had an interest, though not a vested one, at the issuance of the policy, sufficient to make out the *prima facie* case for those claiming under him.

“True, the beneficiary has no vested interest, because the insured can change the beneficiary. But it is an expectancy, which ripens into an interest unless the insured makes a change; and the burden of showing change is on those claiming thereunder. In the absence thereof, the qualified interest of the named beneficiary sustains his right.”

This was a case of regular insurance where the insured could change the beneficiary; but under this ruling the first named beneficiary in all cases of fraternal insurance would have a *prima facie* case, as would *a fortiori* be true of regular policies where the beneficiary could not be changed by the insured.

In *Cowman v. Rogers*, 73 Md. 403, the insurance was in a fraternal organization. The policy was primarily payable to the wife. The regulations provided that if the named beneficiary should die in the life time of the member, the

payment should be made first, to the widow; next, to children; next, to mother, etc. The insured, his wife and his two children were swept down to death together by the Johnstown flood. The decision is in favor of those claiming under the wife.

“Mrs. Hoopes (the wife) was the beneficiary named in the certificate. Her representative has a *prima facie* title to the fund. That title can only be divested by evidence showing that she died before her husband.”

Roman law would have presumed that Mr. Hoopes survived his wife and children, so the fund would have gone to his next relative, in this case, his sister.

In the foregoing paragraphs a few selected cases have been stated with no attempt to solve the complicated questions there raised. That would only obscure the purpose, which is to point out some of the intricate problems which must arise under our doctrine of no presumptions as to survivorship; the conflict and confusion as to the rulings thereunder, and the fact that under this system property rights are settled on technicalities remote from the real question, leading to distinctions which have no ethical merits. With this the simple working and substantial justice of the doctrine of presumptions is contrasted.

With this view, I cite one more striking illustration: *Wing v. Angrave*, 8 H. L. 183, a leading authority decided in 1860, in which five law lords participated.

In this case one John Tully by will left his property in trust for his daughter, Mary Ann, for life; on her decease for her children, to vest in them at the age of twenty-one; should all children die before attaining twenty-one, then as Mary Ann may by will direct; in default of that, to testator's brothers and sisters.

Mr. Tully died. Mary Ann married Mr. Underwood. Mary Ann (Mrs. Underwood) made a will in execution of the power under her father's will, leaving her property to her husband, “and in case my husband should die in my life time” to Wm. Wing.

Mr. Underwood also made a will leaving his property to Wm. Wing in trust for his wife absolutely, and "in case my said wife shall die in my life time," in trust for the children, and in case all of them died under twenty-one, to said Wm. Wing for his own use.

Underwood, his wife and their three children, under twenty-one, perished at sea. One child, Catherine, survived the rest of the family a few hours. It was impossible to determine the order of death of the others by any evidence.

Taking Mrs. Underwood's property as derived under her father's will, it is obviously under that father's will wholly controlled by Mrs. Underwood's will, which was the execution of a power.

Under her will, the question is whether or not her husband survived her. If he did, though only for a moment, his wife's property passed to him absolutely, and its disposition at death is governed by his will. If he died first, on the other hand, Mr. Wing takes the property absolutely. In no event do the Underwood children take directly in their own right any part of their mother's property. They all died under twenty-one and for that reason are excluded from the estate under the provisions of both their father's and their mother's will.

Turning then to Mr. Underwood's will, it is first to be noted that it controls the disposition of the property he held in his own right in any event; that it also controls the property his wife owned only in the event he survived her; but that if he did survive her, the disposition of the property derived from her must be the same as of that which he owned in his own right.

Under the will of Mr. Underwood, all his property went to his wife, if she survived him; but if she died first (and also all the children before attaining twenty-one—which latter event occurred in fact) then to Wm. Wing.

It results:

A. As to Mrs. Underwood's property:

1. If she died first, her property passed to her husband,

upon whose death it passed under his will, going to Mr. Wing as shown below (B. 2).

2. If the husband died first, it went under the provisions of Mrs. Underwood's will directly to Mr. Wing.

B. As to Mr. Underwood's property:

1. If he died before his wife, the property (his alone, of course, in that case) went to his wife absolutely, in which event it passed on her subsequent death, under her will (A. 2 above) to Mr. Wing absolutely.

2. If he died after his wife, then under the provisions of his will the property, which in that event includes also what came to him from his wife, inasmuch as she died before him and all the children died before twenty-one, goes to Mr. Wing absolutely.

From the foregoing analysis it appears that if Mr. Underwood died first, Mr. Wing gets all the property of both Mr. and Mrs. Underwood, and that if Mrs. Underwood died first, Mr. Wing likewise gets both estates. A layman would say it is utterly immaterial which died first. All the property goes to Mr. Wing beyond question.

Limiting ourselves to consideration of the estate held by Mrs. Underwood, it is true there is a formal difference as to Mr. Wing's title dependent on the question of survivorship. If Mr. Underwood died first, the property passed directly to Mr. Wing without passing through an administrator and without liability for Mrs. Underwood's debts, for the source of his right is Mr. Tully's will through the exercise by Mrs. Underwood of the power given her. Whereas, if Mr. Underwood survived, the property held by his wife became part of his estate, and as such became liable for any debts he might have, and so would come to Mr. Wing under the terms of Mr. Underwood's will only at the end of administration. But there is no suggestion anywhere that Mr. Underwood left debts; indeed, surrounding facts indicate the contrary. So while a technical difference in the title must be acknowledged, it remains true in every practical sense that

Mr. Wing should get the property whether the husband survived the wife or vice versa; in other words, he should get it in any event.

The case of *Wing v. Angrave*, *supra*, was brought to determine the rights of all claimants to the property given by Mr. Tully to his daughter, Mrs. Underwood, by his will.

The Chancellor, Lord Campbell, was of opinion that the clause in Mrs. Underwood's will, "in case my husband should die in my life time" (then to Mr. Wing), should be liberally interpreted, in accordance with the evident intent of the testatrix, as meaning that if the gift to the husband should substantially fail *for any reason*, then the property should go to Wing (see *Young Women's Christian Home v. French*, 187 U. S. 401, *supra*); but all the other law lords rejected that construction, and, following the reasoning as to absence of presumption under our law, the decision awarded the property to the brothers and sisters of Mr. Tully, the last beneficiaries mentioned in his will.

Foregoing criticism of the construction of the will, we are impressed with the result that Mr. Wing gets nothing, though each of the law lords takes for granted that if Mr. Wing could show that Mr. Underwood died first, the property would be Mr. Wing's, and it would also be his if Mrs. Underwood died first. But he could not recover on the theory that Mr. Underwood died first because he couldn't establish that fact; nor could he recover on the theory that Mrs. Underwood died first on account of inability to show that. As a result of inability to show which of two events happened, he cannot recover, even though one or the other must have happened, and the property would go to him in either event. Can it be true that our law excludes processes of reasoning that the science of logic recognizes and common sense (in proceedings out of court) habitually employs? If A is true, C is true; if B is true, C is true; but either A or B is true; then C is true. It is immaterial to inquire whether A or B is true, since one or the other is true, and that involves the truth of C. That reasoning has stood since Euclid's day. A stream divides into two arms which reunite further down. An article

placed in the stream above that division is found floating below the junction. The inference is that the object floated down the stream, though we have nothing to tell us which branch it took. Nor does it seem that in that case in court the result, as between the parties to the litigation, should be affected by the consideration that if Mr. Wing claims through Mr. Underwood, he receives the property only at the end of administration, whereas if Mr. Underwood died first, Mr. Wing gets it directly without administration. In either case it ultimately reaches him. In one arm of the stream above supposed, let us assume there was a millrace. If our object placed in the stream above the division is found floating below the junction, our conclusion is not weakened by our inability to determine whether or not it passed through the millrace. At most, to protect possible rights of Mr. Underwood's creditors, if any, Mr. Wing should be called on to recognize those claims as binding on the estate coming to him through Mrs. Underwood. This is only a formality, for Mr. Underwood's own estate is clearly solvent.

But query as to the correctness of the holding in this particular is collateral to our main thesis. The concurrent view of four lawyers of such professional standing may well make us pause. Admit they are right, as well may be. The overshadowing matter, of general interest, is an amazed contemplation of how far the so-called absence of presumption as to survivorship leads us into intricate logical channels through which no ethical currents circulate. The technical process may end in a result which not only makes no appeal to our sense of natural justice, but may run directly counter to it. That is what occurred in this Wing case. Each and all the judges regret that legal rules, as they see it, prohibit them from awarding the property to Wing. They acknowledge the result in the special case to be wrong.

Under Roman law the case would have been simple. Under the facts of the case, a presumption would have determined that the husband survived the wife. The result, giving the property to Wing, would follow. There would have been no discussion as to burden of proof, or as to showing a right

through alternative sources. What is said of *Wing v. Angrave* applies to the similar case of *Newell v. Nichols*, 75 N. Y. 78, above stated.

The subject of this article is the ethical and practical desirability—perhaps it might be said the necessity—of introducing into our law presumptions as to survivorship analogous to those of the Roman law. This case of *Wing v. Angrave* might serve as a text.

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