Wills: Effect of a provision that testator should be deemed, in the event of death in common disaster of the testator and wife, to have predeceased his wife

J. H. Casey

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Two noteworthy contentions were advanced by the able counsel for the city in a futile attempt to maintain the position of their predecessors: (1) that the term "jury" was loosely used at the time of the adoption of the constitution, and (2) that the uniform interpretation given to a constitutional provision for a number of years must be followed. The first is sufficiently answered in the words of the court, quoted above. As to the second, the court held that this rule applied only where there was an ambiguity in the constitutional provision. Here the clause was clear and unambiguous and this rule had no application.

WILL C. GÖBEL

Wills: Effect of a provision that testator should be deemed, in the event of death in common disaster of the testator and wife, to have predeceased his wife.—In the Matter of the Will of Charles F. Fowles.¹

The will of the testator provided that if he and his wife should die in a common disaster in such circumstances as to render it impossible to determine who died first it should be 'deemed' that he predeceased his wife and all provisions of the will were to be construed on that assumption. It was further stipulated that his wife was to receive part of the residuary estate in trust for life with the right to dispose of part of the share by her will. They both lost their lives in a disaster at sea, and there was no evidence showing which was the survivor. The court, however, permitted the testator's self-enunciated presumption to prevail and the provisions of the will were given effect as though it were indisputably established that he actually did predecease his wife. Admitting that there is no legal presumption that one survived or outlived the other² and the party alleging survivorship must prove it by some competent evidence,³ the court sees no objection in carrying out the testator's instructions. Crane, J., in speaking of the above principles, voices the opinion of the court in these words:

But this is no more than saying that the courts are limited in knowledge of events the same as individuals; that where no one knows who died first the courts likewise cannot determine. It is no positive rule of law; it is a lack of one; the expression is a mere declaration of a fundamental principle of our jurisprudence,—that the facts must be proved. The only facts that can be proved are the sinking and the death. Our law goes no further; it indulges in no fictions or presumptions. Fictions and presumptions are means to an end in the absence of proof. The necessity for the creation of a fact by the "ipse dixit" of the court has never been felt by us in cases like this.

By the civil law in cases of dispute about survivorship in the cases of common disasters, persons who by reason of age or sex or state of health were deemed best fitted in a struggle for their lives were presumed to be the survivors.⁴ But this is not the rule of the common law, being objectionable because of its apparent lack of certainty.⁵

¹ 222 N. Y. 222; 118 N. E. 611.
² Jones, Evidence 3rd Ed. Sec. 64.
The general rule as recognized in England and in the United States (Louisiana and California by statute incorporated in a modified way the Roman law with respect to presumptions of survivorship), is that where two or more persons perish in the same disaster and there is no fact or circumstance to prove which survived, the question of such survivorship is considered incapable of being correctly answered and in such situation, the difficulty is determined as though the death of all occurred simultaneously. Briefly, the party asserting survivorship, being the party averring the fact, must prove it.

Where, however, there is evidence from which inferences, fair and reasonable, may be drawn, there is no objection to a consideration of all the facts, circumstances, and such external indicia as may illumine the theories and probabilities sought to be advanced. Just precisely that method was followed in Will of Abram Ehle, the court examining all the minute factors in arriving at a proper solution of a vexing situation, founded upon the determination of the survivorship of persons burned in a fire which occurred during the night.

In short, then, generally there is no presumption of survivorship, the civil law with the doctrine of the survival of the fittest excepted, but this rigorous restriction yields to the propriety of introducing evidence tending to strengthen or clarify what was perhaps originally alleged. As a further relaxation of the general doctrine, is the holding of the court in the Will of Fowles, that the testator may express his wish as to the presumptions of survivorship and that such expression of the testator will be recognized, in the absence of any evidence overcoming it.

J. H. Casey

Railroads: Commission not authorized to deny certificate of necessity and convenience because of detriment to individuals by interference with zoning and county planning.—Several years ago, the Milwaukee Electric Railway and Light Co., completed their new Lakeside power plant, located several miles south of Milwaukee and destined to supply electric light and power to Milwaukee and its suburbs. In order to insure a steady supply of fuel to the new plant, the company thought it necessary to build another incoming railroad line, running from the plant to the main line of the Chicago, Milwaukee and St. Paul Railroad. The proposed trackage was to be about three and a third miles long, running in an east and west direction. The location as proposed would take the line through the heart of Tippecanoe, an unincorporated village lying about a mile south of Milwaukee, with a population estimated variously at from a thousand to thirty-five hundred people. The Electric company also proposed to build at the same time a line about seven miles long, to run in a north and south direction. This line was intended to skirt the towns of Cudahy and South Milwaukee, and the settled spots between, and thus materially lessen the

*Jones, Evidence 3rd Ed. Par. 64.
*73 Wis. 445, 41 N. W. 627.
*Supra.