

and leisure require him to pay, in this currency, the debt he owes his profession, and the amount of which debt is greater in proportion to the extent of the talents bestowed upon him.

Permit me to subscribe myself your friend, and also

AMICUS CURIÆ.

PRESUMPTION OF SURVIVORSHIP.

In a very late English case, 1 Jur. N. S. 169 Ch., *Underwood vs. Wing*, where it appeared that both husband and wife were drowned at sea, having been swept off the side of the vessel by the same wave, there was no direct evidence, one way or the other, as to survivorship, but there was considerable medical evidence of a conflicting nature. Some of the medical witnesses stated that asphyxia would take place at the same time in a case of complete and continued submersion of a man aged forty-three and of a woman aged forty, (the respective ages of the husband and wife), and that there was in this case no medical presumption of survivorship. Others of the medical witnesses stated, that although asphyxia might take place at the same moment of time in both cases, still that asphyxia was not death; and that "the length of time between asphyxia supervening and death ensuing, would depend on the physical strength of the party, varying according to age and sex, and the healthy or unhealthy state of the body; cæteris paribus, that time would be longer in the case of a male of forty-three, than of a female aged forty;" and they were of opinion that there was in this case a *medical* presumption in favor of survivorship of the husband.

But held by WIGHTMAN, J.—The question of survivorship is the subject of evidence to be produced before the tribunal which is to decide upon it, and which is to determine it as it determines any other question of fact. If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide; and if there be no evidence, the case is the same as in a great variety of other cases, more frequent formerly than at present, where

no evidence exists, and consequently no judgment can be formed. On this point we concur with the Master of the Rolls. We think there is no evidence to show whether the husband or the wife was the survivor. There may be surmise, and speculation, and guess; but we think there is no evidence. We have no doubt that the scientific gentlemen who were examined, were perfectly sincere in their opinions; but it is obvious that their evidence was given having reference to the case of two persons quietly submerged in water, and remaining there until drowned, or to the case of two persons, one being a swimmer, the other not, and both thrown suddenly into the water unincumbered, and acting on certain instinct. The present case is that of two persons clasped together, two boys clinging to one of them, standing pretty high out of the water, on the ship's side, swept off together by an overwhelming wave into a raging sea; and one or other or both of them may have been stunned by the violence of the blow from a wave, or they may have struck against a timber of the ship, and may, in fact, have been dead before he or she reached the water at all. How is it possible, under such circumstances, for any tribunal sitting judicially, to say which of these two individuals died first? We may guess, or imagine, or fancy; but the law of England requires evidence; and we are of opinion that there is no evidence upon which we can give a judicial opinion that either survived the other.

In this opinion the *Lord Chancellor* fully concurred.

Mr. Best, in his *Princ. of Evid.*, p. 478, 2d ed., had arrived at the same conclusion, although his book does not appear to have been referred to by either counsel or Court. We subjoin the passage: "As connected with the subject of the continuance of human life, it remains to notice a class of cases, which have embarrassed, more or less, the jurists and lawyers of every country. We allude to those unfortunate cases which have from time to time presented themselves, where several individuals, generally of the same family, have perished by a common calamity, such as shipwreck, earthquake, conflagration, or battle, and where most usually the priority in point of time of the death of one over the rest, would exercise an influence on the rights of third parties. The civil law

and its commentators were considerably occupied with questions of this nature, and it seems to have been a general principle among them, (subject, however, to exceptions,) that where the parties thus perishing together were parent and child, the latter, if under the age of puberty, was presumed to have died first; but if above that age, the rule was reversed. In the case of husband and wife, the presumption seems to have been in favor of the survivorship of the husband. The French authors, also, both ancient and modern, have taken much pains on this subject. All the theories that have been formed respecting it are based on the assumption that the party deemed to have survived was likely, from superior strength, to have struggled longer against death than his companion. Now, even assuming that *prima facie* a male would struggle longer against death than a female, a person of mature age than one under that of puberty, or very far advanced in years, the position can at best only hold good as a general rule; for not only in particular instances might the superior strength or health of the party supposed to be the weaker reverse all, but the rules rest upon the hypothesis that both parties were in exactly the same situation with respect to the impending danger—a circumstance, generally speaking, unascertainable in the fury of a battle, or the horrors of an earthquake or shipwreck. Add to this, that, according to some modern physiologists, in certain species of deaths the strongest perish first.¹

“However this may be, in opening the door to this class of questions, the lawyers of Rome and France lost sight of this salutary maxim, ‘*Nimia subtilitas in jure reprobatur.*’ The English law has

¹“See Beck’s *Juris.* 397, 7th ed., where is related an incident furnished by a modern traveler, who, in giving an account of a caravan coming in want of water in a Nubian desert, says that “the youngest slaves bore the thirst better than the rest; and that while the grown-up boys all died, the children reached Egypt in safety.” The same author adds, ‘As to habit and variety of constitution, all such as have a tendency to affections of the head and lungs should be deemed the first victims, in case the causes of death are of a description to affect these. And the moral condition must not be overlooked: the brave survive the fearful and the nervous.’ We subjoin the following statement, though not from a work of authority:—‘It seems that death from hunger occurs sooner in the young and robust, their vital organs being accustomed to greater action than those of persons past the adult age.’ (Chambers’ *Miscellany*, vol. 8, p. 119).”