THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☞ **Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.**

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At the Annual Meeting of the Canadian Bar Association held last August in Winnipeg, the by-laws of the Association were amended to provide that the REVIEW would be sent to every member and only one fee would be charged, namely, $5.00 in the case of ordinary members, and $3.00 in the case of junior members. Membership in the Canadian Bar Association thus automatically entitles members to receive THE CANADIAN BAR REVIEW. The by-law as amended reads as follows:

(V) (a) The fee for active members who are not life members or junior members shall be $5.00 per annum payable in advance on or before the 2nd day of January in each year. Payment of the annual fee shall entitle each member to receive "The Canadian Bar Review" during such year.

(b) Every barrister, solicitor or notary (in the Province of Quebec), during the first five years after becoming entitled to practice his profession, may become a junior member upon payment of an annual fee of $3.00 until the expiration of the fifth year and payment thereof shall entitle him to all the privileges of active membership, including the receipt of "The Canadian Bar Review."

CASE AND COMMENT

NEGLIGENCE—PERSON IMPERILLED BY OWN NEGLIGENCE—INJURY TO RESCUER.—*Dupuis* v. *New Regina Trading Co. Ltd.*[1] in the Saskatchewan Court of Appeal is an illustration of a classroom problem in the law of negligence before a court. In view of the recent House of Lords' decision in *Bourhill* v. *Young*,[2] re-emphasizing as it did the concept of "duty" in negligence problems, the present decision takes on an added significance, and shows that "foreseeability" as a test of duty may present serious difficulties.

[1] [1943] 4 D.L.R. 275.
[2] [1943] A.C. 92, and see 21 Can. Bar Rev. 65.

It has been a well accepted doctrine in the American courts for some time, and in England since the decision in *Haynes* v. *Harwood*,[3] that a defendant whose negligence imperils another, is liable in damages to a rescuer for injuries sustained by him while going to the assistance of a person jeopardized by the defendant's negligence. While the voluntary nature of the act of a rescuer has provided most of the discussion on this subject,[4] the more difficult problem involved is to ascertain the nature of the defendant's duty of care towards the rescuer. It has become increasingly popular in recent years to state that an actor owes a duty of care only to those persons that he can foresee, at the time of acting, as likely to be affected by his conduct unless due care is used. This relational aspect of negligence was most clearly dealt with in the judgment of Cardozo J. in *Palsgraf* v. *Long Island Ry. Co.*[5] and furnishes the basis of the House of Lords' delimitation of liability in situations of nervous shock as explained in *Bourhill* v. *Young*. The rescue cases are difficult, if not impossible, to explain on this basis.

It is true that decisions, including *Dupuis* v. *New Regina Trading Co.*, state that a defendant who is acting negligently towards another "should forsee that any one seeing such other in danger will react to the spectacle and attempt a rescue." It has been pointed out, however, that a reasonable man at the time of acting could scarcely contemplate as a probability the heroic act of a rescuer.[7] As Professor Bohlen stated, this would be "straining the idea of foreseeability past the breaking point."[8] In the same article in which Bohlen deprecates such a use of foreseeability he argues that as damage to a third person could be reasonably contemplated, liability to a rescuer follows because it is, looking at the matter as it comes before the court, a not unnatural consequence that a rescuer would come to the rescue of the party inperilled. This view would seem to indicate that liability to a rescuer was merely one phase of the causation problem[9] inherent in the negligence established towards the person imperilled. Such a view is at variance with the doctrine that a plaintiff must show a wrong done to himself (in the language of

[3] [1935] 1 K.B. 146.
[4] See Goodhart, *Rescue and Voluntary Assumption of Risk*, 5 Camb. L.J. 192.
[5] (1928), 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253.
[6] [1943] A.C. 92.
[7] *Prosser, Torts*, p. 359.
[8] Review of Harper, Law of Torts, (1934), 47 Harv. L.Rev. 556, 557.
[9] This is the method adopted by the *Restatement of Torts* (for which in this connection, Professor Bohlen was Reporter) in stating the "principles" of causation.

Cardozo J.) and cannot base his claim derivatively on a wrong done to a third person. Lord Wright in *Bourhill* v. *Young* approved of the theory that a plaintiff "cannot build on a wrong to someone else," and thus agreed in principle with Cardozo J. that proof of negligence towards A is not necessarily negligence towards B. Peculiarly enough, Lord Wright stated that the truth of this principle was "also illustrated by cases such as have been called in the United States 'rescue' and 'search' cases." It is difficult to appreciate how the principle, rather than an exception to the principle, justifies the "rescue" cases. That difficulty becomes more apparent in a case like *Dupuis* v. *New Regina Trading Co.*, where the question was: Can a person who, by careless conduct, imperils no one but himself be liable to a rescuer?[10]

In the *Dupuis Case*, the defendant employed a Miss Bradley to operate one of their elevators. Miss Bradley, as found by the jury, failed to close and lock the elevator door before the car moved from a landing, at a time when there were no passengers in the elevator. As a result, her foot, or feet, were caught between the floor of the elevator and the grillwork which protected the elevator shaft, and when the elevator moved she became suspended head down in the elevator shaft, the door of the grill remaining open. In response to her screams for help several people came to Miss Bradley's assistance and attempted to take the weight off her legs by resting her head on their shoulders. The deceased Dupuis, who had a barber shop in the basement of the building, ran up the stairs towards the elevator and approached the elevator opening with his arms raised, "with the evident intention of catching her limbs when released so as to prevent her dropping to the floor."[11] He apparently advanced too far, fell down the elevator shaft and was killed. In an action brought against the defendant under the Fatal Accidents Act by Dupuis' dependants, the Court of Appeal were faced with the issue whether carelessness jeopardizing one's self could give rise to a cause of action on the part of a rescuer, since liability of the company had to depend, on the facts disclosed, on establishing a tortious act on the part of its servant.

It is, of course, difficult to say that Miss Bradley could be, in the language of an American case much relied on by the present court, "guilty legally . . . . of neglecting herself".[12] On this view

[10] While the question did not appear as bluntly as stated, since the action was against the employer of a servant who imperilled herself, the principle of vicarious liability—in the absence of any personal negligence on the part of the employer—would seem to require a finding that the employee was under a liability for which the employer must respond.

[11] [1943] 4 D.L.R. at p. 276.

[12] *Saylor* v. *Parsons* (1904), 122 Iowa 679, 98 N.W. 500.

the American court came to the conclusion that unless some third person were jeopardized by negligent conduct there could be no liability to a rescuer. This, in effect, was the holding of the Saskatchewan Court of Appeal, which, after discussing the American case of *Saylor* v. *Parsons*,[13] *Bourhill* v. *Young*[14] and other English cases, stated the principle behind the rescue cases in the following language:

> When a person, in breach of duty towards another, places the latter in danger, he, as a reasonable man should foresee that anyone seeing such other in danger will react to the spectacle and attempt a rescue. It is thus the danger, actual or apprehended to that other which brings the rescuer within the ambit of the negligent party's duty to take due care.[15]

In other words, the court stated in effect that the wrong towards a rescuer flows from or is based upon a wrong towards the person in danger. There is no doubt that *Saylor* v. *Parsons*, a 1904 decision in the Iowa courts, squarely took this position. While the Saskatchewan court indicated that the case stood alone, a similar holding is also to be found in *Linz Realty Co.* v. *McDonald*,[16] a decision of the Court of Civil Appeals of Texas. Both of these decisions present difficulties, which the Saskatchewan court recognized, since liability to a rescuer has been stated as based on a duty to the rescuer which is independent from that owed to the endangered party, and is in no way derivative. Thus it has been held,[17] as the present court indicated, that a rescuer is not barred by contributory negligence on the part of the person imperilled. If this be so, the only basis in the language of the cases for holding the defendant liable is because he should have "foreseen" the possibility of a rescuer at the time of acting. As mentioned previously, this is a requirement of foresight in the reasonable man which seems to go beyond common experience. It has been argued, however, that "the human inclination of the court to reward heroism may well explain a peculiar extension

[13] See note 12.
[14] *Supra.*
[15] [1943] 4 D.L.R. at p. 284.
[16] (1911), 133 S.W. 535. See p. 538, where the Court refers to a statement of law in *Donahue* v. *Ry. Co.*, 83 Mo. 560, 53 Am. Rep. 594 to the effect that "the negligence of the company, as to the person in danger, is imputed to the company with respect to him who attempts the rescue, and, if not guilty of negligence as to such person, then it is only liable for negligence occurring with regard to the rescuer, after his efforts to rescue the person in danger commenced."
[17] *Pittsburg etc. Co.* v. *Lynch* (1903), 69 Ohio St. 123, 68 N.E. 703; *Highland* v. *Wilsonian Investment Co.* (1932), 171 Wash. 34, 17 P.(2d) 631.

of probability."[18] On this view there seems no reason to deny recovery in a case similar to the present.

The difficulty of determining the proper approach to such cases is well indicated by a comparison of the remarks of Professor Bohlen, in an article written in 1924,[19] with his later observation, mentioned above, with regard to straining the notion of foreseeability. In 1924 Professor Bohlen, after considering the cases which had held that a rescuer's right is not derivative, and is therefore not affected by contributory negligence on the part of the imperilled person, stated:[20]

> The rescuer's right of action, therefore, must rest upon the view that one who imperils another, at a place where there may be bystanders, must take into account the chance that some bystander will yield to the meritorious impulse to save life or even property from destruction, and attempt a rescue. If this is so, the right of action depends not upon the wrongfulness of the defendant's conduct in its tendency to imperil the person whose rescue is attempted, but upon its tendency to cause the rescuer to take the risk involved in the attempted rescue. And it would seem that a person who carelessly exposes himself to danger or who attempts to take his life in a place where others may be expected to be, does commit a wrongful act towards them in that it exposes them to a recognizable risk of injury.
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> The case of *Saylor* v. *Parsons*, 122 Iowa 679, 98 N.S. 500 (1904), which denied the recovery to a plaintiff, who was injured while attempting to prop up a wall which threatened to fall upon a defendant who had carelessly undermined it, upon the ground that the defendant's duty to protect himself from harm was moral and not legal, is, it is submitted, erroneous since it assumes that the right of a rescuer is derived from the right of the person imperiled to recover, had he instead of the rescuer, been injured.

Something similar to this view seems to lie behind the judgment of the New Jersey court discussed in the *Dupuis Case*, namely *Butler* v. *Jersey Coast News Co.*[21] In that case, the defendant's truck, having been driven by its servant at a high rate of speed, collided with an electric light pole which broke and caused an electric wire to sag across the highway. The plaintiff, who observed the accident, came to the assistance of the driver of the truck and was severely burned by contact with the charged wire. In an action by the plaintiff against the defendant for damages,

[18] McLaughlin, *Proximate Cause* (1925), 39 Harv. L. Rev. 149 at p. 171, referred to in *Prosser, Torts*, p. 359.

[19] Bohlen, Liability in Tort of Infants and Insane Persons (1924), 23 Mich. L. Rev. 9, reprinted in *Bohlen, Studies in the Law of Torts*, 543.

[20] *Bohlen, Studies in the Law of Torts*, at p. 569.

[21] (1932), 109 N.J.L. 255, 160 Atl. 659 (referred to in the *Dupuis Case* without citation of reports).

the court stated that the situation did not come within the rescue cases, giving as one of their reasons the fact that there was no obvious danger to the rescuing party. The court imposed liability, however, on the ground that the plaintiff, being a lawful user of the highway, was entitled to remove an obstruction on the highway or assist anyone who appeared to be in danger. This reasoning is far from satisfactory, although it was accepted by the Saskatchewan Court of Appeal, which explained the *Butler Case* as one where the defendant through its servant had created a danger on the highway. While it is true that the sagging wire was probably a source of danger to persons on the highway other than rescuers, the case has been considered as opposed in principle to *Saylor* v. *Parsons*.[22]

If, as Cardozo J. stated in *Wagner* v. *International Ry. Co.*:[23]

> Danger invites rescue. The cry of distress is the summons to relief, ... The risk of rescue, if only it be not wanton, is born of the occasion . . . . The wrong doer may not have foreseen the coming of a deliverer. He is as accountable as if he had,

it is difficult to see why, on facts similar to those in the *Dupuis Case*, the servant could not be said to have created a dangerous condition of the premises to potential rescuers. Apparently the courts have not been willing to extend their humanitarian doctrine of rescue this far, although, if the duty as now recognized cannot be based on any doctrine of foreseeability at the time of acting, it is difficult to understand why the line should be drawn to exclude persons in the position of the rescuer in the *Dupuis Case*. So far as Dupuis was concerned, the lady suspended in the elevator shaft might just as well have been a passenger on the elevator jeopardized by the negligence of the operator of the car. If liability would have been imposed in that case—and it seems clear that the defendant's duty would extend that far—what logical reason is there for excluding it in the present case?

The present case, despite protests to the contrary, does seem to recognize, in a somewhat attenuated form, the derivative nature of a rescuer's action. If it be true that there is only liability to a rescuer if there has been negligence towards an imperilled person, does this mean "actionable" negligence? The cases where contributory negligence of an imperilled person has not affected the right of a rescuer might seem to dictate a negative answer save that, as the Saskatchewan Court indicated, contributory negligence does postulate negligence with its technique of duty etc.

[22] See *Prosser, Torts*, p. 359.
[23] (1921), 232 N.Y. 176, 133 N.E. 437, 19 A.L.R. 1.

But suppose that a servant of a defendant carelessly exposes a fellow servant to a risk of serious bodily harm, from which danger the fellow-servant is rescued by the act of a stranger who is injured in so doing, would the defendant employer be liable to the rescuer in such case, in light of the fact that the fellow-servant rule exonerates the employer from liability to the rescuer on the theory of assumption of risk which negatives any duty of care on the part of the employer towards the person jeopardized? Or again, suppose that a husband is threatening his wife with a risk of serious bodily harm from which she is rescued by a stranger. Such cases can be distinguished from the present by saying that the law merely confers an immunity on the employer and the husband respectively with regard to liability to the person jeopardized and that the act is still *prima facie* a wrong towards such person. This, however, would seem to be a mere play with words since in neither case can it be said that the defendant's conduct was "negligent" or "tortious" with respect to the imperilled party.

While it would seem, granting liability to a rescuer when a third person is jeopardized, that there should be liability when no one save the rescued is at "fault," care should be taken to recognize that it is not merely the possibility of rescue that makes a person liable. Such a view would result in the imposition of a strict liability for inevitable accident, Thus, for example, a person in the exercise of care may be involved in an accident. To say that because rescuers could be "foreseen," such person is "negligent" to a rescuer is to place an entirely new meaning on a phrase that is already overworked in the law. Something more than the possibility of a rescue seems required to shift the loss from the voluntary rescuer to him who creates the occasion for the rescue or is, himself, rescued. This "something more" is found in most of the cases by conduct which imperils through want of care a third person so that we can, in accordance with "the language of the street,"[24] speak of the person held liable as negligent. Divested of "techniques" of tortious liability this merely means that as between a careless man and the heroic rescuer the policy of the law favours shifting the loss from the latter to the former. Apart from legal concepts of "duty," we have no difficulty in finding a plaintiff in an action guilty of "contributory negligence" and thereby depriving him in whole, or in part, of compensation caused by another's fault. Is there any reason why careless conduct for one's own safety should not involve liability towards

[24] Andrews J. in the *Palsgraf Case, supra*, note 5.

a rescuer who seeks to mitigate the harm likely to result from such carelessness? Such fault—granted a policy in favour of rescuers—should, in terms of legal concepts, result in a "duty" which is ordinarily lacking in the contributory negligence situations. The necessity of finding "something more" than the possibility of rescue is emphasized in cases like *Dupuis* v. *New Regina Trading Co.* and *Saylor* v. *Parsons* which require "fault" towards a third person. It is submitted that "fault" with respect to oneself should also suffice to shift the loss. In the present case if it could be found that Miss Bradley was placed in her predicament because she failed to observe due care for her own safety has she not, as a servant of the defendant, negligently created a danger in the course of her employment to potential rescuers?

Even if this position were recognized, however, it is still not clear that the plaintiffs should have recovered in the present case. The jury's findings would seem to have been, to say the least, difficult to reconcile, since they found that the attempted assistance of Dupuis on behalf of the operator was reckless, while they negatived, in another answer, contributory negligence on his part. If the conduct of the deceased were reckless, it may be that, subject to difficulties inherent in the application of Contributory Negligence Acts to actions brought under Fatal Accidents Acts,[25] the defendant should have been exonerated. This, however, is an entirely different question from the issue of duty of care, which cannot be considered as definitely settled under the existing state of authority. Perhaps the only moral which one can draw from a consideration of cases like the present, is to recognize that while "duty" in tort problems is a helpful tool in delimiting liability, it is, like other techniques, highly artificial and must yield to the legislative policy inherent in practically every case of negligence, whether, in a given case, it be exercised by a judge or jury.

C.A.W.

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TRUSTS—DEVIATION FROM TERMS OF THE TRUST INSTRUMENT—TRUSTEE INVESTMENTS.—A comment in the April issue of the *Law Quarterly Review*[1] made apparent one of the weaknesses which, in the present writer's opinion, characterizes much of the work appearing in the name of the Canadian Bar Association, namely, the tendency to leave to individuals the preparation of reports which are considered but little, if at all, by the Association

[25] See 19 Can. Bar Rev. 291.
[1] 59 L.Q.R. 111.

generally and which are, however, put out as representing the views of that body. In that issue the contributor wrote as follows:

> Section 57 of the Trustees Act, 1925[2], which gives the Court power to sanction breaches of trust, has generally been considered a useful provision in this country. In Canada, it seems, other views prevail. The 25th Annual Meeting of the Canadian Bar Association, 1941, adopted a report in which it is said: 'The last thing I am going to mention is something which I think is wholly vicious. It is an amendment to the Trustee Act of Alberta.[3] Alberta has done a good many funny things in the last few years but this one is the funniest and the most undesirable one yet.' The report then sets out the amendment, which is very nearly a verbatim reproduction of the Trustee Act, 1925, s. 57 (1), and adds: 'In other words, this almost completely wrecks the solidity of a trust instrument' (Proceedings, Vol. 25, 1941, pp. 215, 216). Lincoln's Inn will perhaps regard with renewed interest a section which, having led a docile life in England for some years, has now been unmasked on the other side of the Atlantic as a humorous yet vicious wrecker of fiduciary solidity.

To the present writer, it seems more than doubtful whether the view expressed in the Canadian Bar Proceedings was in any way representative of the opinion of the Canadian profession and it is highly doubtful whether, at the time such views were expressed, the author realized that he was ridiculing a section of the English Trustee Act which most writers on trusts have greeted with marked approval. Speaking personally, the present writer has advocated for years the necessity for some section similar to section 57 in the law pertaining to trustees in Ontario. At the present time, unforeseen emergencies and contingencies not contemplated by testators afford considerable embarrassment to trustees and may jeopardize the proper working of a trust in the interests of the beneficiaries unless a court has power to extend the terms of a trust to cover such contingencies. The whole subject has been most fully dealt with by Professor Scott, first in an article[4] and later in his treatise on the Law of Trusts.[5] In Ontario

[2] "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income."

[3] See now R.S.A. 1942, c. 215, s. 17.

[4] Scott, *Deviations from the Terms of a Trust* (1931), 44 Harv. L. Rev. 1025.

[5] *Scott, Trusts*, secs. 163 A, 164, 167.

the situation is most peculiar, since it is well known that some judges will assume jurisdiction to extend or deviate from the express terms of a trust instrument, while other judges take the view that there is no power in the court so to act. This may operate satisfactorily among members of the profession who happen to know which judge will purport to exercise the power. It is far from a happy state of affairs to have uncertainty in a matter of such practical importance to beneficiaries of a trust.

The recent decision of Morton J. *in re Pratt's Will Trusts*[6] shows that the English legislation, as interpreted by the courts, goes much further, and as we believe desirably so, then much of our Canadian legislation. The decision is further evidence of the fact that the English legislative and judicial approach has veered towards adopting the principle that a trustee should have such powers as are necessary and appropriate for the effective administration of the trust, rather than the outworn attitude that a trustee has only such powers as have been expressly conferred on him by the trust deed itself. Undoubtedly the attitude of the writer of the Report to the Canadian Bar Association would approve of the customary view expressed in *In re Tollemache*[7] that a court cannot, save in case of an emergency,[8] confer a power of sale of trust property on a trustee which he is not otherwise empowered to sell. As Scott has pointed out,[9] such views are based on the fact that the modern trust is an outgrowth of the old use in which the trustees' duties were originally negative. At the present time it would seem desirable that a trustee should have such powers as are necessary to administer the trust for the benefit of beneficiaries whether they have been expressly conferred on him or not. Certainly, no testator today can consider all the possibilities that may confront a trustee in the course of administration and even if he could, it would seem undesirable that a testator could place limits on a trustee's power so as to prevent the productivity of the trust res.

In *In re Pratt's Will Trusts* the deceased left to trustees all his shares in a certain named limited company to pay the dividends thereof to one person for his life and after his death to divide amongst other parties. An application was made to the court by one of the trustees for an order under section 57 of the Trustee Act empowering the trustee to sell such shares. On the hearing

[6] (1943), 59 T.L.R. 371.
[7] [1903] 1 Ch. 457, aff'd. at p. 955.
[8] See *In re New*, [1901] 2 Ch. 534. Of course, the word "emergency" can be given a narrow or wide interpretation.
[9] *Scott, op. cit.*, sec. 163 A.

of the application no one, including the court, doubted the desirability of selling the shares, and the only question was whether such an order was necessary. The court came to the conclusion that an order under section 57 was unnecessary since by section 1(1)[10] of the Trustee Act it was provided that "any trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in the following manner, that is to say:". The question for the court's consideration was whether these words should be confined to the case where a trustee had actual cash in his hands waiting for investment. Two old cases,[11] taking different views as to Lord St. Leonard's Act and the power of investment therein contained, were cited, but the court came to the conclusion that there was nothing in the present Trustee Act which prevented trust funds in any state of investment from being invested in the trust securities described by the Act, and if that were so, then a power of sale must necessarily be implied in the trustee.

We cannot help wondering whether the writer of the Report at the 1941 Meeting of the Association would be shocked by this "vicious" doctrine. In Ontario, the Trustee Act in section 26,[12] provides for investment in certain securities therein set out, where a trustee has "money in his hands which it is his duty" to invest. Any possibility of getting an extended power, similar to that in *In re Pratt's Will Trusts* would seem to be excluded by the wording of that section. As Ontario has, unfortunately as it seems to the present writer, no section similar to section 57 of the English Trustee Act, one can only speculate concerning a trustee's course of action on similar facts, where he is given securities which are steadily depreciating in value and which he has no power to sell under the will. It seems to the present writer that Alberta was wise in adopting the provisions of the English Act in this respect, and we submit that it should be enacted in other provinces. It is worth noting that Nova Scotia in 1939 passed an amendment to their Trustee Act,[13] being a new authorized investment section, and the opening paragraph of that section, contains language which is identical with that in section 1 (1) of the English Trustee Act. In the matter of trustees' powers, the Ontario statute would seem to leave much to be desired and it is to be hoped that in the not too distant future the whole question of incorporating in a

[10] *In re Warde* (1861), 2 J. & H. 191; *Waite* v. *Littlewood*, 41 L.J. Ch. 636.
[11] 22 & 23 Vict. c. 35, s. 32.
[12] R.S.C. 1937, c. 165.
[13] 1939 (N.S.) c. 39, repealing and substituting a new s. 3(1) in the Trustee Act, R.S.N.S. 1923, c. 212.

statute many of the long and tedious powers, which the well-advised testator now feels compelled to set out at some length in a will or trust document, will be considered by the proper authorities. There seems no reason why wills and trust settlements could not be considerably shortened if a proper statute extended powers which are usually found in most modern wills, such as the clause permitting trustees to concur in schemes for the reorganization and amalgamation of companies, sales of their assets etc.,[14] and for good measure we would suggest also adding a clause similar to section 57 of the English Act.

C.A.W.

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PRESUMPTION OF DEATH—JURISDICTION OF COURTS TO MAKE DECLARATION.—In the October issue of the REVIEW we discussed the unhappy position of the spouse in Saskatchewan, British Columbia and Ontario, whose husband or wife has been missing for some years and who is unable, according to the decisions of the courts in those provinces, to obtain a declaration presuming death which would enable him or her to obtain a licence to remarry. In the comment we indicated that the position in Manitoba was similar. A number of Manitoba readers have brought to our attention the fact that Manitoba, by statute passed at the last session of the Manitoba Legislature 1943 (Man.) c. 30 amended the Marriage Act by adding a new section 18(a) dealing with the situation. The section reads in part as follows:

> 18A. (1) Where a married person presents to the Court of King's Bench a petition for an order declaring that the other party to the marriage shall be presumed dead, and with his petition presents evidence, which may be by affidavit or *viva voce*, showing that
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> (a) the other party has been continually absent from the petitioner for a period of seven years or more;
>
> (b) the other party has not been heard from, or heard of, during that period, by the petitioner or, to the knowledge of the petitioner, by any other person;
>
> (c) he has no reason to believe that the other party is living; and
>
> (d) reasonable grounds exist for supposing that the other party is dead, a judge of the court, upon being satisfied as to the truth of the matters stated in the petition and as to the evidence submitted in support thereof, may, in his discretion, make an order declaring that the other party to the marriage shall be presumed to be dead.

[14] See, for example s. 10(3) (4) of the English Trustee Act, 1925. Such applications to the Court as in *In re Cotton*, [1939] 4 D.L.R. 734, might be rendered unnecessary by such a section as 10(3).

(2) An order made pursuant to subsection (1) shall permit the petitioner to obtain a licence under subsection (4) and to enter into the solemnization of the form of marriage so licensed; but, subject to subsections (4), (5) and (6), shall have no other legal effect.

Mr. Arnold M. Campbell, K.C., the Manitoba representative of the Canadian Bar Review Committee, has sent us the following suggested allegations for a petition regarding presumption of death under the new amendment. The form is one in general use in the province and contains the maximum requirements under the Act which have proved acceptable to the judges. For the benefit of members of the profession in Manitoba who may not be familiar with the form we set it out in full.

The following are some suggested allegations for a petition (and /or proof to be made) by a wife for a presumption of the death of her husband:—

In the body of the petition it shall be stated,—

1. The names in full of the petitioner and of the other party to the marriage (the respondent herein), and the present place of residence and occupation of the petitioner.

2. The date of marriage; where and by whom it was performed; the name and place of residence of the respondent at the time of marriage, and the petitioner's name prior thereto; the date of separation and the circumstances under which it took place.

3. The names and places of cohabitation of the parties before separation and the last date and place of cohabitation; the place or places of residence of the petitioner since that date; and, so far as known, that of the respondent since such separation.

4. The date that the petitioner last saw the respondent, and the nature of the last communication (if any) from the respondent; and the last date that the petitioner had any information from anyone of the whereabouts of the respondent.

5. The surviving children (if any) of the marriage, and their place or places of residence. The nature of the answer of each of them to enquiry made of them, or any of them, in reference to the absence of the respondent.

6. A statement whether it was the habit of the respondent to correspond with any of his relatives or any other person.

7. Names, place of residence, and occupation of the respondent's parents (if alive), and of his brothers and sisters (if any), and of any relatives or friends who might have knowledge of his residence after separation from the petitioner.

8. Reason (if any) why the respondent might (if alive) likely correspond with any person; and if none, negative the fact to the extent of petitioner's knowledge.

9. Particulars of any intention by the respondent (if any expressed) as to place or destination.

10. In cases where it is known that the respondent left for some definite place, particulars of the first information received by the petitioner that he had not reached that place,—the reasons why delay (if any) occurred.

11. Statement of enquiries made and answers received (if any) in the effort made to discover the whereabouts of the respondent from any relatives or other persons with whom the respondent might reasonably have corresponded when absent. Any information, supported by belief of the petitioner, which the petitioner has of the movements or occupation of the respondent after separation.

12. Statement of the state of affection or friendship between the petitioner and respondent at the time of separation, and his attitude generally towards the petitioner and/or members of his family and/or other relatives.

13. Negative any known or reported causes, or likely causes, (e.g., legal involvement) for the disappearance or absence of the respondent.

14. Negative any known cause or belief by the petitioner why the respondent might desire to have his residence or identity remain unknown.

15. The age and condition of health and mind of the respondent at the time last seen or heard of.

16. Statement of the theory of the petitioner as to possible cause of death, with the possible date thereof.

17. Statement of any sources from which corroboration might be obtained of any of the allegations in the petition.

18. Statement of any particular special steps taken by or on behalf of the petitioner to locate the respondent.

19. Statement that he has caused to be searched the files kept of national registration, and result thereof.

20. That search has been made of records of the Vital Statistics Branch of the Province where the respondent was last seen or heard of, or from.

21. Whether assistance of police has been requested in connection with the disappearance of the respondent, and the results or report of or from the police.

22. That the petitioner believes that the respondent is dead.

23. Corroboration of the petitioner's belief that the respondent is dead, from some relative by blood of the respondent.

NOTES

1. The affidavit in support of the petition should state any other grounds not specified in the foregoing which might tend to support a presumption of death.

2. If any relative or other person who might likely have received a communication from the respondent within the period since the disappearance of the respondent, did not respond to enquiries made by

or on behalf of the petitioner, or who might not believe that the respondent had become deceased,—a copy of the petition might be sent or delivered to that person.

3. Exceptional cases which may require a smaller number of the above enquiries to be made will be such as, e.g., disappearance following the sinking of a ship or after a military operation.

4. The petition herein being under a provincial statute, the King's Bench Rules rather than the Divorce Rules are applicable.

5. See *Tomberg* v. *Tomberg*, [1942] 3 W.W.R., 542, as to principle and extent of proof required.