CASE AND COMMENT

BANKRUPTCY—IMPROVIDENT ASSIGNMENT OF LEASE BY TRUSTEE —ONTARIO LANDLORD AND TENANT ACT, 14 GEO. V. c. 42.—The case of *Re Bowman*[1] deals with one of those unsatisfactory transactions which may be expected so long as Parliament refrains from appointing an Inspector in Bankruptcy, with some disciplinary power.

It appears from the judgment of Meredith, C.J.C.P., in this case that the trustee of Bowman's estate, without any authorization from the inspectors, purported to assign to one Richard Skale for $10 certain "lands and premises comprised in and demised by" a lease. There was a breach by the landlords of one of their covenants, so that what was done by the assignment, if effectual, was to convey for $10 a law suit in which a large amount in damages might have been sought from the landlords; but Bowman's creditors could get nothing by reason of the assignment.

The case turned on section 38(2) of the Landlord and Tenant Act, as enacted by 14 Geo. V. c. 42. That subsection provides that when a trustee has within three months after the bankruptcy, by notice in writing, elected to retain the demised premises, he can assign the lease to a person approved by a Judge of the Supreme Court of Ontario. The only "notice in writing" in this case was given in the name of the trustee by a solicitor acting both for the trustee and for Skale, as follows: "that we have assigned the lease . . . to Rachel Skale." The learned Chief Justice held that the Act required the trustee to retain, in a case of retention, not to give away; and having retained, to make the most of the retention for the benefit of creditors. In refusing the application made by the trustee for an order approving of Rachel Skale as a fit and proper person to be put in possession of the premises he said: "The enactment plainly prevents that which was done in this case—a gratuitous giving by the trustee to a third person of that which should have gone to the creditors."

L. D.

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PREROGATIVE RIGHT OF THE CROWN.—A note in the June number of the *Canadian Bar Review*[1] stated that the prerogative right

[1] (1927) 33 O.W.N. 243.

[1] 5 C.B. Rev. 431.

of the Crown in Ontario to payment of a debt due by a debtor in Ontario, in right of the province, in priority to the claims of other creditors of such debtor, seems to be no longer existent. In the October number,[2] it was suggested that the prerogative right, as to debtors in right of the Dominion, had also been abolished in Ontario. The case of *In re West*,[3] which held that the prerogative right to priority of payment of debts due by debtors to the Crown in right of the Dominion still existed, was referred to in the latter note, but it was pointed out that the Honourable Mr. Justice Orde, in deciding that case, did not have before him the pre-confederation legislation on the subject. This legislation will be found in 29 & 30 Victoria, Cap 43, Section2. It abolished the prerogative right as against Crown debtors in Upper Canada. The act was in force at Confederation, having been passed by the old Province of Canada, and was continued in force by the B.N.A. Act.

In the case of *Re D. Moore Co. Ltd.*,[4] which was a motion before Fisher, J., the question submitted was whether or not the Crown ranked as a preferred creditor for sales tax, or as an ordinary creditor. The learned Judge cited the pre-confederation statute before mentioned and the fact that under the B.N.A. Act the said statute is still in force, mentioning that the Act of 1866 was not brought to the attention of Orde, J., in the *West* case (*supra*), and that it did not appear to have been considered in the subsequent cases. Not agreeing with the decision of the Honourable Mr. Justice Orde, and, according to the note in the *Canadian Bar Review*,[5] being unable to follow the reasoning of the Honourable Mr. Justice Audette in the case of *Holmstead* v. *Minister of Customs*,[6] the learned Judge referred the motion to the Appellate Division of the Supreme Court of Ontario for decision.

The case of *Holmstead* v. *Minister of Customs* (*supra*), above referred to, involved the question whether legislation, passed by the old Province of Canada, denying the right to tax or exempting any subject in Ontario to pay such tax, was still valid, after the passing of the B.N.A. Act. After setting out the facts, the judgment continues as follows:—

> The legislative power of the Old Province of Canada to tax or exempt from taxation cannot prevail as against the legislative power of the Dominion conferred by the B.N.A. Act. Exemptions are matters of favour and special

[2] 5 C.B. Rev. 633.
[3] 2 C.B.R. 3.
[4] 32 O.W.N. 421.
[5] 5 C.B. Rev. 633.
[6] [1927] Ex. C.R. 68.

privilege and should be limited in their operation to the field of legislative authority in which they were created. They disappear in the event of a change in the constitution of the political community, such constitution depriving, either expressly or by implication, the pre-existing legislature of authority over a new field of taxation.

The power and authority to raise revenue for Dominion purposes is specially given the Parliament of Canada, under the B.N.A. Act, and any legislation passed by the Old Province of Canada denying the right to tax —or exempting any subject in Ontario to pay such tax—could not obtain and be valid after the passing of the B.N.A. Act. .. .. .. When the Dominion passed the Income Tax Act of 1917, it entered upon a proper field of legislation hitherto lying dormant. This legislation cannot be controlled or limited by any inconsistent or repugnant legislation enacted by a legislature whose powers were taken away *quoad hoc* by the provisions of a new Constitution.

The learned Judge found that this pre-confederation legislation was repealed by the B.N.A. Act.

The case of *Re D. Moore Co. Ltd.*,[7] referred by Mr. Justice Fisher to the Appellate Division, is now reported in the *Ontario Weekly Notes* and *The Canadian Bankruptcy Reports*.[8] The question at issue involved the determination of the Crown's rights, upon bankruptcy of a debtor, with respect to moneys payable under The Special War Revenue Act, 1915, and, in fact, as to practically all Dominion taxation. The Court decided that:—

The Dominion Bankruptcy Act is, in all matters now under consideration, applicable to the Crown: see sec. 86. .. .. .. The Crown has surrendered its prerogative right to be paid debts due to it in priority to debts due to a subject, save only debts that fall within subsec. 6.

This decision, it should be noted, follows the judgment of Orde, J., in the *West* case (*supra*).

In the course of the case, counsel argued that the Crown Debtors Act of the old Province of Canada, passed in 1866, which destroyed the prerogative right of the Crown, had not been effectively repealed. The words of the judgment dealing with this aspect of the case are as follows:—

When the Imperial Parliament, by the British North America Act, created the Dominion of Canada, Her Majesty remained the Sovereign of Canada; and, so far as all prerogative rights of the Sovereign, 'in the right of the Dominion', are concerned, these rights existed absolutely untrammelled by any pre-existing legislation of any of the Provinces entering the Dominion.

The prerogatives of the Crown are not to be taken away save by express enactment, and it can hardly be conceived that the intention of the Imperial

[7] (1927) 33 O.W.N. 176.
[8] (1927) 33 O.W.N. 176, at p. 177; 8 C.B.R. 479.

Parliament, when constituting the Dominion, was that the rights of the Crown, as representing that Dominion, should vary from Province to Province, having regard to the pre-existing state of law in the different Provinces. The 'laws' of the former Provinces, preserved by sec. 129 of the British North America Act, had no application to the then unborn Dominion.

It was held that the Crown had the right, with respect to the taxes in question, to rank in the manner provided by section 51 of the Bankruptcy Act, and it was ordered that the taxes were to be paid out of the bankrupt's assets available for distribution, in priority to the claims of the other creditors. This decision is in accord with that of the Honourable Mr. Justice Audette in the case of *Holmstead* v. *Minister of Customs* (*supra*), particularly as regards the effect of pre-confederation legislation of the provinces upon subsequent Dominion legislation.

A. S. B.

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DRUNKENNESS AS A DEFENCE TO THEFT.—In a recent case, *Rex.* v. *Morrow*,[1] heard on appeal by the Court of Appeal (Second Appellate Division of the Supreme Court of Ontario), the charge was theft of an automobile, and the defence and grounds of appeal were that the accused was so drunk he was incapable of forming an intent to steal, and that therefore no crime had been committed. The appeal was dismissed. The reported decisions in which the defence has been given effect to by the Courts are so rare that the question arises whether the defence is sound in law, and if so, whether there is any inherent difficulty in proving the particular facts required to be proved in order to justify its application.

Voluntary drunkenness, prior to 1800 was considered to be rather an aggravation than a defence to any crime. Coke upon Littleton, 247a, says:—

> As for a drunkard who is *voluntarius daemon*, he hath (as hath beene said) no privilege thereby, but what hurt or ill soever he doth, his drunkenesse doth aggravate it.

This view prevailed until early in the 19th Century when the rigidity of the rule was slightly relaxed in favour of a degree of drunkenness which could be described as habitual drunkenness causing continuous insanity.[2] Drunkenness then came to be considered from the point of view of its effect on intention. In *Reg.* v. *Cruse*,[3] an indictment for assault with intent to murder, Mr. Justice Patteson

[1] Unreported.
[2] *Rennie's case* (1825) 1 Lewin C.C., p. 76.
[3] (1838) 8 Car. & P., p. 546.

directed the jury that although drunkenness is no excuse for crime, yet it is often of very great importance in cases where it is a question of intention. In *Reg.* v. *Moore*,[4] drunkenness was held to negative the intent in a case of attempted suicide, Chief Justice Jervis saying:

> If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself.

In *Reg.* v. *Doherty*,[5] Mr. Justice Stephen said:—

> Although you cannot take drunkenness as an excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime.

The cases were reviewed in *Director of Public Prosecutions (on behalf of His Majesty)* v. *Beard*.[6] An appeal from the English Court of Appeal to the House of Lords, and the rule of law stated to be, pp. 193 and 194:—

1. That insanity whether produced by drunkenness or otherwise is a defence to the crime charged.
2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequence of his acts.

The second part of the rule is expressed more fully at page 192 as follows:—

> These decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was only committed if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime, but that the state of drunkenness may be incompatible with the actual crime charged, and may, therefore, negative the commission of that crime.

Intent and *mens rea* being essential elements in the crime of

[4] (1852) 3 Car. & K., p. 319.
[5] (1887) 16 Cox C.C., 306, at p. 307.
[6] 14 Cr. App. R. 159.

theft,[6a] a degree of drunkenness incapacitating the accused from forming such intent would appear to be a complete defence. In *Russell on Crimes, Eighth Edition,* at page 91, it is stated:—

> There is no reported decision in England on the question whether drunkenness can be considered as negativing the *animus furandi* in larceny, but the English rule as to the effect of drunkenness on criminal responsibility seems to have been correctly laid down in a New Zealand case, *R.* v. *Mathieson.*[7]

In this case the charge was breaking and entering a store and stealing therefrom tobacco and cigarettes. The evidence showed that the prisoner was under the influence of liquor when the alleged offence was committed. Cooper, J., at page 880, says:—

> If a man chooses to get drunk, it is his own voluntary act. In cases, however, where the intention is the main ingredient of an offence, drunkenness may, under certain circumstances, amount to a sufficient defence. . . . But if the drunkenness is such as to take away from his act all criminal intent, then the act is not criminal.

The verdict was not guilty of breaking and entering the store, but guilty of stealing the tobacco and cigarettes. The defence was raised in at least one reported case in England, *William Chapman.*[8] The charge was theft of a pair of boots, the defence, drunkenness, and the question: Was the prisoner incapable of forming a felonious intention? It was held that under the circumstances the legal question of whether or not drunkenness could be a defence was immaterial.

The American cases are more numerous. In the *State* v. *Kavanaugh,*[9] the charge was larceny and the defence that the prisoner was intoxicated and suffering from *delirium tremens.* After discussing *delirium tremens* as a defence, Grubb, J., at page 337, adds:—

> In cases in which a specific or particular intent or purpose is an essential or constituent element of the offense, as in the case of larceny, intoxication, even though voluntary, becomes a matter for consideration, and is competent evidence on the question whether the defendant was capable of forming such an intent or purpose at the time the act was perpetrated. The verdict was "Not Guilty."

In *Chatham v. The State,*[10] the charge was larceny from a storehouse. There was some evidence that the accused was drunk at the time of the commission of the offence and he himself testified that

[6a] See section 347 of the Criminal Code and *Hirshman* v. *Beal* (1916-17), 38 O.L.R. 40, at p. 45.

[7] (1906) 25 N.Z. L.R. p. 879.

[8] 4 Cr. App. R. 54.

[9] 53 Atl. R., p. 335.

[10] (1890-91) 92 Ala. R. 47.

he did not remember anything which occurred on that day. Clopton, J., cites a number of authorities, and at pp. 48 and 49, says:—

> While, as a general proposition, voluntary drunkenness neither excuses nor palliates an offense, yet its excessiveness may produce such a mental condition as to render the intoxicated person incapable of forming or conceiving a specific intent or purpose. . . . There being some testimony tending to show that the defendant was drunk, he had a right to have the jury pass upon its credibility and sufficiency to prove that he was so drunk as to be incapable of forming the specific intent to steal.

To sustain the defence, there must evidently be proved a degree of drunkenness which renders the accused incapable of forming an intention to steal and such other facts as will raise the inference that there was an entire absence of such intent prior to the taking in question. Coleridge, J., in *Rex.* v. *Monkhouse*,[11] says:—

> Such a state of drunkenness may no doubt exist. To ascertain whether or not it did exist in this instance, you must take into consideration the quantity of spirit he (the accused) had taken, as well as his previous conduct. His conduct subsequently is of less importance, because the consciousness (if he had any) of what he had done might itself beget considerable excitement.

In *The State* v. *Kavanaugh* (supra), Grubb, J., says:—

> It is manifest that great caution is necessary in the application of this doctrine, and those whose province it is to decide in such cases should be satisfied from all the facts and circumstances before them that the unlawful act was committed by the accused when his mental condition was such that he did not know that he was commiting a crime, and also that no design to do the wrong existed on his part before he became thus incapable of knowing what he was doing.

On the facts, *Rex.* v. *Morrow* (supra) appeared to be a case where the defence could reasonably be advanced. It is submitted, with deference to the judgment of the learned Court of Appeal, that there was nothing in the previous conduct of the accused which indicated an intention to steal the car and the degree of drunkenness was great enough to raise the inference that there was no capacity to form an intention, the accused being unable to walk and in the words of the railway constable who found him in the middle of the tracks of a railway platform "crazy drunk." On the other hand there was the fact that the car had been driven for several blocks, a feat difficult to reconcile with complete incapacity. As to whether or not the accused had actually driven the car himself, there was no evidence. In any event, the learned Court held that there was not sufficient

[11] 4 Cox C.C. 55 at p. 56.

evidence favourable to the accused to justify giving him the benefit of the doubt.

In the result it may be said that though the defence is sound in law, that the facts necessary to support it rarely exist, and when they do, are frequently not susceptible of proof. The crux of the matter is the degree of drunkenness and it appears to be invariably difficult to prove that at the time the taking took place, the accused had reached that state of drunkenness recognized by law as negativing intent.

V. L. P.

* * *

ABSOLUTE ADOPTION.—A matter, *Re William Scott Estate,* unreported at the time of writing, has just come before Kilgour, J., of the Court of King's Bench for Manitoba, involving the interpretation of the provisions of The Child Welfare Act, (S.M.C.A. 1924, c. 30) regarding absolute adoption in respect to an adoption agreement entered into nearly thirty years before the date on which such Act came into force.

In 1897, A., a widower, being unable to give to B., his infant daughter (then eight years of age), that degree of care and attention which he considered necessary for her proper nurture, training, and education, entered into a written agreement under seal with C. for the adoption of B. by C. In the agreement C. covenanted to rear, nurture, care for, maintain, educate, and train B. as though she were his own daughter until she attained maturity, and in every respect to treat her as a parent would his own child; and in consideration of this covenant A. agreed that C. should have "the sole and absolute control and custody of" B. until she attained her majority. A. further agreed, that so long as C. supported, maintained, and educated B. in a manner suitable to C.'s position in life and performed the duties of a parent A. would allow C. to retain the custody and control of B., and would refrain from all acts or deeds and from taking any proceedings to recover the custody or control of B., and would not as against C. assert his legal rights as parent or natural guardian, but would so far as he was able defend and maintain the rights of C. to the custody, control, and guardianship of B. The agreement also contained a declaration that it was the intention of the parties thereto, so far as it could legally be done by contract, to transfer from A. to C. all the rights, liabilities, duties, and obligations of a parent in respect of B. At the time this agreement was entered into B. was, and had been for some time previous thereto, living with

and being cared for by C., and B. continued thereafter so to live with C., who continued to support, maintain, and educate B. as his own child; and B. came to be called by C.'s surname, until her marriage in 1911, at which date she had maintained twenty-two years of age. During the whole of this time she never saw or, save indirectly, heard of A., who never asserted any rights of parentage he may have had in respect to B.

It will be observed that it was clearly the intention of the parties to effect an absolute adoption of B. by C., so far as it was then possible to effect this. Under the Roman Law and certain systems based upon it, and under the statute law of certain of the United States of America, absolute adoption can be effected. The principle of absolute adoption, however, is not recognized by the law of England.[1]

The position in regard to adoption in Manitoba at the time the agreement referred to above was entered into appears to be that shown by the Infants Act, R.S.M. 1892, c. 79, s. 4, (as amended by 58 and 59 Vic. c. 18, s. 17) and s. 5; which sections read as follows:—

4. Any parent or guardian, or any other person having the care or charge of a minor, or any charitable society or any society incorporated under "The Humane Societies Act," authorized in case of either society by the Lieutenant-Governor to exercise the powers conferred by this Act, may, with the minor's consent if the minor is a male not under the age of fourteen years or is a female not under the age of twelve years, and without such consent if he or she is under such age, constitute by indenture, to be the guardian of the child, any respectable, trustworthy person who is willing to assume, and by indenture or other instrument in writing doth assume, the duty of a parent towards the child; but the parent shall remain liable for the performance of any duty imposed by law in case the guardian shall fail in the performance thereof.

5. The guardian shall thereupon possess the same authority over the child as he or she would have, were the ward his or her own child, and shall be bound to perform the duties of a parent towards such child.

The expression "minor" when used in the Act means, any person under the age of twenty-one years: sec. 2 (a); and under sec. 19, the guardian is given the care of the person and education of the ward.

It will be observed that the wording of the sections referred to above is not such as would have the effect of changing the status of the parties, or enabling either the adoptive child or parent to inherit from the other.

Sec. 128 of the Manitoba Child Welfare Act, 1924 S.M. (Con. Amendts.) c. 30, provides as follows:—

[1] 17 Hals., art. 260.

128 (1). When a child is adopted in accordance with the provisions of this Act, all rights and duties as between such child and its natural parents shall cease and determine, subject to the same being restored in the event of the child being subsequently returned to the care and control of his or her own parent or parents pursuant to the provisions of section 130 hereof. Such child shall thereafter be deemed and held to be for every purpose the child of his or her parent or parents by adoption as fully as if by natural birth, and such child shall take the name under which it is adopted. Such child shall be entitled to proper support, nuture and care from such parent or parents by adoption and shall be capable of inheriting from, and as the child of such parent or parents by adoption as fully as if by natural birth. Such parent or parents by adoption shall be entitled to the services, wages, control, custody, and company of such adopted child and shall be capable of inheriting from, and as the parent or parents of, such adopted child as fully as if the child had been the child of such parent or parents by natural birth. Provided, however, that neither such adopted child nor such parent or parents by adoption shall be capable of inheriting from or taking through each other property expressly limited to heirs of the body of such child or parent by adoption.

(2) When a child is adopted he or she shall not lose the right to inherit from his or her natural parents or kindred.

By S.M. 1926, c. 4, sec. 15, a new section is added (132A), which reads as follows:—

132A. Every agreement, whether made in Manitoba or otherwise, between the Children's Home of Winnipeg, a Children's Aid or other similar society or a person having the legal guardianship of a child, and any person or persons for the adoption of such child, made prior to the first day of September, 1921, is hereby made absolute, and every child so adopted shall be deemed to have been adopted under the preceding provisions of this Act; and any such agreement made after such date but prior to the first day of September 1924, may be made absolute, for all purposes as if the child had been adopted under the preceding provisions of this Act, by a County Court Judge upon application to him in that behalf, if such application is supported by the report, in writing, of the Director that he has made due inquiry and is satisfied that the agreement was entered into in good faith by all parties thereto and that the best interests of the child will be served by the same being made absolute; the judge hearing any such application may make or cause to be made any enquiries, and hear any person for or against the application, as he may see fit.

C. died on the 15th May, 1926, and the chief controversy as to C.'s will, the subject of the proceedings, centred round the effect which the above mentioned adoption agreement and the provisions of the Child Welfare Act and amendments had on the status of B. Was the effect of the agreement, the adoption, and the legislation noted above to derogate from the Common Law rule and change the status of B. to the extent of placing her in the position of the natural-born child of C.? His Lordship held that it was.

Amongst the arguments advanced against such an interpretation was the contention that such a construction was never intended by the Legislature, as the effect would be to disturb vested interests and property rights, and that the Court should, therefore, if necessary, sacrifice the obvious and grammatical sense of the words in order to find some construction less sweeping and far-reaching. While the provisions of 132A were in form retroactive, it was contended that they ought not to be given any greater retrospective effect than was strictly necessary; and there should therefore be read into the section, as qualifying the word "child," some such phrase as "being a child at or after the date of the passing of the Act."

The term "child" is defined by the Act (sec. 2 (b)) as "a boy or girl actually or apparently under eighteen years of age;" and his Lordship held that admittedly B. was a child under eighteen years of age when the adoption agreement was entered into, and he was unable to find anything in the preamble or general scope and purview of the Act to restrict the wording of sec. 132A from its plain, grammatical meaning, and he decided that the Act had taken the whole relationship of foster parent and child out of the region of contract and placed it on the higher plane of status. His Lordship referred to certain amendments to the Act made by S.M. 1927, c. 3, sec. 3 of which amends sec. 132A, as enacted in 1926, by deleting from the third line the words, "Children's Aid or other similar society," and provides that the section shall be construed as if it had been originally enacted as so amended; and sec. 11 provides as follows:—

> 11. Subsection (1) of section 128 of said Act is amended by substituting for the words 'shall be capable of inheriting from, and as the child of, such parent or parents as fully as if by natural birth', in the thirteenth and fourteenth lines, the words 'shall have the same rights of inheritance as a child of such parent or parents by natural birth', and by substituting for the words 'shall be capable of inheriting from and as the parent or parents of, such adopted child', in the seventeenth and eighteenth lines the words 'shall have the same rights of inheritance from or through such child.'

He also refers to a number of American cases dealing with statutes similar to the Child Welfare Act.[2]

Another contention was that sec. 132A as amended in 1926 did not extend to an adoption agreement by a father, that the only person who under the section could make such an agreement was the Children's Home of Winnipeg, or a person *ejusdem generis* having legal

[2] *Power* v. *Hafley*, 4 S.W. 683; *Rasmussen* v. *Rasmussen*, (1912) 35 Lawyers Reports (Ann.) N.S. 216; and *Appeal of Latham* (Maine), 126 Atl. 626.

guardianship of a child. The Act (sec. 2 (n)) refers to a parent as including a guardian and every person who is by law or in fact liable to maintain a child. Under English law the natural and primary guardian of a child is its father:[3] and his Lordship held that the context of the Act excluded the *ejusdem generis* rule, and that A. was the guardian of B. within the meaning of the Act.

Another argument advanced was that the agreement of 1897 was not an adoption agreement, the word "adoption" having nowhere been used in the agreement; but his Lordship held that adoption essentially meant the transfer to a foster parent of the rights and obligations of a natural parent; and the adoption agreement and the whole course of conduct and events effected this.

A further contention was raised, that the adoption agreement was a mere agreement which had spent itself when the child attained maturity. In respect of this, his Lordship held, that while adoption may originate in contract, like the marriage contract, it is now, under the Child Welfare Act, far more than a contractual nexus; a status is created, and the word "inheriting" would appear from the concluding proviso of section 128 (1) to connote something more than the mere succeeding to property rights upon an intestacy. There seemed to be no reason why capacity to inherit should not include and mean the capacity to take property by operation of law upon the death of a person whether the operation of law is brought about by a statute of distributions, Devolution of Estates Act, or an Insurance Act.

The result of this decision is, that where in Manitoba there has been an adoption agreement entered into between, *inter alios*, a person having the legal guardianship of a child (e.g. its father) and any person for the adoption of such child previous to the 1st September, 1921, (no matter how long before that date the agreement may have been entered into), such child for every purpose is deemed to be, and to have the same rights of inheritance as, the child of its parent or parents by adoption as fully as if by natural birth.

F. READ.

* * *

THE WIFE AND THE HOMESTEAD—HOW LONG HAS SHE PROTECTION.—Is a wife's claim to the homestead good only while she resides on it, or during twelve months after she has quit it, or, irrespective of limit, if she discovers a flaw?

[3] 17 Hals., par. 286.

If we are to carry the *Frostad* case[1] to its logical goal, the answer seems to be that, as against her cozener, the wife holds her homestead rights quite irrespective of time limit. In other words, if a wife is cheated out of her homestead it does not matter that long before she takes action to upset the sale, the land has ceased to be the family home. This dictum, of course, must save the rights acquired by an innocent purchaser, on the strength of public records. In the *Frostad* case (*supra*) there was serious delay and the writ was certainly not issued within twelve months of the family's leaving the farm, nor within twice that time; but there was no evidence to show an undue delay after the wife had fully discovered the fraud.

Mrs. Frostad and her husband had been dwelling on their farm homestead for years prior to Christmas, 1923. About Christmas they moved off to live with a fellow-countryman named Libek, and two months later the husband signed an agreement to trade to Libek the homestead farm for some mining rights. Mrs. Frostad did not sign this contract, but she did a few days later sign the transfer. She had no separate advice in so doing, and may not even have understood what her signature meant. At any rate Libek's agent, a J.P., took it on himself to fill up the usual certificate without the usual interview, and the transfer went safely through the L.T.O.

Later on Libek sold to an innocent purchaser on terms, and, still later, the wife discovered her rights and filed a caveat. That happened a day or two short of one year from the time of the transfer, and fourteen months from the date that the Frostad family had quit the homestead. Another complete year went by before the wife commenced her action to recover her homestead. What had justified that extra year's delay? The report does not show. Despite the delay the Judges, six in number both trial and appeal, upheld the wife unanimously; but they also upheld the innocent purchaser from the guilty transferee. He must be privileged to buy the land on the agreed terms, while Mrs. Frostad gets restoration of her homestead title, and therefore the balance still due.

G. C. T.

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THE SOLICITOR'S AUTHORITY—DOES RETAINER INVOLVE FEES?—

There was a young lady of Cicester
Who went to consult her solicitor:
When he asked for his fee
She said: "Fiddle-de-dee,
I only looked in as a visitor."

[1] *Frostad* v. *Libek and Wagner*, [1927] 3 D.L.R. 916; (1927) 21 S.L.R. 603.

Lawyers are apt to know only too well the young lady of Cicester; but they might be excused for believing themselves safe in transacting with registered public companies.[1] This case will make them wish, not for the first time, that some corporations had a soul to be damned. At any rate it is to be hoped that the defendant herein has a fiscal body to be kicked. It allowed a solicitor to obtain in its name and for its sole benefit a judgment of $2,963.16, and to garnish under such distinct telegraphic authority as:—"This will be your authority to take legal action against Hodgins & Hare to protect our interests." On the strength of that, the action went on with the corporation as nominal as well as actual plaintiff. Then after the whole suit was over the company wrote:—

> We certainly hope that you and Mr. Labelle understood that we are *not* in any way responsible for any charges in connection with this suit as Labelle apparently deemed it advisable to take Court action, and in order to assist him we agreed.

The Judge stigmatised this as "a most extraordinary missive."

The corporation was one of those companies that finance auto sales, and Labelle was a dealer who had sold his vendor's contracts to the corporation, and who afterwards fell into financial misfortune. The company had to admit that they had retained their solicitor, but tried to reason that they had made no agreement to pay him; their assignor Labelle (who got nothing out of the suit) should have paid him! Very naturally the Judge held that if the client is to evade liability for costs the retainer by it to its solicitor must show a clear agreement that the client is *not* responsible for costs.

G. C. T.

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HUSBAND AND WIFE—GROUNDS FOR DESERTION.—In the useful Alberta case of *Clarke* v. *Clarke*,[1] we have a new test of the type of conduct that will excuse desertion.

> Mere infirmity of temper accompanied by the free use of a vulgar and abusive tongue, an occasional resort to physical violence not directed against the person of the husband, and futile threats of bodily harm to him.

do not amount to just cause for desertion by the husband. They would provide an exceedingly unhappy home for the husband, but not an impossible or dangerous one. Here was a powerful man well able to protect himself; and in case one should grieve too much over

[1] *Earle* v. *Continental Guarantee Corporation of Canada*, [1927] 4 D.L.R. 939; (1927) 3 W.W.R. 784.

[1] (1927) 3 W.W.R. 728.

his lamentable fate the evidence disclosed him as having decided weaknesses of his own, with no special desire to remedy matters.

G. C. T.

BOOKS AND PERIODICALS.

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A Selection of Cases on the Sale of Goods. By John Delatre Falconbridge, Dean, Osgoode Hall Law School. Toronto: The Canada Law Book Company, Limited. 1927.

This book recently published is one of a series of draft case books prepared by various law teachers and used in mimeographed form for some years in some of the Canadian Law Schools. It is the first of the series to be published. A critical perusal dictates the hope that it shall not be the last.

There has not been hitherto in Canada unanimity as to the place of the case book in legal education. Some teachers rely on oral lectures supplemented by the citation and reading of cases; others make the case book the basis of the course and rely on the class room discussion without formal lectures. Whatever be the respective merits of these two systems there is clearly discernible in Canada and England an inclination to the view that the case book as such has an essential place in every curriculum. It is a matter of individual preference on the part of the teacher as to what degree of emphasis shall be placed on the case book but there can be no doubt that a properly selected collection of cases is of immense advantage to both teacher and student.

The lecture method presents the student with a series of general principles with illustrative cases arranged and pre-digested by the lecturer. Unfortunately the lawyer is confronted not with principles of law but with sets of facts which must be analyzed and reduced to their essentials before the relevant principle can be found. The case-method thus trains the student to inductively discover his law from his facts and also develops a critical habit of mind; (subject to certain qualifications) is would seem to be the preferable method where the time available and the ability of the teacher permits.

As a member of the teaching Faculty of Dalhousie Law School the present reviewer had the experience of using Dean Falconbridge's book for two years and it is in the light of that experience that his comments are respectfully offered.

A case book is a collection of cases on a given topic compiled for teaching purposes according to the compiler's experience as to which are the most suitable cases for that purpose. Obviously one teacher's experience may not correspond with that of others; it is therefore idle to point out reasons why any given case should have been included or omitted or to take issue with