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SUPREME COURT OF CANADA.

OTTAWA, 6 June, 1896.

Quebec.]

LAINE v. BELAND.

Sale—Immovables by destination.

An action was brought by L. to revendicate an engine and two boilers under the resolutory condition (*condition résolutoire*) contained in a written agreement providing that until fully paid for they should remain the property of L., and that all payments on account of the price should be considered as for rent for their use; and further, that upon default L. should have the right to resume possession and remove the machinery. The machinery in question had previously been imbedded in foundations in a saw mill which had been sold separately to the defendants, and, at the time of the agreement, the boilers were still attached to the building, but the engine had been taken out and was lying in the mill yard, outside of the building. Whilst in this condition the defendants hypothecated the mill property to the respondent, and the hypothecs were duly registered. The engine was subsequently replaced in the building and used for some time in connection with the boilers for the purpose of running the mill. The agreement respecting the engine and boilers was not registered. The respondent intervened in the action of revendication, and claimed that the machinery formed part of the freehold and was subject to his hypothecary lien upon the lands.

Held, that notwithstanding the conditions in the agreement, the dealings that had taken place between L. and the defendants, and the consent by L. that the machinery should remain affixed in the mill, constituted an absolute sale thereof so long as it continued incorporated with the freehold, and, in so far as regarded the rights of persons who were not parties to the agreement, the engine and boilers had become immovables by destination and formed part of the real estate.

That such parts of the machinery as were actually attached to the mill or built into the foundations at the time of the hypothecs were charged thereby as part of the freehold, and that the conditions in the agreement did not confer any privilege upon the unpaid vendor which would deprive the registered hypothecary creditor of the priority he had acquired under the provisions of the law relating to the registration of real rights.

Wallbridge v. *Cardwell*, (18 Can. S. C. R. 1.), followed.

Appeal dismissed with costs.

Belleau, Q.C., for appellants.

Robitaille, for respondent.

Ontario.] 18 May, 1896.

CRAWFORD ET AL. v. BRODDY ET AL.

Will, Construction of—Death without issue—Executory devise over—Conditional fee—Life estate—Estate tail.

A testator died in 1856 having previously made his last will which was subdivided into numbered paragraphs and dated on the 27th May, 1852. By the third clause he devised lands to his son F., on attaining the age of 21 years,—"giving the executors power to lift the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of 21 years,"—and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be equally divided among the survivors." F. attained the age of 21 years and died in 1893, unmarried and without issue.

Held, that the subdivision of the will into sections or paragraphs could not authorize a departure from the general rule as to the construction of wills according to the ordinary grammatical meaning of the words used by the testator, and that as

there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to all the property devised to the testator's sons and daughters by all the preceding clauses of the will. (Decision of the Court of Appeal for Ontario, reversed.)

Held, further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee, and that, thus, the first devisee took an estate in fee subject conditionally to the executory devise over.

Appeal allowed with costs.

Chrysler, Q.C., for appellants.
Blain & McFadden, for respondents.

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18 May, 1896.

Ontario.]

RENNIE v. BLOCK.

Chattel mortgage—Mortgagee in possession—Trespass—Negligence—Wilful default—Sale under powers—"Slaughter sale"—Practice—Parties—Agent of bailiff—Assignment for the benefit of creditors—Revocation of.

A mortgagee in possession selling mortgaged goods which constituted the general stock of a trader, must conduct the sale in such a manner as a merchant would do in the ordinary management of his business, and where the goods were sold recklessly or improvidently, at unusually low prices and without taking proper precautions to prevent their being lost or damaged, the mortgagee if wilfully in default is liable to account not only for what he actually received but also for what he might have obtained for the goods, of which he was the trustee, had he acted with proper regard for the interest of the mortgagor.

Where the plaintiff's right of action accrues from the wilful default of a mortgagee in possession, the agent or bailiff acting for the mortgagee is not a proper party to be joined as a defendant in the suit.

After the commencement of the action the plaintiff made a general assignment of his estate for the benefit of his creditors, but at the first meeting of the creditors they all refused to execute or accept the benefits thereof, whereupon the assignee

notified the plaintiff in writing of such refusal and that the assignment had not been registered, but no formal reconveyance was made.

Held, that under the circumstances, the plaintiff was not precluded from proceeding with his action, and that the execution of a written instrument was not necessary to restore the assignor to his original rights.

Appeal allowed with costs.

O'Donohue, Q.C., & Meek for appellant.
Watson, Q.C., for respondents.

Ontario.] 6 June, 1896.

STEPHENS v. BOISSEAU.

Debtor and creditor—Payment by debtor—Appropriation—Preference—R. S. O. (1887), *c.* 124.

A trader carrying on business in two establishments mortgaged both stocks to B. as security for indorsements on a composition with his creditors, and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months after, the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, and applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after, B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B. who received, out of the proceeds of the sale of the goods under an order of court, the balance remaining due on his mortgage. *Horsfall* v. *Boisseau* (21 Ont. App. R. 663). The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt which was paid by the purchase of the first stock, and which payment was alleged to be a preference to B. over the other creditors.

Held, affirming the decision of the Court of Appeal, that there was no preference to B. within R. S. O. (1887, c. 124, s. 2); that his position was the same as if his whole debt, secured and unsecured, had been overdue, and there had been one sale of both stocks of goods realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under sec. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale which would have deprived B. of the benefit of such set-off.

Appeal dismissed with costs.

Gibbons, Q.C., for the appellant.
Kappele, for the respondent.

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6 June, 1896.

Ontario.]

CARTER v. LONG.

Trust—Principal and agent—Advances to agent to buy goods—Trust goods mixed with those of agent—Replevin—Equitable title.

If an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the funds producing it.

If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance.

Under the present system of the procedure in Ontario an equitable title to chattels will support an action of replevin.

Judgment of the Court of Appeal (23 Ont. App. R. 121) affirmed.

Appeal dismissed with costs.

Gibbons, Q. C., for appellant.
Crerar, for respondents.

Ontario,] 6 June, 1896.

PURDOM v. PAVEY.

Action—Jurisdiction to entertain—Mortgage on foreign lands—Action to set aside—Secret trust—"Lex rei sitæ."

An insolvent firm assigned for the benefit of creditors. Shortly after the assignment a brother of E. D., a member of the firm, died in Oregon, U. S., and left real estate there which he devised to his parents for life and at their death to E. D., who some months after sold his interest to his father who mortgaged the lands to P. An action was brought by creditors of the insolvent firm to have this mortgage set aside as fraudulent, and a demurrer to the statement of claim was allowed. *Burns* v. *Davidson* (21 O.R. 547). The action was then abandoned and another brought in which it was alleged that P. took the mortgage as trustee only for E. D. in pursuance of a fraudulent scheme to hinder, delay and defraud the creditors of the firm, and it was asked that P. be declared a trustee for D. of the said mortgage and the monies secured thereby. A demurrer to this statement of claim was allowed by Armour, C. J., but his judgment was reversed on appeal.

Held, reversing the decision of the Court of Appeal (23 Ont. App. R. 9) that the action would not lie; that the above allegation could only be read as one impeaching the mortgage transaction as fraudulent for having been made on a secret trust; that so far as the lands were concerned the validity of the transaction depended on the law of Oregon, and it was not alleged that according to that law a constructive trust would arise by reason of the intent to hinder and delay creditors, and the court could not assume that the law of Oregon corresponded to the statutory law of Ontario; that the debt could not be separated from the security, and it was doubtful if the action would lie even if only an attachment of the debt had been asked for; and that the action was in substance an attempt to get satisfaction by way of equitable execution for debt out of a mortgagee's interest in foreign lands.

Appeal allowed with costs.

Purdom, for appellants.
Gibbons, Q.C., for respondents.

6 June, 1896.

Nova Scotia.]

WARNER v. DON.

Personal chattels—Fixtures.

The "Fixtures" included in the meaning of the expression "Personal Chattels" by the tenth section of the Nova Scotia "Bills of Sale Act," are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to, or in any way affecting, the land; and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.

An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia "Bills of Sale Act," (R. S. N. S. 5 Ser. c. 92) and there is now no distinction in this respect between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee.

Appeal dismissed with costs.

Harris, Q.C., for the appellant.

Harrington, Q.C., for the respondents.

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6 June, 1896.

New Brunswick.]

RICHARDS v. BANK OF NOVA SCOTIA.

Principal and agent—Agent's authority—Acting beyond scope—Representation.

The manager of a branch of a bank induced the drawee of a draft to accept by representing that the bank held goods as security for it, and when the goods were sold the draft would be protected. This representation was made to serve the interests of the manager himself, who was speculating in the goods, as well as those of his brother. The bank sued the acceptor on the draft, who pleaded that he was induced to accept by fraud of the manager and for the accommodation of the bank.

Held, affirming the decision of the Supreme Court of New Brunswick, that the representation made to further the private ends of the manager himself, or of a third person, could not be said to be the representation of the bank; and that it was immaterial whether or not the acceptor believed the agent had authority to make it.

Held also, that if the manager was the bank's agent to present the draft and procure its acceptance, the bank was only affected with the agent's knowledge of what was material to the transaction and that it was his duty to make known to his principals.

Appeal dismissed with costs.

Blair, Q.C., Attorney-General of New Brunswick, and *Pugsley Q.C.*, for the appellant.

Borden, Q.C. and *Coster*, for the respondents.

North-West Territories.] 18 May, 1896.

HOWLAND v. GRANT.

Debtor and creditor—Composition and discharge—Acquiescence in—New arrangement of terms of settlement—Waiver of time clause—Principal and agent—Deed of discharge—Notice of withdrawal from agreement—Fraudulent preferences.

Upon default to carry out the terms of a deed of composition and discharge, a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented.

Held, that a creditor who had benefited by the realization of the assets, and by his action gives the body of the creditors reason to believe that he had adopted the new arrangements, could not repudiate the transaction upon the ground that the new arrangements were not fully understood, without at least a surrender of the advantage he had received through them.

The debtor's assent to allow such repudiation and grant better terms to the one creditor, would be a fraud upon the other creditors, and, as such, inoperative and of no effect.

Appeal dismissed with costs.

Kappele, for the appellants.

Lougheed, Q.C., for the respondent.

Nova Scotia.] 18 May, 1896.

CITY OF HALIFAX v. LITHGOW.

Municipal corporation—Repair of streets—Pavements—Assessment on property owner—Double taxation—24 Vict., c. 39 (N. S.)—53 Vict., c. 60, s. 14 (N.S.)

By sec. 14 of the Nova Scotia statute 53 Vict., c. 60, the city council of Halifax was authorized to borrow money for covering

the sidewalks of the city with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done, and to be a first lien on such properties. A concrete sidewalk was laid, under authority of this statute, in front of L's property, and he refused to pay half the cost on the ground that his predecessor in title had in 1867, under the Act 24 Vict., c. 89, furnished the material to construct a brick sidewalk in front of the same property, and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorised no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing, because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless and dangerous.

Appeal dismissed with costs.

MacCoy, Q.C., for appellant.
Bell, for respondent.

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6 June, 1896.

North West Territories.]

CONGER v. KENNEDY.

Constitutional law—Marital rights—Married woman—Separate estate—Jurisdiction of N. W. Territorial Legislature—Statute—Interpretation of—R. S. C. c. 50*—N. W. Ter. Ord. No.* 16 *of* 1889.

The provisions of Ordinance No. 16 of 1889 respecting the personal property of married women, are *intra vires* of the legislature of the North West Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorised to legislate by the Order of the Governor General in Council passed under the provisions of "The North West Territories Act," R. S. C. ch. 50. The provisions of said Ordinance No. 16 are not in-

consistent with sections 36 to 40 inclusively of "The North West Territories Act."

The words "her personal property" used in the said Ordinance No. 16, are unconfined by any context, and must be interpreted as having reference to all the personal property belonging to a woman, married subsequently to the Ordinance, as well as to all the personal property acquired since then by women married before it was enacted.

Brittlebank v. *Grey-Jones* (5 Man. L. R. 33) distinguished.

Appeal allowed with costs.

Hogg, Q.C., for the appellant.
Taylor, Q.C., for the respondent.

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6 June, 1896.

Ontario.]

WILLIAMS v. LEONARD.

Chattel mortgage—Description—Bill of Sale Act, R. S. O., (1887) *c.* 125*—Appeal—Order to amend pleadings—Interference with—Debtor and creditor—Purchase by creditor—Consideration—Existing debt.*

In a chattel mortgage the goods conveyed were described as follows: "All of which said goods and chattels are now the property of the said mortgagor and are situate in and upon the premises of the London Machine Tool Co. (describing the premises) on the north side of King Street in the city of London"; and in a schedule referred to in the mortgage was this additional description: "and all machines . . . in course of construction or which shall hereafter be in course of construction or completed, while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor . . . or which are now or shall be on any other premises in the said city of London."

Held, affirming the decision of the Court of Appeal and of the Divisional Court (16 Ont. P. R. 544), that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and if it could the description was not sufficient, within the meaning of the Bills of Sale Act (R. S. O. 1887, c. 125) to cover machines so manufactured.

The Supreme Court will not interfere on appeal with an order made by a provincial court granting leave to amend the pleadings, such order being a matter of procedure within the discretion of the court below.

A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt, is a purchaser for valuable consideration within sec. 5 of The Bills of Sale Act.

Appeal dismissed with costs.

McEvoy, for the appellant.
Gibbons, Q.C., for the respondents.

OPTIONS AND DAMAGES.

Lord Justice Lindley, in a recent lecture, remarked that the charm for him in the study of the law was that it was continually presenting a series of legal problems for solution both new and interesting. *In re The South African Trust Company*, before that learned judge and his colleagues, furnished this sort of intellectual gratification. It arose out of that modern invention of the operator in stocks and shares—the option. On the propriety of directors pledging a company's future by giving these options a good deal might be said, but the point was not taken. Suffice it to say that in *In re The South African Trust Company* the directors had done so—had given a three months' option to a speculator to take up 36,000 1*l.* shares at 11*s.* 6*d.* apiece. If that was all, no interesting puzzle would have arisen; but the next thing the company did was, before the option had run out, to resolve on a winding-up and a sale and transfer of its assets to another very flourishing South African Company, the Johannesburg Investment Company, the consideration being a sum of 345,000*l.* in cash and an option to the South African shareholders to get shares in the Johannesburg company on application within a month—a reconstruction which at once sent up the South African Trust shares to double or treble their former value. The option-holder knew all about the reconstruction, was offered shares, and declined to come in, preferring to play his own cards; in other words, he waits until the option is running out, and then says to the company, 'Give me those shares.' 'It is too late,' says the company; 'the reconstruction is complete.' 'Then pay me

10,000*l.* damages.' 'Damages! Very well,' says the company; 'but your damages are the shares of the purchase-money, 345,000*l.* which works out at 11*s.* rather less than what you have to pay under the option.' 'No,' says the option-holder. 'I claim to be put in the same position as any ordinary shareholder in the South African Trust. I want the Johannesburg option included in the measure of damages.' 'But that option,' replies the company, 'was only given to shareholders at the date of the reconstruction, and you chose not to become a shareholder.' Here was the vice in the option-holder's argument. The Court of Appeal pointed it out. The moral is, that a person with an option cannot have it both ways. He cannot wait to see the turn of the market and claim the benefits of an actual shareholder as well.—*Law Journal* (*London*).

VEXATIOUS ACTIONS.

The Lord Chancellor, in asking their lordships to read the Vexatious Actions Bill a second time, said the practice of bringing absolutely wanton and vexatious actions by persons of no responsibility whatever on every conceivable subject had now become such a scandal that the time had arrived when some sort of stop should be put to such proceedings. The misfortune was that these actions were apt to create an example and to multiply themselves, and, although a particular plaintiff might be estopped he would have many successors and the practice would go on undiminished. The difficulty was to have some process by which they could stop useless, wanton, and mischievous actions and, at the same time, not place unnecessary obstruction in their Courts against the bringing of causes by those of Her Majesty's subjects who really had a grievance. The object sought to be secured by the bill was that there should be some protection to the public and some protection to the persons sued. It was quite true that in such cases as those to which he was directing attention verdicts followed for the defendants, but it appeared to be forgotten that they had to appear to defend themselves and to instruct counsel, and the result was that, though they succeeded, they succeeded at a loss to themselves. It was to put an end to that wanton and vexatious course of procedure that this bill had been devised. The list of actions he had read as having been brought

by one person against a number of other persons—cases of a vexatious and frivolous kind—made out a case, he believed, for the interference of their lordships' House. The object of the bill was to prevent wanton and vexatious proceedings of this kind. It was proposed by the bill that the conduct of a person engaging in wanton and vexatious litigation and not paying the necessary costs should be brought to the attention of the Attorney-General, and that the Attorney-General might, in his discretion, apply to the High Court of Justice, who might then make an order that no process should in future be issued in the person's behalf without leave obtained in the High Court for that purpose. While the interests of the public and of citizens who had good cause of complaint were sufficiently protected by the provisions of the bill, he thought the time had arrived when persons should be protected from groundless and vexatious proceedings and the infliction of the costs attending them. He therefore moved that the bill be read a second time.

Lord Herschell agreed with his noble and learned friend that some measure of this kind was necessary, and he was satisfied that, while the bill gave protection against wanton and vexatious actions, it placed no obstruction in the way of persons who had real cause of action.

The bill was read a second time.

THE LAW OF PRIVACY.

Probably the state of civilisation, rather than a disposition on the part of the common law to ignore personal rights, accounts for the fact that the law of privacy is yet an embryo without form and which scarcely has life. Only a few years ago the conditions were such that the necessity of a law securing privacy was hardly thought of. But now that newspaper enterprise is behind the times if it does not proclaim all that is done in the closet at midnight from the surrounding housetops at sunrise, and culture has made people sensitive to the public stare, while there seems to be no armour invincible to the ever-present 'button' and 'flash-light,' the question comes: Is there no protection, or must one submit to have his deeds and likeness serve to gratify the idle curiosity of the multitude for the private purpose or emolument of a stranger? The question was passed upon in *Corliss* v. *Walker*, 31 L. R. A. 283, and *Schuyler* v. *Curtis*, 31 L. R. A. 286,

and although in both cases injunctions were refused, yet in both the actions were by survivors of the person directly interested, and the Courts held that there was nothing of which they could complain. Upon turning to the cases cited in the note *Corliss* v. *Walker*, no case is found which directly involves the law of privacy until within the last few years. The few cases upon the subject show a tendency to uphold the right, one case even carrying it to an extreme. There the use of a negative of an actress was enjoined which was procured while she was enacting a *rôle* upon a public stage. That some protection should be afforded cannot be successfully disputed, but what the limit should be is a difficult question. There is little in the lives of masses of private citizens to offer temptations to infringe their right to privacy. And in most cases when the public becomes interested, the question will arise, Has not some act been committed which has removed the mantle of privacy and made the person a public character, who has of his own volition surrendered his former position and rights? It would seem that at least the gratification of mere idle curiosity and the invasion of the right of privacy for pecuniary or other ulterior purposes should be stopped, and there is likely to be considerable litigation in the future for the definition and protection of this right.—*Case and Comment.*

THE LAWYER AS HE IS.

The following are some of the pungent and humorous remarks of Mr. Justice Brewer, in an address delivered before the law students of Maryland University:—"It is a blessed thing to be a lawyer, providing always that you are of the right kind, and I take it no one is permitted to graduate at this law school unless he is of the right kind. It is the rule of our profession to work hard, live well and die poor. And to such a life I cordially invite you.

"Never sign your own name as plaintiff or defendant, but only as counsel.

"One class of persons would as soon expect to find a baby that never cried, a woman that never talked, a Shylock loaning money without interest, a Mormon advocating celibacy, a gentleman without a cent opposed to the income tax, or a candidate for the presidency hurrying to express himself on the silver question, as an honest lawyer.

"I admit that lawyers do not support themselves by planting potatoes or plowing corn, though there is many an attorney who would bless himself and the bar and bless all of us if he struck his name off the court rolls and entered it on the books of an agricultural society.

"We are not, as a profession, physically speaking, like Pharoah's lean kine. Those pictures which Dickens, that prince of slanderers, and others like him, draw and call attorneys, are nothing but atrocious libels.

"From time immemorial, size, physical as well as mental, has been considered one of the qualifications of a judge. Justice and corpulence seem to dwell together. There appears to be a mysterious and inexplicable connection between legal lore and large abdomens. I do not know why this is, unless it be that in order that Justice may not easily be moved by the foibles and passions of men she requires as firm and as broad a foundation as possible.

"George Washington's hatchet is not popularly regarded as one of the heirlooms of the legal family. I can say, that for over thirty years I have been a judge, and of the many thousands of lawyers who have appeared before me, I have never found but a single one upon whose word I could not depend.

"While other professions and vocations are constantly putting on striped clothes, how seldom does any lawyer respond to a warden's roll-call?

"The business man needs us to draw his contracts, the laborer to collect his wages, the doctor to save him from the consequence of his mistakes, the preacher to compel the payment of his salary, the wife to obtain a divorce and the widow to settle the husband's estate. The people need us in the Legislature and in Congress to hold the offices and draw the salaries. Every convention and public meeting needs us to fill the chair and occupy comfortable seats on the platform. Every man accused of crime needs us to establish his innocence through the verdict of twelve of his peers.

"In short, it may be said of us, in the language of the itinerant vendor of soap, 'everybody needs us,' and, like that very useful article, nothing tends to keep society so clean as the presence of a lawyer.

"Blot from American history the lawyer and all that he has done, and you will rob it of more than half its glory. Remove

from our society to-day the lawyer, with the work that he does, and you will leave that society as dry and shifting as the sands that sweep over Sahara."

NOTES OF RECENT U. S. DECISIONS.

The question whether an electric car is to be classed with horse cars, or with ordinary railroad cars, in respect to the matter of negligence in getting on or off while in motion, is decided in *Cicero & P. St. R. Co.* v. *Meixner*, 160 Ill. 320, 31 L. R. A. 331, by classing the electric car with horse cars, making the question of negligence in boarding or leaving it while in motion a question for the jury.

Testimony of a judge as a witness in a criminal trial over which he is presiding is held, in *Rogers* v. *State* (Ark.), 31 L. R. A. 465, to be improper and to constitute a material error, even if the testimony is subsequently excluded. A note to this case reviews the authorities on the competency of a judge as a witness in a cause on trial before him.

The use of partnership property by members of an insolvent firm to pay their individual debts, leaving the partnership debts unpaid, is held, in *Jackson Bank* v. *Durfey*, 72 Miss. 971, 31 L. R. A. 470, to be unlawful, although the rights of partnership creditors are regarded as derivative, resting upon the equities of the partners as between each other.

The cursing, abuse, and maltreatment of a person by an agent of an express company immediately after refunding to the former the amount of overcharges which he had come to the express office to obtain, are held, in *Richberger* v. *American Express Co.* (Miss.), 31 L. R. A. 390, to constitute a part of the *res gestæ* and make the company liable for the tort.

A State statute requiring vessels burning wood to have screens of the best approved kind for protection from fire is sustained in *Burrows* v. *Delta Transportation Co.* (Mich.), 29 L. R. A. 468, against the contention that it is an interference with interstate commerce.

The right of self-defence in favor of a person who began an affray by a felonious assault is sustained in *People* v. *Hecker*, (Cal.), 30 L. R. A. 403, where he had first in good faith attempted to withdraw from the combat, and fairly made known such purpose.