will modify its order and give him the custody. So far as the amount of alimony is concerned, we suppose it was intended for the benefit of the children rather than of the wife. The law does not intend that a woman unfit to remain the wife shall be supported in idleness by the toil of the husband. We however are not prepared to say that it was exorbitant, when the custody and care of the children are taken into the account.

Judgment affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME JUDICIAL COURT OF MAINE.[2]

SUPREME COURT OF MICHIGAN.[3]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[4]

SUPREME COURT OF PENNSYLVANIA.[5]

ADMIRALTY.

Practice—Review by Supreme Court—Liability of Towing-Boats for Accident.—Though on appeals in admiralty, involving issues of fact alone, this court will not, except in a clear case, reverse where both the District and the Circuit Court have agreed in their conclusions, yet in a clear case it will reverse even in such circumstances: *The Lady Pike,* 21 Wall.

The master of a steamer which undertakes to tow boats up and down a river where piers of bridges impede the navigation, is bound to know the width of his steamers and their tows, and whether, when lashed together, he can run them safely between piers through which he attempts to pass. He is bound also, if it is necessary for his safe navigation in the places where he chooses to be, to know how the currents set about the piers in different heights of the water, and to know whether, at high water, his steamers and their tows will safely pass over an obstruction which, in low water, they could not pass over: *Id.*

The owners of steamers undertaking to tow vessels are responsible for accidents, the result of want of proper knowledge on the part of their captains, of the difficulties of navigation in the river in which the steamers ply: *Id.*

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[1] From J. W. Wallace, Esq., Reporter, to appear in vol. 21 of his Reports.

[2] From Hon. Edwin B. Smith, Reporter; to appear in vol. 63 Maine Reports.

[3] From Hoyt Post, Esq., Reporter; cases decided at February and April Terms 1875.

[4] From John M. Shirley, Esq., Reporter; to appear in 54 & 55 N. H. Reports.

[5] From P. F. Smith, Esq., Reporter; to appear in 76 Penna. Reports.

Arbitration and Award.

Irregularities not amounting to Fraud.—An award will not be set aside for slight irregularities in the conduct of the referees, it being apparent that they acted in good faith, and that no injustice was done: *Plummer* v. *Sanders*, 55 N. H.

Where one of three referees, the report of a major part of whom was to be conclusive, was guilty of fraudulent misconduct in the interest of one of the parties, and the other two referees in good faith made an award in which such referee refused to join, it was *held*, that the award would not be set aside at the instance of the party in whose interest the misconduct had happened: *Id.*

Bailment.

Relinquishment of Possession—Lien.—The voluntary relinquishment, by the bailee, of possession of the subject of the bailment discharges his lien, unless it is consistent with the contract, the course of business, or the intention of the parties, that it should continue: *Robinson* v. *Larrabee*, 63 Me.

When the bailee has parted with his possession, the presumption is that he has waived or abandoned his lien, unless his conduct, in so doing, is satisfactorily explained: *Id.*

The forfeiture of a lien-claim, when once incurred, is not waived by a subsequent arrangement between the parties, whereby the bailee resumes the custody of the subject of the bailment, unless such was the intention of the parties: *Id.*

Bankruptcy. See *Landlord and Tenant.*

Attachment more than Four Months previous—Where personal property is attached, receipted for, restored to the defendant, and sold by him to an innocent purchaser, and the defendant becomes a bankrupt before judgment, but more than four months after the attachment, the plaintiff is entitled to judgment *in rem*, and his execution may be levied upon the avails of the property when recovered from the receiptor: *Batchelder* v. *Putnam*, 54 N. H.

Assignment for Creditors—Insolvent Laws—Effect of Bankrupt Act.—November 18th 1873, Albert Bow made a voluntary assignment for the benefit of his creditors to Eli B. Rogers, the assignment being without any preferences. Plaintiffs thereupon sued Bow and garnisheed Rogers. They recovered judgment against the principal defendant. In the garnishee case it appeared that the only property of Bow's that Rogers held was that he had received by virtue of such assignment, and that his only interest in this case was that of trustee under the assignment, and that the value of the assigned property in his hands was greater than the amount of the judgment against the principal defendant. The court below held the assignment valid, and that the possession by Rogers of the property in virtue thereof gave no right to plaintiffs as creditors of Bow to maintain garnishee process against Rogers; and judgment was rendered in Rogers's favor for costs. It is insisted that this common-law assignment, though otherwise unobjectionable, is rendered void by the existence of the Federal Bankrupt Law. The argument is, that the bankrupt law *ipso facto* supersedes all state insolvent laws; that the

common-law principles prevailing in this state on which voluntary assignments for the benefit of creditors are based, and to which they owe their legal efficacy, are a part of the state system regulating and governing in cases of insolvency, and are within the principle which causes a bankrupt act to work suspension of incompatible regulations, and hence can have no force while such act exists. *Held*, That there is no proper analogy between insolvent laws, correctly so called, and those principles of common law which allow and sanction such an assignment, and no such resemblance or relation as to warrant the conclusion that the Bankrupt Act suspends the latter as well as the former, and that in a state at least where common-law assignments for the benefit of creditors have not been absorbed into or connected with the local insolvent laws, but rest entirely upon common-law principles, they are not *ipso facto* void, simply because a bankrupt law is in force, and in the absence of any attempt to proceed under the Bankrupt Act: *Cook et al.* v. *Rogers*, S. C. Mich.

Held, further, That the result of the proposition stated would be in effect to make the Bankrupt Law operate to defeat an instrument intended and designed to square exactly with what has been held to be the "main purpose" of the act itself—namely, equal distribution of the property of the debtor *pro rata* among his creditors; and that, too, at the instance of parties who by the very proceeding itself in which the claim is set up are aiming solely to defeat such main purpose and secure to themselves present full satisfaction, without the slightest regard to the equal claims of other creditors: *Id.*

BILLS AND NOTES. See *Debtor and Creditor.*

What estops Maker to deny Consideration.—Where, at the request of the party with whom he deals, one makes his promissory note (which is to be a partial payment for a piece of work to be done for him) payable to a third party, who is a creditor of the party with whom he contracts for the work, and it is credited by the payee to such party in good faith, the maker cannot set up a failure of consideration, as between himself and the party with whom he deals, in defence of a suit upon such note, in the name of the payee: *South Boston Iron Co.* v. *Brown*, 63 Me.

The governing principle in this case is not distinguishable from that which was laid down in *Munroe* v. *Bordin*, 65 E. C. L. R. 862: *Id.*

CONDITION. See *Grant.*

CONFEDERATE STATES. See *Constitutional Law.*

CONSTITUTIONAL LAW.

War Powers—License to trade with Enemy—Tax for such License.—The government of the United States clearly has power to permit limited commercial intercourse with an enemy in time of war, and to impose such conditions thereon as it sees fit; this power is incident to the power to declare war and to carry it on to a successful termination: *Hamilton* v. *Dillin*, 21 Wall.

It seems that the President alone, who is constitutionally invested with the entire charge of hostile operations, may exercise this power; but whether so or not, there is no doubt that with the concurrent authority of the Congress, he may exercise it according to his discretion: *Id.*

The Act of Congress of July 13th 1861 (12 Stat. at Large 257), prohibiting commercial intercourse with the insurrectionary states, but providing that the President might, in his discretion, license and permit it in such articles, for such time, and by such persons, as he might think most conducive to the public interest, to be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury, fully authorized the rules and regulations adopted March 31st and September 11th 1863, whereby, amongst other things, permission was given to purchase cotton in the insurrectionary states and export the same to other states, upon condition of paying (besides other fees) a fee or bonus of four cents per pound: *Id.*

The Act of July 2d 1864 (13 Stat. at Large 375), respecting commercial intercourse with the insurrectionary states, recognised and confirmed these regulations: *Id.*

The charge of four cents per pound required by these regulations was not a tax, nor was it imposed in the exercise of the taxing power, but in the exercise of the war power of the government. It was a condition which the government, and the President, endued with powers thereof, in the exercise of supreme and absolute control over the subject, had a perfect right to impose: *Id.*

The condition thus imposed was entirely in the option of any person to accept or not. If any did accept it, and engage in the trade, it was a voluntary act, and all payments made in consequence were voluntary payments, and, on that ground alone (if there were no other), could not be recovered back: *Id.*

The Internal Revenue Acts of 1862 (12 Stat. at Large 465) and 1864 (13 Id. 15), in imposing specific duties by way of excise on cotton, were not inconsistent with or repugnant to the charge in question. The two charges were different things One was a payment as a condition of trading at all, required by the war power; the other was an excise imposed by the taxing power: *Id.*

Nashville, though within the national military lines in 1863 and 1864, was nevertheless hostile territory within the prohibition of commercial intercourse, being within the terms of the President's proclamation on that subject, which proclamation in that regard was not inconsistent with the Act of July 13th 1861, properly construed: *Id.*

The civil war affected the status of the entire territory of the states declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President: *Id.*

Declaratory Act having Reference to Special Case.—An Act of Assembly enacted that no one should be eligible to the Councils of Philadelphia who at the time of his election held "office or employment" under the state. A notary public was elected to the Councils. A quo warranto to oust him was issued on the suggestion of private relators; pending which an act was passed declaring that the meaning of the first act was not to prevent a member of Councils from holding the office of notary public at the same time, and that no member of the present Councils should be disqualified on account of being a notary public, nor should he be removed from the Councils for such disqualification: *Held*, That the latter act was constitutional: *Hawkins* v. *The Commonwealth ex rel., &c*, 76 Pa.

The act simply modified the charter of a municipal corporation, over

which the legislature has control, and did not interfere with any vested right: *Id.*

The act concerned the public, and did not interfere with the proper functions of the court, nor override the judiciary: *Id.*

CORPORATION. See *Railroad.*

Interest of Creditors—Formal Defects of Organization not a Bar.—In an action by an insolvent corporation to collect an assessment for the purpose of paying their debts, the interests of the creditors will be so far regarded that no defence grounded on defects in the organization of the corporation can be maintained, unless it could have been successfully set up in answer to a creditor's bill against the stockholders to enforce their personal liability: *Ossipee Hosiery and Woollen Manufacturing Co.* v. *Canney*, 54 N. H.

The plaintiffs' charter provided that the first meeting of the corporators might be called by publication at least fifteen days prior thereto. Only fourteen days' notice of the meeting was given: *Held*, that if neither the grantors of the charter (*i. e.*, the state) nor the grantees complained of the defect in the preliminary notice, the objection could not subsequently be raised by a stockholder in a suit by the corporation against him to recover an assessment made under the provision, chapter 136, section 4, General Statutes: *Id.*

A *de facto* organization of a corporation, formed and operated in good faith, under color of the charter, is an organization under the charter, within the meaning of the statute of 1846, ch. 321, sect. 7: *Id.*

In a suit brought against a stockholder to recover an assessment made under the provisions of chapter 136, section 4, General Statutes, he will be regarded as having waived the right to object that the whole number of shares fixed and limited by the corporation was not subscribed for, if he has paid for the stock for which he subscribed: *Id.*

CRIMINAL LAW.

Witness called by wrong Name—Sufficiency of Indictment for Murder.—A witness in a capital case should not be excluded because the list of witnesses furnished to the respondent does not contain his true name, if it contains the name by which he is known: *State* v. *Burke*, 54 N. H.

In an indictment for murder, a count which charges that the respondent "in some way and manner, and by some means, instrument, and weapon to the jurors unknown," killed and murdered the deceased, is good: *Id.*

A general verdict of guilty of manslaughter in the first degree being returned on a trial under an indictment which contains several counts, judgment will not be arrested, nor will the verdict be set aside, because there is one count under which, had there been no other, the jury could not have found the respondent guilty of manslaughter in the first degree: *Id.*

Negative Averment—Burden of Proof.—Where the subject-matter of a negative averment in an indictment relates to the respondent personally, or lies peculiarly within his knowledge, the averment will be taken as true, unless disproved by him: *State* v. *Keggon*, 55 N. H.

Upon an indictment for a breach of the statute, prohibiting the sale of spirituous liquors, alleging affirmatively that the respondent was not

an agent for the sale of liquor, the state is not bound to prove the averment: *Id.*

DAMAGES. See *Master and Servant; Slander*

Injury by Negligence—Loss of Profits.—In an action by a passenger for injury from collision on a railroad: *Held*, that evidence might be given that one part of his business "was dealing in land, that he had a quantity of land on hand, and to show the value of the business and the profits arising therefrom:" *Pennsylvania Railroad Company* v. *Dale*, 76 Pa.

The court charged: "If the plaintiff, at the time of the injury, was engaged in a legitimate business from which pecuniary profits had arisen, and future profits might reasonably be expected, which business was interrupted or suspended in consequence of disabilities, physical or mental, inflicted by the negligence of the defendant, the loss of such anticipated profits is properly the subject of compensation in damages:" *Held* to be correct: *Id.*

Mere speculative profits are not to be considered; damages in cases of personal injury may be ascertained by the reduction of plaintiff's earning powers, mental or physical, and therefore reference is to be had to his business at the time of the accident: *Id.*

Probable Profits not a proper Basis.—In this case the defendant covenanted to use all reasonable and proper diligence in the manufacture and introduction into the market of a patented invention, and that he would pay for said patent five thousand dollars from the net profits arising from the sale and manufacture thereof, as soon and as rapidly as such profits shall be realized from said sale. For a breach of the former covenant, the plaintiff would be entitled to at least nominal damages; if he would recover more, the burden of proof is upon him to show the amount: *Winslow* v. *Lane*, 63 Me.

Probable profits are not a proper basis upon which to estimate damages, and therefore, under the testimony as reported in this case, nominal damages only can be recovered: *Id.*

DEBTOR AND CREDITOR. See *Bankruptcy; Bills and Notes.*

Note on Time is Agreement for Delay, which is a sufficient Consideration.—The taking of a promissory note for an antecedent debt, imposes upon the creditor an obligation to wait for his pay till the note matures, without any special agreement to that effect, or any understanding that the debt shall be thereby extinguished; and the delay thus obtained is a sufficient consideration for the note. Therefore, the note of a married woman, given for the antecedent debt of her husband, is not void for want of consideration, if it is made payable at a future day: *Thompson* v. *Gray*, 63 Me.

ESTOPPEL. See *Mechanic's Lien.*

EVIDENCE. See *Railroad; Slander.*

Action for Goods sold and refused to be Accepted—Cost Price.—In an action of assumpsit for not accepting goods sold, it appeared that the defendant agreed to take the goods and pay the plaintiff their cost for the same; there was also evidence tending to show that he afterwards

refused to perform his contract by accepting the goods: *Held*, that a nonsuit could not be ordered even though there were no evidence as to the cost of the goods: *Watts* v. *Sawyer*, 55 N. H.

Evidence of the value of goods is admissible on the question of their cost: *Id.*

Whether a memorandum, which a witness knew when it was made to be correct, can go to the jury as evidence, depends upon whether the witness, after examining it, is able to state the fact from memory: *Id.*

When Secondary is Admissible—Copy.—The burden is upon the plaintiff to prove that neither of duplicate bills of lading can be produced, before introducing parol testimony of the contents. If he offers the latter, and it is received, the presumption is that he satisfied the court of his inability to procure either part; which presumption is not overcome by the fact that the defendant, a shipmaster, delivered his part to one of his owners at the end of the voyage, ten years before: *Dyer* v. *Fredericks*, 63 Me

If the plaintiff thinks this copy is still in existence, it is his duty to summon the owner to produce it; if he does not do so, he cannot except to the introduction by the defence of parol testimony of its contents, to rebut like evidence introduced by himself: *Id.*

Fixture.

Machinery—Sales of Personal Property—Deed.—On May 29th 1867, Kaufman owned certain lands, on which a building had been erected into which machinery for the manufacture of wool had been put and annexed in a substantial manner. This machinery was owned by Hardy. Kaufman conveyed an undivided fourth of the real estate to Hardy, who sold to Kaufman an undivided half of the machinery. January 29th 1868, Kaufman sold an undivided fourth of the real estate together with his half of the machinery to one Kinney. August 25th 1868, Hardy sold to Kinney, deeding one-fourth of the real estate and delivering possession. On this sale Kinney gave Hardy a purchase-price mortgage on the undivided half of the real estate. The machinery was not mentioned in this mortgage. Lee became purchaser upon foreclosure of this mortgage, and claims that the mortgage covered the machinery as fixtures. Adams asserts a right to the machinery by a purchase of it as personal property from Kinney previous to the foreclosure. The court below sustained Lee's claim, and Adams brings error. *Held*, That this ruling was erroneous; that at no time has there been unity of ownership of the land and the machinery put into the building; and that the fact that all the time the various parties have had title to the machinery distinct from their title to the land, is of itself conclusive that the machinery was personalty; that when the ownership of the land is in one person and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot in contemplation of law become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only; and that a thing cannot as to an undivided interest therein be real estate, and as to another undivided interest be personalty: *Adams* v. *Lee*, S. C. Mich.

Lee, claiming that if the machinery continued to be personal estate

after being put up in the building, Adams was nevertheless a wrong-doer in taking it out of the building, because, if personalty, the title to it was never transferred by any of the conveyances of interests in the land, has procured assignments from Kaufman & Hardy of any right of action they, as owners of the machinery, might have against Adams for taking it away. But these assignments were made after Kaufman & Hardy, as the evidence clearly showed, had sold their right to the machinery to Kinney. *Held*, That the failure to mention the machinery in the deeds was of no importance; that no writing was requisite to transfer the title to this any more than to any other personalty: *Id.*

The query is suggested, but not decided, whether Lee, on his own theory of the case, had any cause of action, the machinery having been taken off the premises before he became purchaser at the foreclosure sale: *Id.*

Foreign Judgment.

Suit on Judgment of Another State.—In a suit upon a judgment of a sister state, objections to the form and sufficiency of the evidence offered to prove the record on which the action is brought cannot be sustained: *Maxwell* v. *Stewart*, 21 Wall.

Nor is it a valid objection against the jurisdiction of the court rendering the judgment that the record shows that the cause was tried without the intervention of a jury, and did not show that a jury had been waived as provided by statute: *Id.*

Grant.

Statutory Grant by Government — Condition Subsequent.—Unless there are clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them: *Schulenberg* v. *Harriman*, 21 Wall.

No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs or successors, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The rule equally obtains where the grant upon condition proceeds from the government: *Id.*

The manner in which the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, the right must be asserted by judicial proceedings authorized by law, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement: *Id.*

Husband and Wife. See *Debtor and Creditor.*

Insurance.

Declaration—Foreign Company—Transitory Action—Conditions.—This was an action brought by defendants in error on an insurance policy for a loss by fire. The plaintiffs below recovered judgment, and the insurance company brings error. The suit was commenced by declaration counting specially upon the policy, and the plea was the general issue with notice of special matter, but no affidavit denying the execution of the policy was filed. On the trial, the defendant objected to the introduction of the policy on the grounds: 1. That the declaration counted on a policy made by a corporation formed and existing under the laws of Kentucky, and the execution of the policy had not been proved; 2. Because no proof had been given of authority of the company to do business in this state; 3. That the policy did not appear to have been made in Bay county, but in Illinois. *Held*, 1. That the law is distinctly settled by our own decisions against the ground first stated. *Held*, 2. That it was not admissible for the company to insist upon a preliminary express showing by its contractee that in insuring it acted honestly and where it was lawful for it to act; but that it would be presumed, certainly as against itself, in the absence of contrary proof, that in making the insurance it acted at a place where it would not be unlawful or in bad faith to act. *Held*, 3. That as to the third ground of objection, wherever the contract was made, the right to sue upon it was transitory and not local; and that the statement in the declaration under a *videlicet* that the contract was made at Bay City, &c., very evidently could not have misled or surprised defendant; and that the ruling of the court upon this point afforded no cause for complaint: *Clay Fire and Marine Insurance Co.* v. *Huron Salt and Lumber Manufacturing Co. et al.*, S. C. Mich.

The defence offered to show that the plaintiff had contracted in writing to sell the premises insured to one Babcock, who had paid the full purchase-price, but this offer was rejected. The policy provided among other things that "if the assured is not the sole and unconditional owner of the property insured, or (if said property be a building or buildings) of the land on which said building or buildings stand, by a sole, unconditional and entire ownership and title, and is not so expressed in the written portion of the policy," then the policy should be void. The only statement of ownership in the policy was the use of the word "their" before the description of property. *Held*, That this statement of ownership as "their" property, taken in connection with the clause requiring it to be stated, if true, that it was not their property by entire ownership and title, &c., makes the policy import that the insured was, not merely owner, but owner by a sole, unconditional and entire ownership and title; that if Babcock had such an equitable title as was offered to be shown, then the plaintiff could not have had such sole and entire ownership and title as the policy represented, and that in that event the policy by its own terms would be made ineffectual, and the plaintiff could not recover; and that the rejectment of this proffered evidence was erroneous: *Id.*

The policy by its terms made the loss, if any, payable to George C. Smith, as his interest might appear. The declaration was in the name of the plaintiff, "for the use and benefit of George C. Smith." It was objected that no recovery could be had without proof of some legal or

equitable interest in him. *Held*, That as the proofs showed no interest in any one but the plaintiff, and the insurance was made with the plaintiff, and not with Smith, the point was not well taken; that the clause directing payment to Smith, &c., was intended merely as a mode of appointing that payment should be made to him to the extent of some claim he had or was expected to have against the assured, and that a payment to him, consistently and in accordance with his claim against the assured, would be a payment to the assured, but that the right of the assured was not intended to be made conditional upon Smith's having some interest or claim: *Id.*

The defence sought to show that when the insurance was effected, and when the loss occurred, the insurance company had not complied with our laws prescribing the terms on which foreign companies may do business in this state, and insisted that this would render the policy invalid. *Held*, That as the contract of insurance purported to have been made in another state, and the defence explicitly assumed such to be the fact, and as the contract was a personal one and not local, or necessarily to be performed in this state, our insurance laws did not affect it, and that the point was not maintainable; that it is questionable whether the point would be a good one even if the contract had been shown to be a Michigan contract, whether such a defence would not be excluded as an attempt by the company to take advantage of its own wrong, and whether our statute was ever intended to make void, at the election of the insurer, such insurances as they may succeed in effecting here in violation of it: *Id.*

Intoxicating Liquors. See *Criminal Law.*

Judgment.

Assignment on the Record—Conflicting Assignments.—S. made a note with warrant of attorney to J. on which judgment was entered; J. borrowed money from F. and delivered him the note as collateral security; the judgment was not marked to F.'s use on the record. J. afterwards borrowed money from N., and by writing assigned the judgment to him; the assignment was noted on the record of the judgment. In the distribution of the proceeds of sale by the sheriff of the property of S.: *Held*, that N. was entitled to the amount of the judgment: *Fraley's Appeal*, 76 Pa.

An instrument on which judgment has been entered by the prothonotary, under the Act of February 24th 1806, should not be delivered to the plaintiff; the practice should be abolished: *Id.*

Landlord and Tenant.

Allowance of Rent in Bankrupt Estate—Preference.—Execution was issued and delivered to the sheriff July 2d; proceedings in bankruptcy commenced on defendant's application July 26th, and he was adjudged a bankrupt the same day; the sheriff levied July 29th, and same day the landlord of defendant gave notice that he claimed his rent from the proceeds of sale: *Held*, that he was entitled in preference to the assignee in bankruptcy: *Barnes's Appeal*, 76 Pa.

The rent is a prior charge under the Act of June 16th 1836 (Execution), and the execution is for the benefit of the landlord: *Id.*

Whenever an execution will carry a valid sale over the assignee in bankruptcy, it carries with it the claim for rent: *Id.*

LIEN. See *Bailment; Mechanic's Lien.*

MASTER AND SERVANT.

Liability of Servant to Master for Consequence of Misconduct—Practice.—A servant is liable to an action at the suit of his master, when a third person has brought an action and recovered damages against the master for injuries sustained in consequence of the servant's negligence or misconduct: *Grand Trunk Railway Co.* v. *Latham, Adm'r.*, 63 Me.

The servant is liable for the costs and counsel fees in such suit, incurred in the defence, he having been notified of its pendency, and having requested his master to defend: *Id.*

MECHANIC'S LIEN.

Loss of Lien by Time—Estoppel.—A mechanic's lien was filed November 14th 1865; *scire facias* issued against contractor and owner March 16th 1866; verdict for plaintiff April 6th 1870, new trial granted; plea October 7th 1871, that five years had elapsed since entry of lien; replication, that continuances were obtained by defendant and that the delay was by their acts, and not by default of plaintiffs. On demurrer to the replication that judgment had not been obtained within five years from the issuing of the writ, *Held*, that the lien was gone and judgment was properly entered for defendants: *Hunter et al.* v. *Lanning et al.*, 76 Pa.

A debt may survive when the lien is gone, and an estoppel to prevent the denial of the debt will not keep the lien alive: *Id.*

The proceeding on a mechanic's lien being *in rem* the lien must appear by the record, and not by outside acts of estoppel: *Id.*

An owner cannot be prejudiced by continuing the debt against the contractor: *Id.*

PRACTICE.

Objections at Trial.—When objections to the reading of a deposition made while a trial is in progress do not go to the testimony of the witness, but relate to defects which might have been obviated by retaking the deposition, the objections will not be sustained; no notice having been given beforehand to opposing counsel that they would be made: *Doane* v. *Glenn*, 21 Wall.

Such objections, if meant to be insisted on at the trial, should be made and noted when the deposition is taking, or be presented afterwards by a motion to suppress it. Otherwise they will be considered as waived: *Id.*

PUBLIC LANDS. See *Grant; Timber.*

RAILROAD. See *Damages.*

Expulsion of Passenger—Right to retain Ticket after Cancellation—Removal of Causes.—In an application for the removal of a case in which a corporation is a party, the affidavit may be made by an agent or employee: *Vankirk* v. *The Pennsylvania Railroad Co.*, 76 Pa.

A passenger purchased a railroad ticket from N. to W., and rode on it to M., an intermediate point; the ticket, under the rules of the company, was cancelled for the whole route; he voluntarily left the train at M. Subsequently he offered the ticket for his passage from M to W :

the conductor took up the ticket, refused to allow him to ride, and ordered him to leave the train, which he did. In a suit by the passenger against the railroad company, the court rejected evidence by the plaintiff that he offered to pay his fare, if the conductor would return the ticket, which was refused, to be followed by evidence that in claiming to ride he had acted in good faith upon information by a ticket agent from whom he had previously purchased the ticket, that he had a right to ride on it. *Held* to be error: *Id.*

By denying plaintiff's right to ride on the ticket, the conductor waived all right to retain it; the plaintiff might have retained the ticket: *Id.*

The declarations of the ticket agent, made days after selling the ticket, although not evidence to establish a contract with the plaintiff, were evidence to show that plaintiff in good faith claimed a right to ride on the ticket: *Id.*

Evidence that the conductor allowed plaintiff to ride past several stations after leaving M., and ejected him at a place remote from shelter, in a storm, &c., was proper for the jury in considering whether the conductor selected such place intentionally: *Id.*

REMOVAL OF CAUSES. See *Railroad; Trust.*

Suit in State Court between Citizens of same State.—A suit in a state court against several defendants, in which the plaintiff and certain of the defendants are citizens of the same state, and the remaining defendants citizens of other states, cannot be removed to the Circuit Court under the Act of March 2d 1867: *Vannevar* v. *Bryant*, 21 Wall.

Nor if the plaintiff was a citizen of one state and the defendants all citizens of one other state, could such removal be made where one trial has been had and a motion for a new trial is yet pending and undisposed of. To authorize a removal under the above-mentioned act, the action must, at the time of the application for removal, be actually pending for trial: *Id.*

REPLEVIN. See *Timber.*

May be maintained without Demand against one having no Title.—No previous demand upon a *bonâ fide* purchaser of a chattel from one who had no authority to sell it is necessary to enable the true owner to maintain replevin: *Prime* v. *Cobb*, 63 Me.

Such purchaser is not lawfully in possession as against the owner: *Id.*

SLANDER.

Damages—Defendant's Wealth.—In an action of slander, evidence as to the reputation of the defendant for wealth is admissible; but it seems it should be proved by general reputation, rather than by particular facts: *Stanwood* v. *Whitmore*, 63 Me.

STATUTE. See *Grant.*

TIMBER.

Cut by Trespasser does not change Title—Mixture of Property—Replevin.—Where the title to land remains in the state, timber cut upon the land belongs to the state. Whilst the timber is standing it constitutes a part of the realty; being severed from the soil, its character is

changed; it becomes personalty, but its title is not affected; it continues as previously the property of the owner of the land, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property: *Schulenberg* v. *Harriman*, 21 Wall.

Where logs cut from the lands of the state without license have been intermingled with logs cut from other lands, so as not to be distinguishable, the state is entitled, under the law of Minnesota, to replevy an equal amount from the whole mass. The remedy afforded by the law of Minnesota in such case held to be just in its operation and less severe than that which the common law would authorize: *Id.*

Where, in an action of replevin, the complaint alleges property and right of possession in the plaintiffs, and the answer traverses directly these allegations, under the issue thus formed any evidence is admissible on the part of the defendant which goes to show that the plaintiffs have neither property nor right of possession. Evidence of title in a stranger is admissible: *Id.*

TRUST.

Failure of Trustee to give Bond as required by Statute.—Though statute may enact that a trustee to whom property is assigned in trust for any person, "before entering upon the discharge of his duty, shall give bond" for the faithful discharge of his duties, his omission to give such bond does not divest the trustee of a legal estate once regularly conveyed to him: *Gardner* v. *Brown*, 21 Wall.

Accordingly, when A., of one state, mortgages by way of trust-deed to B., of another, lands in that other in trust for C., of this same other state, authorizing B., upon default in the payment of the mortgage-debt, to take possession of the mortgaged premises and sell them upon certain specified conditions, B. is a necessary party in any proceedings in the nature of foreclosure; though by statute of the state, B. may have been required to give bond such as above mentioned, and may not have given it. And if C., the creditor, have filed a bill for foreclosure against A. and B., A. cannot transfer the case from the state court to the Circuit Court, under the Act of July 27th 1866. The suit is not one in which there can be a final determination of the controversy, so far as it concerns *him*, without the presence of B., to whom the trust-deed was made: *Id.*

USAGE.

Must not be repugnant to Contract or Law.—When a shipper and a carrier of goods have entered into a valid contract, the one to load the other's vessel with a cargo of coal, at a specified port, and to pay freight at a certain rate per ton, and the other to carry such cargo to the place of contract for that price, a practice among persons engaged in that kind of business at such place of contract, to treat such contract as binding upon the parties only as might suit the convenience of either of them, cannot be upheld as a commercial usage to affect such written contract, because of its repugnancy thereto and to the principles of law: *Randall et al.* v. *Smith*, 63 Me.

In order that a contract may be regarded as having been made with reference to a usage of trade, such usage must be certain, general, known, reasonable and not repugnant to the contract or the rules of law: *Id.*