tribunal for the settlement of various interesting questions between parties not legally interested under our present constitutions, such questions must be relegated to lyceums and debating schools; for if once the principle of the statute in question is conceded to be correct, there is no limit whatever to the number and kind of questions that may be propounded to our courts for discussion, and our courts might easily become moot courts to which all sorts of questions as well as controversies might be brought.

The end sought by the statute is, however, a meritorious one, which might be accomplished by some such system of acknowledgment and record as is applicable to deeds of conveyance. It would be easy to prepare such an act, and it is to be hoped that although the present statute cannot be enforced, it has subserved a useful purpose in drawing attention to a subject than which there are few more important.

MARSHALL D. EWELL.

Chicago.

ABSTRACTS OF RECENT DECISIONS.

SUPREME JUDICIAL COURT OF MAINE.[1]

COURT OF ERRORS AND APPEALS OF MARYLAND.[2]

SUPREME COURT OF OHIO.[3]

SUPREME COURT OF RHODE ISLAND.[4]

ACKNOWLEDGMENT.

By Married Woman—Sufficiency of.—Under a statute which provided that in every case of a deed executed by husband and wife to convey the wife's realty, "the wife acknowledging such deed or instrument shall be examined privily and apart from her husband, and shall declare to the officer taking such acknowledgment that the deed or instrument shown and explained to her by such magistrate is her voluntary act, and that she doth not wish to retract the same," an acknowledgment was certified to as follows by the magistrate who took it: "Personally appeared S. A. J. and A. J., wife of said S. A. J., to the within and foregoing written instrument and severally acknowledged the same to be their free and voluntary act and deed, hand and seal, the said A. J. having acknowledged separate and apart from the said husband as the law directs, and that they did not wish to retract the same:" *Held*, that the acknowledgment was fatally defective: *Held, further*, that the statutory provision requiring the deed to be "shown and explained" to the married woman was mandatory, and that the omission from the magistrate's certificate of a statement that the deed had been "shown and explained" to the married woman was fatal: *Paine* v. *Baker*, 15 R. I

BILLS OF LADING.

Cotton Shipped by Mistake to wrong Person—Bona Fide Purchaser.—Z. & Sons, and S., L., K. & Co., of Baltimore, employed the firm of

[1] From J. W. Spaulding, Esq., Reporter; to appear in 77 Me. Rep.

[2] From J. Shaaff Stockett, Esq., Reporter; to appear in 63 Md. Rep.

[3] From George B. Okey, Esq., Reporter; to appear in 43 Ohio St. Rep.

[4] From Arnold Green, Esq., Reporter; to appear in 15 R. I. Rep.

G. Bros, as a common agent for the sale of fertilizers in the state of Georgia. The fertilizers were sold on credit, and payment was secured by cotton notes of the purchasers, payable to G. Bros., agent for Z. & Sons, or agent for S., L., K. & Co., as the case might be. The cotton notes were for a certain sum of money, with the privilege to the makers of redeeming them at maturity in cotton of a specified quality, and at an agreed price. When sales were made, G. Bros., forwarded the purchasers' notes to their principals in Baltimore, and when the notes matured, they were returned to G. Bros., for collection. Some thirty-two bales of cotton received in payment of the fertilizers of Z. & Sons, were shipped through the mistake of G. Bros., to S., L., K. & Co., and the bills of lading were also delivered to them; they sold the cotton and applied the proceeds to the payment of an indebtedness of G. Bros. to them. Subsequently G. Bros., discovering their mistake, sent to Z. & Sons an order on S., L., K. & Co. for the cotton. Demand having been made, and delivery refused, Z. & Sons sued S., L., K. & Co. in trover for the conversion of the cotton. The defendants claimed that they were *bona fide* holders of the bills of lading for value, and that they thereby acquired under the Act of 1876, ch. 262, a perfect title to the cotton, not only as against G. Bros., but also as against the plaintiffs, the actual owners: *Held*, that the plaintiffs not only had a right of property in the cotton, but a right to its immediate possession, and were entitled to bring their action of trover to recover damages for its conversion: *Seal* v. *Zell*, 63 Md.

Constitutional Law.

Municipal Assessment—New Culvert—Under an ordinance for that purpose, the city of Cleveland improved Kinsman street, between certain points, by grading, draining and paving the same. This improvement included the construction of a culvert for drainage, and the cost of the improvement, which included the cost of the culvert, was assessed upon the lots bounding and abutting thereon. After it was completed, and the assessment was made, the culvert broke down and became useless for the use intended. The city then by another ordinance provided for the construction of a new culvert at another point on the street, in place of the old one, the cost of which to be assessed upon property bounding and abutting on Kinsman street, within the termini of the original improvement, and which had been assessed therefor, but not bounding or abutting upon the culvert: *Held*, that this additional assessment for the cost of the new culvert was not authorized by law. *Spangler* v. *Cleveland*, 35 Ohio St. 469, approved and followed: *Watterson* v. *Bradley*, 43 Ohio St.

Criminal Law.

Juror—Questions to.—At the trial of one indicted for keeping a liquor nuisance the presiding justice commits no error in refusing to allow a juror to be asked on his *voire dire* whether he has contributed money for the prosecution of persons generally who are charged with keeping such nuisances: *State* v. *Hoxsie*, 15 R. I.

Damages.

Trespass for unauthorized use of Land by Railroad.—An action of trespass was brought against a railroad for running cars over ground, the

title to which, owing to a failure to comply with certain statutory requisites, never vested in the railroad: *Held*, that plaintiff should be confined to the damages caused by the acts of the defendant in running the cars over the ground, and that plaintiffs were not entitled to recover in this action either compensation for the use of the tracks or the value of the land taken or exemplary damages: *Balt. & Ohio Railroad* v. *Boyd*, 63 Md.

DEED. See *Acknowledgment.*

EJECTMENT.

Title—Possession—Undivided Interest.—Where land is forfeited to the state for the non-payment of taxes assessed upon it, and the state fails to convey the title to a purchaser for the reason of illegality in its proceedings of sale, the original owner has a better claim of title to the land than the purchaser has, and he may maintain an action against the purchaser therefor: *Chandler* v. *Wilson*, 77 Me.

A person having for over twenty years a recorded deed of a township of mainly wild land, during the time lumbering on some portions of it and cultivating other portions, does not thereby divest the true owner of his title of certain lots within the township, such lots not having been occupied during that period of time: *Id.*

A person who obtains the title of three of the five heirs of an owner of land, deceased, can recover only three undivided fifths of the land of a person in possession, although the latter person does not occupy under the other heirs; the demandant has no seisin of more than three-fifths of the land: *Id.*

EQUITY.

Reformation—Character of Proof required—Lapse of Time.—Where a person seeks to reform an instrument upon the ground of mistake, he must not only show clearly and beyond doubt that there has been a mistake, but he must also be able to show with equal clearness and certainty the exact and precise form and import that the instrument ought to be made to assume, in order that it may express and effectuate what was really intended by the parties. And the alleged intention of the parties to which it is sought to make the instrument conform, must be shown to have continued in their minds concurrently down to the time of the execution of the instrument: *Keedy* v. *Nally*, 63 Md.

The application for relief on the ground of mistake should be made with due diligence, and time runs from the discovery of the mistake: *Id.*

An agreement in writing between S. and N. was made in the year 1862. S. died in the year 1883, and one of the witnesses to the agreement also died. In the year 1884, N. filed a bill against the executor of S., to have the agreement reformed on the ground of mistake. It was not pretended that N. was ignorant of what was written in the agreement, or that he could not have been informed of it by the use of due diligence. The agreement was at all times accessible to him, and he procured its production for the examination of his counsel in respect to a litigation between himself and the son of S. sometime before the death of either S. or the deceased subscribing witness: *Held*, that the complainants' application was barred by the great lapse of time from the date of the agreement to the time of filing the bill: *Id.*

EVIDENCE. See *Negligence.*

Expert—Who is such—Insanity.—Whether a physician, called in a case, is qualified to testify as an expert upon questions of insanity, is a question of fact for the presiding judge to decide, and his decision is usually final. In extreme cases where a serious mistake has been committed, through some accident, inadvertence or misconception, his action may be reviewed: *Fayette* v. *Chesterville*, 77 Me.

Skilful and reputable physicians, although not experts upon the subject, may testify to the mental condition of their patients when they have adequate opportunity of observing and judging of their mental qualities. But this does not embrace a case where a single examination was made by a physician to qualify himself as a witness in a pending litigation: *Id.*

EXECUTION. See *Pension.*

EXECUTOR AND ADMINISTRATOR.

Right to Property—Fraudulent Conveyance by Testator.—An administrator cannot in Rhode Island maintain proceedings to recover property conveyed away by the deceased, though the conveyances may have been in fraud of creditors and the property may be needed to pay the debts of the estate of the deceased: *Estes* v. *Howland*, 15 R. I.

In such case the defrauded creditors are the proper parties to act: *Id.*

An administrator is, however, the proper party to act, in order to recover sufficient property to defray the expenses of administration if the assets in his hands are not sufficient for this purpose: *Id.*

When a bill in equity was brought by an administrator to set aside as fraudulent against creditors conveyances made by the deceased, and it did not appear whether the administrator held sufficient assets to pay the expenses of administration: *Held*, that the bill instead of being dismissed might, if the administrator lacked funds to defray the expenses of administration, be amended by setting forth this fact and by adding the creditors or some of them suing for themselves and the others: *Id.*

EXPERT. See *Evidence.*

FORMER RECOVERY.

Judgment in Tort—Previous Judgment in Assumpsit.—A. recovered judgment in assumpsit against B. for money loaned. A. afterwards brought case against B. for alleged fraudulent and false statements made to obtain the loan. B. pleaded in bar the judgment against him in assumpsit: *Held*, that the plea was not good: *Held, further*, that the value of the judgment in assumpsit was to be considered as *pro tanto* reducing the damages recoverable in the action on the case: *Whittier* v. *Collins*, 15 R. I.

FRAUDS, STATUTE OF. See *Specific Performance.*

Parol Contracts for Sale of Growing Timber.—Parol or simple contracts for the sale of growing timber to be cut and severed from the land by the vendee do not convey any interest in lands, and are not therefore within the Statute of Frauds: *Banton* v. *Shorey*, 77 Me.

HIGHWAY. See *Negligence.*

HUSBAND AND WIFE. See *Acknowledgment; Limitations, Statute of.*

INJUNCTION. See *Way.*

INSANITY. See *Evidence.*

INSOLVENCY. See *Lis Pendens.*

INSURANCE.

Settlement on Wife and Children—Revocation of.—F. took out a life insurance policy payable to M. and the children of F. When the policy was taken out M. was his wife, and he had four children living by a former wife. Subsequently a child was born to F. and M. Afterwards F. and M. transferred their right, title and interest in the policy by an unsealed instrument signed by them, as collateral security for a debt of F., and the instrument and the policy were delivered to the creditor. No question was made as to the validity of the transfer. On a bill of interpleader brought by the insuring company after the deaths of F. and M.: *Held,* that the policy was an executed, irrevocable, voluntary settlement in favor of the wife and the children in being when it was taken out: *Held, further,* that F. and M. could pledge or assign the policy to the extent of their interests in it: *Held, further,* the policy being for $5000, that one-fifth of this amount was due to the creditor and one-fifth to each of the four children: *Held, further,* one of the four children having died a minor before F., that the one-fifth due this child should be paid to his legal representative, if any, and if none, to the administrator of F., the child's father and next of kin: *Conn. Mut. Life Ins. Co.* v. *Baldwin,* 15 R. I.

Separate Policies in different Companies—Several Liability—Election to Rebuild—Separate Compromise—Measure of Liability.—A policy of insurance on a building against loss or damage by fire, reserved to the insurer the right to repair or rebuild upon giving notice of such intention within ninety days after proof of loss. After such proof the insurer served notice of its intention to rebuild, "acting jointly with other insurance companies claiming to be interested." At the time of the fire and of this notice, there were ten separate policies, in as many different companies, upon the same building; eight of which served like notices, severally signed by the company serving them. Before the time expired to rebuild, but while these insurers were taking steps for that purpose, the plaintiff compromised and settled with all said companies so electing to rebuild, except defendant, and released each of them from all liability, receiving for such release an amount of money in the aggregate much less than the amount of these policies. The defendant's policy had this condition: "In no case shall the claim be for a greater sum than the actual damages to or cash value of the property at the time of the fire; nor shall the assured be entitled to recover of this company in a greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific, or by general, or floating policies, and without reference to the solvency or liability of other insurance." *Held:* 1. That the liability of the defendant was several and not joint and that the service

by defendant of its intention to rebuild, acting jointly with the other companies, converted the respective policies from contracts for a money indemnity into contracts of indemnity payable in repairing or rebuilding, to be performed in the time named in the policy, but if no time is specified then within a reasonable time. 2. That the service of the notices did not operate to change the terms of this policy. Hence the plaintiff may recover on this policy, such share of the whole damages as the sum insured bears to the whole amount insured without reference to the solvency or liability of other insurance. 3. That after the policy has been thus converted into a building contract, the insured might settle and compromise with any of the companies thus bound to rebuild without releasing the others from such proportionate share of such loss as their policies bore to the aggregate insurance. 4. That in ascertaining defendant's proportionate share of the entire loss reference must be had to the aggregate insurance without regard to the fact that some of the companies had been settled with for a less sum than they were liable for, or that others did not elect to rebuild, or were insolvent or not liable: *Good* v. *Buckeye Mut. Fire Ins. Co.*, 43 Ohio St.

JURY. See *Trial.*

LANDLORD AND TENANT. See *Trespass.*

LICENSE. See *Way.*

LIFE ESTATE.

Life Tenant—Income—Partnership Profits—Corpus of Estate.—A testator devised the residue of his estate to his wife in trust for herself for life, with remainder over. Just before his death he entered into a co-partnership which was to continue for three years, and even in the event of his death to be carried on until the end of that period. *Held*, That the profits derived from the testator's share in the partnership belonged to the life-tenant as income, and did not constitute a part of the corpus of the testator's estate: *Heighe* v. *Littig*, 63 Md.

LIMITATIONS, STATUTE OF. See *Municipal Corporation.*

Exception as to Married Women—How far affected by subsequent Legislation enlarging their Powers.—The Act of April 3d 1861, constituting the real and personal property of a married woman her separate estate, and the provisions of section 28 of the Civil Code (now Rev. Stats., sec. 4996), authorizing her to sue and be sued alone, did not repeal by implication the saving clause in the Statute of Limitations securing to married women the right to maintain actions within the respective times limited after such disability is removed: *Ashley* v. *Rockwell*, 43 Ohio St.

LIS PENDENS.

Insolvency Proceedings—Assignment Pending.—While proceedings were pending against A. and B. copartners, for the appointment of a receiver of their property under proceedings in insolvency, A. made an assignment of his individual property to C. The receiver after his appointment petitioned the court for an order upon A. and C. requiring them to join in a conveyance to him of the assigned realty and to transfer to him the assigned personalty: *Held*, that the assignment was sub-

ject to the doctrine of *lis pendens*, and that the petition of the receiver should be granted: *Petition of Frank S. Arnold*, 15 R. I.

MASTER AND SERVANT. See *Municipal Corporation.*

MECHANIC'S LIEN.

Statutory Requirements.—A mechanic's lien exists, and is operative by virtue of statutory law only, and unless the substantial requirements of the law are observed, the claimant is beyond the scope of the remedy. While the courts are always prepared to construe the law liberally, and as remedial in its nature, and to allow all proper and necessary amendments to be made, yet all the proceedings must be in substantial accord with the main requirements of the statute: *Kenly* v. *Sisters of Charity*, 63 Md.

MORTGAGE.

Failure to Record—Right of subsequent Purchaser—Interest of Mortgagor who Sells and Receives Purchase-Money Mortgage.—The mortgagor in an unrecorded mortgage, who sells and conveys the mortgaged property, and concurrently takes back a mortgage from the purchaser to secure the purchase-money, retains such an interest in the property as may be taken in equity and applied on the debt secured by the unrecorded mortgage: *Home Building and Loan Association* v. *Clark*, 43 Ohio St.

The purchaser from the mortgagor of lands encumbered by an unrecorded mortgage, takes title thereto free from such encumbrance, even if he has full knowledge and notice of its existence, and that it is unpaid at the date of his purchase: *Id.*

If a judgment creditor procures a judgment against such a purchaser after such unrecorded mortgage has been recorded, his lien thereunder is valid as against such mortgage, and upon a judicial sale of the mortgaged property the proceeds of sale will be applied to pay such judgment lien, in preference to the mortgage which was not recorded at the date of such purchase: *Id.*

Foreclosure by Senior Mortgagee—Rights of Junior Mortgagee.—Where a senior mortgagee forecloses his mortgage, and sells the property, without making a junior mortgagee a party, or giving him notice, the purchaser, at such judicial sale, whether it be the senior mortgagee or a stranger, acquires his title subject to the right of redemption by the junior mortgagee, and the same rule applies where the junior mortgagee has assigned all his interest in the mortgage, and the notes secured thereby to a third person, who is not a party and is without notice of such proceedings and sale: *Holliger* v. *Bates*, 43 Ohio St.

MUNICIPAL CORPORATION. See *Constitutional Law; Negligence.*

Injury to Bridge—Parties to Action for—Statute of Limitations.—The board of commissioners of a county is the proper party to bring an action to reimburse the county for expense incurred by such board in rebuilding a bridge upon a county road within the limits of a village, which bridge had been so far wrongfully injured by a railroad company in the construction of its railroad across such county road, as to require the construction of a new bridge. *Railroad Co.* v. *Commissioners*, 35

Ohio St. 1, distinguished: *Commissioners* v. *Newark, S. & S. Rd. Co.*, 43 Ohio St.

The Statute of Limitations does not begin to run against such cause of action until the complete restoration of such bridge, by the commissioners, to its former condition of usefulness and safety; and does not interpose a bar to recovery within six years after such restoration: *Id.*

Tort of Officer—Discharge of Inferior Employee—Suit for Damages.—The foreman of an engine company in the fire department of Baltimore city, was dismissed by the fire commissioners from the service of the department, for disrespect to his superiors. In an action brought by him against the city, to recover the salary claimed to have become due to him since the date of his dismissal, it was *held*: 1st. That the defendant could not be held responsible for the determination of the fire commissioners, but they alone must answer for the want of good faith, if any existed, in dismissing their appointee. 2d. That if there were no arrears of salary at the time of dismissal, any wrong done by the commissioners must be redressed by an action of damages against them, and not the city. 3d. That their right of removal being absolute, the discharged employee ceased to be an incumbent of the position, and could no longer sustain a demand for salary as such, however its subsequent loss might enter as an element into the damages to be recovered of the commissioners, for fraudulent or illegal conduct in his removal: *Mayor, &c., of Baltimore* v. *O'Neill*, 63 Md.

NEGLIGENCE.

Proof of—General Character for Carefulness.—In an action for personal injuries received by a collision at a railroad crossing, evidence will not be received to show the general character and habits of the traveller for carefulness, as bearing upon the question of due care on his part, though the injuries occasioned death before he could tell how the accident happened, and no one saw him at the time of the collision: *Chase* v. *Maine Cent. Rd. Co.*, 77 Me.

In such a case the natural instinct for self-preservation does not afford proof of the absence of contributory negligence on the part of the traveller. It may give character or force to facts already proved, but it does not of itself add or create proof: *Id.*

Town—Highway—Want of Repair—Contributory Negligence.—A town is not required to render a way passable for the entire width of the whole located limits: *Morse* v. *Inhabitants of Belfast*, 77 Me.

In determining the question whether a way is safe and convenient within the meaning of the statute, it is enough that the way is safe and convenient in view of such casualties as might reasonably be expected to happen to travellers: *Id.*

The law has not prescribed what imperfections in a way will be considered as constituting a defect or want of repair, so as to render a town liable if an injury is occasioned thereby. These are questions of fact, generally, for the jury to settle, under proper instructions: *Id.*

In an action for personal injuries received by reason of a defect in a way the question, whether the plaintiff or driver was in the exercise of ordinary care, is proper for the jury to consider and determine: *Id.*

PENSION.

Exemption from Execution.—By the statutes of the United States, the money due a pensioner is exempted from attachment or seizure upon legal process while it remains with the pension office or any officer or agent thereof, or is in course of transmission from such officer or agent to the pensioner, but not after the money has come to the pensioner's hands; when the money is actually in the possession of the pensioner the protection ceases: *Friend* v. *Garcelon*, 77 Me.

Pledge—Attachment.—One who loans money to a pension claimant to enable him to establish his claim, and to be repaid when the pension money is received, is not debarred from recovering back his loan by U. S. R. S., sect. 5485: *Crane* v. *Inhab. of Linneus*, 77 Me.

A verbal promise by a pension claimant, to pay a debt, when he receives his pension, or out of his pension, is not such a pledge, mortgage, assignment, transfer, or sale of the pension claim, as is forbidden by U. S. R. S., sect. 4745: *Id.*

When the pension check has come into the hands of the pensioner, it is then at his free disposal, and its proceeds are liable to attachment, unaffected by U. S. R. S., sect. 4747: *Id.*

RAILROAD. See *Damages; Negligence; Way.*

REFORMATION. See *Equity.*

SPECIFIC PERFORMANCE.

Parol Contract for Land.—A parol agreement for the conveyance of land may be enforced in equity in behalf of the vendee whose partial performance has been such that fraud would result to him unless the vendor be compelled to perform on his part: *Woodbury* v. *Gardner*, 77 Me.

Thus, where the vendee, with the assent of the vendor, took open, actual possession of the premises in pursuance of the agreement, made permanent erections thereon, promptly paid the taxes assessed thereon to him by direction of the vendor and substantially performed his agreement, specific performance was decreed against the vendor's sole devisee: *Id.*

TAXATION. See *Constitutional Law.*

TRESPASS.

Landlord and Tenant.—A landlord cannot maintain trespass for injury to the premises let, done by the tenant during the tenancy. His remedy is trespass on the case: *Carroll* v. *Rigney*, 15 R. I.

TROVER. See *Bills of Lading.*

TRIAL.

Instruction to Jury—Personal Knowledge.—An instruction which authorizes a jury, in determining an issue presented to them, to infer what was the fact from the evidence, "or from such personal knowledge as you may have in relation to matters of this kind," is erroneous: *Douglass* v. *Trask*, 77 Me.

WAY.

Railroad—License—Revocation—Injunction.—A railway company which has entered upon land under a license from the owner, and constructed its road, cannot plead such license as a defence to an action of trespass *quare clausum fregit*, for running its trains over said land, brought by the owner thereof: *Baltimore & Hanover Rd. Co.* v. *Algire*, 63 Md.

A right of way is such an interest in land as cannot be acquired by a mere license. It can only be acquired in this state in the mode provided by the statute, that is, by deed duly executed and recorded: *Id.*

Where a railway company has the right under its charter to acquire a right of way over certain land by condemnation, and proceedings for such purpose are dispensed with by reason of the consent of the owner of the land to the construction of the road, and he subsequently, after the road has been built at large expense, revokes his consent, a court of equity will restrain him from interfering with the railway company in the use and enjoyment of the right of way pending proceedings to have the same condemned: *Id.*

Public Way—Dedication—Use—Right of Owner of Soil.—The existence of a public way may be established by evidence of an uninterrupted user by the public for twenty years; the presumption being that such long-continued use and enjoyment by the public of such way had a legal rather than an illegal origin: *Thomas* v. *Ford*, 63 Md.

At the common law, however, the principle of presumptive dedication, or *quasi* prescription, does not apply to give rise to a right in the general public to use the land of an individual on a navigable river, as a public landing, and place of deposit of wood and other articles of property for an indefinite time: *Id.*

The existence of an ordinary highway over the land of an owner, whether it had its origin by condemnation, dedication or prescription, does not divest him of the property in the soil. In such case he has full dominion and control over the land, subject to the easement in the public, and he may recover it in ejectment, or bring an action for trespass against any person who deposits wood, stones or rubbish upon the soil, or otherwise infringes upon the ordinary proprietory rights of the owner of the soil, in a manner not in the use of the easement as a highway: *Id.*

WILL.

Attestation.—Under a statute requiring that a will shall be attested and subscribed in the presence of the testator the witness must actually sign in the testator's presence; acknowledgment in the presence of the testator of the witness's signature affixed in the testator's absence, is a nullity: *Town of Pawtucket* v. *Ballou*, 15 R. I.

Devise—Lapse—Gift of Residue.—Residuary testamentary disposition as follows: "I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, wherever and however situate, of which I am now possessed, or may die seised or possessed, unto my sons S., T., B., H., J. and C., to have and to hold the same with all the privileges and appurtenances to the same belonging, to them