capable of expelling the ball from the gun with great force, and so on? Generally, as to the negligence imputed to the defendant, it may be said that the act was not to be affected by the circumstances attending it, and therefore it was not to be decided by the jury. If, under any circumstances, the storing of powder with other goods in a warehouse in a city, would be a reasonable exercise of judgment and discretion, the rule would be otherwise; because, if the circumstances may give color to the act and make that fair and unquestionable, which otherwise must appear to be culpable, the jury would have to determine, whether by the circumstances the act was relieved of the character ascribed to it. But such, it is believed, cannot be the rule as to any such misconduct. There was nothing in the evidence upon which the jury could say, that the act of putting powder in the warehouse was not negligent, and, therefore, there was nothing to be determined by them on that point, except the matter of putting it there, which was left to them to decide on the evidence. Whether the presence of powder in the warehouse was the direct and efficient cause of the loss, was not, as it could not be, conclusively shown; but the evidence on that point is regarded as sufficient to sustain the verdict; that was peculiarly a question for the jury: *Milwaukee Railway Co.* v. *Kellogg*, 4 Otto 474. We do not feel at liberty to disturb the verdict on that ground, and we have not been able to discover any error in any part of the record. The motion is denied.

DILLON, Circuit J., concurred.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
ENGLISH COURTS OF COMMON LAW.[2]
SUPREME COURT OF MAINE.[3]
SUPREME COURT OF MICHIGAN.[4]

ACTION.

Cause of Action determinable by Declaration—Bill of Particulars.—The declaration in the writ is the criterion for determining what is recoverable in an action. If the declaration is broad enough to cover

[1] Prepared expressly for the American Law Register, from the original opinions filed during October Term 1877. The cases will be reported in 7 Otto.

[2] Selected from late numbers of the Law Reports.

[3] From J. D. Pulsifer, Esq., Reporter; to appear in 68 Maine Reports.

[4] Prepared from the opinions filed at the April Term 1878. The cases will probably be reported in 38 or 39 Michigan Reports.

a particular claim, it may be proved and recovered, though it was not specified nor contemplated by the plaintiff when the writ was drawn: *Haley* v. *Hobson*, 68 Me.

The filing of a bill of particulars, either upon the motion of the plaintiff or the defendant, is not objectionable as introducing a new cause of action, even though the plaintiff had no such cause in his mind as the bill states when he commenced the action: *Id.*

ADMIRALTY.

Salvage—Services rendered in setting Salvors in Motion.—A steam-tug, having a vessel in tow, saw a ship ashore and went out of her way to inform, and informed, another steam-tug of what she had seen. The other steam-tug thereupon proceeded to the stranded ship and towed her into safety. In an action of salvage instituted on behalf of both steam-tugs against the ship, *Held*, that the owners, master, and crew of both steam-tugs were entitled to salvage remuneration: *The Sarah*, Law Rep. 3 Prob. Div.

Salvage—Contribution—Non-liability of Shipowners for Life Salvage in cases where no Property belonging to them has been salved.—The C., a Spanish steamship, fell in at sea with the S., an English steamship, with signals of distress flying and entirely helpless from injuries sustained in a collision with a third vessel. The passengers of the S. and a quantity of specie, which had formed part of the cargo of the S., having been taken on board the C., attempts were made by the master and crew of the C. to tow the S. into safety. These attempts were ineffectual, and ultimately, after the master and crew of the S. had gone on board the C. the S. was abandoned, and her passengers, master and crew were landed in safety at an English port. Afterwards the specie was arrested in an action of salvage instituted at the suit of the owners, master, and crew of the C., who claimed in the action to recover for life salvage and for salvage services rendered to the S. and the specie. The owners of the specie appeared as defendants, and served a notice on the owners of the S., calling upon them to contribute to the remuneration claimed by the plaintiffs. Thereupon the owners of the S. appeared. At the hearing of the action the court awarded salvage remuneration to the plaintiffs for the services rendered, but reserved all questions as to the liability of the owners of the S. The owners of the specie then moved the court to declare that such portion of the sum awarded as was awarded for life salvage ought to be recouped to the owners of the specie. The court refused the motion on the ground that no property belonging to the owners of the S. having been salved they could not be held personally liable to pay any portion of the sum awarded: *The Cargo ex Sarpedon*, Law Rep. 3 Prob. Div.

AGENT. See *Trover.*

ASSUMPSIT.

Money had and received.—The defendant subscribed for shares in a patent right, to be held by him without payment therefor, otherwise than by inducing others to subscribe for shares and give their notes therefor for greatly more than the value of the shares; the notes afterwards came into his hands by purchase, and were by him negotiated for money

and paid by the makers. *Held*, that these facts would not entitle the makers to maintain an action against him for money had and received: *Lane* v. *Smith*, 68 Me.

BANK.

Failure of—Suspension of Specie Payments.—A suspension of specie payments by a bank is a failure of such bank: *Godfrey et al.* v. *Terry*, S. C. U. S., Oct. Term 1877.

BANKRUPTCY.

Preference of Creditor under Bankrupt Act—Scienter necessary on part of Creditor.—Under the Bankrupt Act, it is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt: *Grant* v. *National Bank et al.*, S. C. U. S., Oct. Term 1877.

BOND.

Requisites of—Tax Collector's Official Bond.—Generally the term "bond" implies an instrument under seal: *Inhabitants of Boothbay* v. *Giles*, 68 Me.

The official bond required of a collector of taxes must be a sealed instrument: *Id.*

The words "witness our hands and seals," when no seal is attached, will not make the instrument, though otherwise in proper form, a bond: *Id.*

An instrument, in form a bond, but containing no seal, voluntarily executed and delivered in lieu of a bond and accepted therefor, is valid: and its acceptance is a sufficient consideration to cover all official delinquencies in not paying over money actually collected after such acceptance: *Id.*

COMMON CARRIER. See *Railroad.*

DAMAGES.

Recovery of Prospective—Support from adjacent Land—Right to.—In an action for injury to the plaintiff's land and buildings, by removal of lateral support through mining operations carried on by the defendant on his own land adjoining, it was found by a referee to whom the amount of damage was referred that, in addition to existing damage, there would be future damage to the extent of 150*l.* *Held*, by MELLOR and MANISTY, JJ. (COCKBURN, C. J., dissenting), that such damage was recoverable in the action: By COCKBURN, C. J., inasmuch as, according to *Backhouse* v. *Bonomi*, 9 H. L. C. 503, the damage was the gist of the action, only the damage actually accrued could be recovered in the action, and further damage must be recovered when it actually occurred in a subsequent action. *Nicklin* v. *Williams*, 10 Ex. 259, and *Backhouse* v. *Bonomi*, 9 H. L. C. 503, considered: *Lamb* v. *Walker*, Law Rep. 3 Q. B. Div.

EASEMENT. See *Damages.*

Implied Grant not Favored—Grant by Necessity.—Implied grants are not to be favored, and will not be held to exist except in cases of clear necessity. Thus, a right of drainage through the grantor's adjoin-

ing land will not pass by implication (the deed being silent upon the subject), unless such right is clearly necessary to the beneficial enjoyment of the estate conveyed, though a drain has already been constructed through the adjoining land, and is in use at the time of the conveyance. *Dolliff et al.* v. *Boston and Maine Railroad*, 68 Me.

EVIDENCE.

Subscription in Aid of Railroad—Evidence of Original Proposal to Build.—In an action upon an instrument referring to a proposal to build a railroad, between two specified points, and binding the signers to give their notes in aid thereof, evidence of what the proposition was is admissible, since the instrument must have been signed in view of it, in the absence of the articles of association (no company having yet been organized at the time of subscription), which might have definitely fixed the line of the road and concluded the parties: *The Detroit L. and L. M. Railroad Co.* v. *Starnes*, S. C. Mich., April Term 1878.

Since an agreement to build a railroad, between two points, ordinarily leaves a choice of routes open, and since parties may subscribe solely in view of the adoption of some particular route, the location of a large body of water or other practically insurmountable obstacle may be shown as a reason why the contemplated road was not intended to start at a particular point and run in a particular direction, but was designed to use for some distance the track of a previously constructed road: *Id.*

Res gestæ.—The plaintiff was assaulted and injured by the defendant while interfering to protect her father in an affray between them. *Held* that, while the fact of the affray and an injury to her father may have been admissible in evidence, the detailed account of its subsequent consequence would not be: *Flint* v. *Breck*, 68 Me.

FENCE. See *Negligence.*

HIGHWAY. See *Negligence.*

HUSBAND AND WIFE.

Separation—Authority to pledge Husband's Credit.—Where husband and wife separate by mutual consent, the wife making her own terms as to her income, and that income proves insufficient for her support, the wife has no authority to pledge her husband's credit. Defendants, husband and wife, executed a deed of separation, by the terms of which the wife retained the income of property settled to her separate use on marriage. The husband covenanted to pay her 20*l.* a year towards the maintenance of three of the children of the marriage, and the wife covenanted to maintain these children until they were twenty-one, and not to apply for further assistance to her husband. The husband had kept up the annual payments of 20*l.*, in accordance with the terms of the deed. Plaintiff sued defendants in the county court to recover the price of meat supplied to the wife after the separation, and the judge at the trial, on hearing the wife's evidence, found that her income was insufficient for her support, and ruled that she had authority to pledge her husband's credit for the price of the meat. On appeal: *Held*, that this ruling was wrong, and that the wife after the separation had no implied authority to pledge her husband's credit: *Eastland* v. *Burchell*, Law Rep. 3 Q. B. Div.

JUDGMENT.

Cannot be rendered against one out of the Jurisdiction of the Court.—No judgment can be rendered against a man who is not brought within the jurisdiction of the court, because somebody else is on a similar liability: *Godfrey et al.* v. *Terry*, S. C. U. S., Oct. Term 1877.

LIBEL.

Privileged Communication—Malice in Fact—Evidence of Express Malice.—In an action for libel where the occasion is privileged, it is for the plaintiff to establish that the statements complained of were made from an indirect motive, such as anger or with a knowledge that they were untrue, or without caring whether they were true or false and not for the reason which would otherwise render them privileged; and if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief: *Clark* v. *Molyneux*, Law Rep. 3 Q. B. Div.

LIEN.

For Repairs not available by Third Parties.—The existence of a lien for repairs cannot be raised by third persons who have levied upon the chattel subject to the lien, as an objection to replevin by the party claiming ownership and who ordered the repairs: *Bodine* v. *Simmons*, S. C. Mich., April Term 1878.

LIS PENDENS. See *Municipal Corporation.*

MASTER AND SERVANT.

Negligence of Servant—Liability of Master.—The servant of the occupants of an upper tenement accidentally left open a faucet, thereby causing the water to overflow and flood the tenement below. *Held*, that the occupants of the upper tenement were liable for the damage thereby done: *Simonton et al.* v. *Loring et al.*, 68 Me.

MORTGAGE.

Writ of Entry by Mortgagor—Judgment on Collateral Notes not Satisfaction.—The mortgagor cannot maintain a writ of entry against the mortgagee, or his assignees, without showing a satisfaction of the mortgage. *Jewett* v. *Hamlin*, 68 Me.

Suing the notes secured by a mortgage, and procuring judgment upon them, without satisfaction, in no way affects the validity of the mortgage: *Id.*

A writ of entry by the mortgagor, against the mortgagee or his assignee, is not an appropriate action in which to determine the validity of an attempted foreclosure: *Id.*

Grantee's Liability to Mortgagee.—The grantee of mortgaged premises is not liable at law to a mortgagee upon his covenant with the mortgagor to pay the mortgage debt: *Hicks* v. *McGarry*, S. C. Mich., April Term 1878.

Mortgagee with Notice.—A mortgagee with notice of the fraudulent discharge of a prior mortgage is not a *bona fide* purchaser: *Connecticut General Life Ins. Co.* v. *Burnstine*, S. C. U. S., October Term 1877.

Absolute Conveyance—Admissibity of.—In equity parol testimony is admissible to show that a conveyance absolute on its face was in fact a mortgage: *Risher* v. *Smith*, S. C. U. S., October Term 1877.

Mortgagee in Possession—Covenants—Costs.—The fact that a mortgagee in possession first conveyed the land with a covenant against encumbrances, and then took the mortgage, under which he holds possession, as security for a portion of the purchase-money, will not render him chargeable with rent, or for damages equal to rent, for a period of time during which a third party held possession of the land without right and without the consent of the mortgagee, such possession not constituting an encumbrance within the meaning of the law, or a breach of the covenant against encumbrances: *Dinsmore* v. *Savage et al.*, 68 Me.

When a mortgagee has upon demand rendered a true account of the amount due upon the mortgage, a bill in equity to redeem cannot be maintained, unless the plaintiff first tenders to the mortgagee the amount due or is prevented from so doing through the fault of the mortgagee: *Id.*

If the plaintiff prevails in a suit in equity to redeem land under mortgage, he recovers costs as a legal right, the law in this respect having been changed since the decision in *Bourne* v. *Littlefield*, 29 Me. 302: *Id.*

Municipal Corporation.

Bonds issued by—Bona fide holder—Lis Pendens.—If a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constitutional body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it: *County of Warren* v. *Marcy et al.*, S. C. U. S., October Term 1877.

It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereof, and will, on their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way: *Id.*

Negligence. See *Nuisance.*

Injury to Cattle from Defective and Improper Fencing—Landlord and Tenant.—The plaintiff and the defendants respectively occupied adjoining lands as tenants under the same landlord. By the terms of their lease, the defendants were bound to fence the land in their occupation for the benefit of the lessor and his tenants. About twenty years ago the predecessors of the defendants had fenced their land with wire rope, and the defendants allowed this fence to remain, and from time to time partially repaired it. From long exposure, the strands of the wires composing the rope decayed, and pieces of it fell to the ground and lay hidden in the grass of the adjoining pasture occupied by the plaintiff. The plaintiff's cow in grazing there, swallowed one of these pieces and died in consequence: *Held*, that the defendants were liable to compensate the plaintiff for the loss of the cow: *Firth* v. *The Bowling Iron Co.*, Law Rep. 3 C. P. Div.

Dangerous Instrument in Road—Proximate Cause of Injury—Intervening Act of third Party—Remoteness of Damage.—The defendant, who was in the occupation of certain premises abutting on a private road consisting of a carriage and footway, which premises he used for the purpose of athletic sports, had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises and overlooking the sports. In the middle of this barrier was a gap which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that the defendant had no legal right to erect this barrier. Some person, without the defendant's authority, removed a part of the barrier armed with spikes, commonly called chevaux de frise, from the carriageway where the defendant had placed it and put it in an upright position across the footpath. The plaintiff, on a dark night, was lawfully passing along the road on his way from one of the houses to which it led. He felt his way through the opening in the middle of the barrier and getting on to the footpath was proceeding along it when his eye came in contact with one of the spikes of the chevaux de frise and was injured. It was not suggested that the plaintiff was guilty of any negligence contributing to the accident, and the jury found that the use of the chevaux de frise in the road was dangerous to the safety of the persons using it: *Held*, that the defendant, having unlawfully placed a dangerous instrument in the road, was liable in respect of injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriageway, where the defendant had placed it, to the footpath. *Mangan* v. *Atterton*, Law Rep. 1 Ex. 239, discussed: *Clark* v. *Chambers*, Law Rep. 3 Q. B. Div.

Nuisance.

Injury caused to an Adjoining Occupier—Water, Percolation of.—A statement of claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain-water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage. *Held*, upon demurrer, that the statement of claim disclosed a good cause of action: *Hurdman* v. *The North Eastern Railway Co.*, Law Rep. 3 C. P. Div. (Ct. App.).

Partnership.

Equity—Death of Partner—Dissolution.—Unless articles of partnership contain some special provision for further continuance, a partner's death dissolves the firm, and leaves its settlement in the survivor's hands; and a court of equity has no power to enforce a partnership agreement after such dissolution of the firm by the partner's death: *Roberts* v. *Kelsey*, S. C. Mich., April Term 1878.

Assent of Co-partners presumed.—Where an agent of a firm, with the assent of one partner, assigned a demand due the firm, to apply on a debt against himself and the assenting partner, *Held*, that the person owing the demand could not contest the validity of the assignment with-

out producing evidence that the other partners did not acquiesce in the transfer: *Kuhl et al.* v. *Thompson et al.*, S. C. Mich., April Term 1878.

Set off against Assignee of Claim.—An indebtedness to be available as set-off against the assignee of a demand, must have accrued before the assignment: *Id.*

PATENT.

Rights secured by—What constitutes difference of Device.—Rights secured to an inventor by letters patent are property which consists in the exclusive privilege of making and using the invention and of vending the same to others to be used for the period prescribed by the patent act, and the provision is that every patent and any interest therein shall be assignable in law by an instrument in writing: *Paper-bag Machine Co. et al.* v. *Murphy et al.*, S C. U. S., October Term 1877.

Devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result: *Id.*

The substantial equivalent of a thing in the sense of the patent law is the same as the thing itself, so that if two devices do the same work in substantially the same way and accomplish substantially the same result they are the same even though they differ in name, form or shape: *Id.*

Redress of Patentee—Reissue of Patent.—Owners of a patent, whether patentees or assignees may seek redress for the unlawful use of the improvement which it secures, in the Circuit Court, by a suit at law or in equity, at their option, but in either form of proceeding they must allege and prove that they or those under whom they claim are the original and first inventors of the improvement, and that the opposite party or parties have infringed their exclusive right to make or use the same or vend it to others to be used. Both allegations must be proved, but the letters-patent, if introduced and in due form, afford a *prima facie* presumption that the first allegation is true, which casts the burden of proof upon the defending party: *Marsh et al.* v. *Seymour et al.*, S. C. U. S., October Term 1877.

Patents when inoperative or invalid, may in certain cases be surrendered and re-issued, but the new patent in such case must be for *the same invention* as the original patent, and if it is for a different invention the re-issue is invalid, for the reason that it was granted without authority of law: *Id.*

Infringers, if they give due notice of such a defence, may show that the patentee is not the original and first inventor of the improvement, and if they establish that allegation the prosecuting party is not entitled to recover, but the burden to the defence if the patent is introduced in evidence, is cast upon the defending party to prove the affirmative of the issue: *Id.*

PAYMENT.

Payment a question of Fact.—Whether certain facts make out an understanding between parties, that a particular transaction shall settle a demand is not a question of law: *Sly* v. *Freeman*, S. C. Mich., April Term 1878.

PLEADING. See *Action.*

RAILROAD.

Passenger's Luggage—Delivery to Passenger—Termination of Company's Risk.—It is the duty of a railway company with regard to the luggage of a passenger, which travels by the same train with him but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it; and the liability of the company does not cease until a reasonable time has been allowed to the owner to do so: *Putscheider* v. *The Great Western Railway Co.*, Law Rep. 3 Ex. Div.

Common Carriers—Passenger's Luggage placed in Compartment with him—Negligence.—A railway company are not insurers in respect of luggage placed at a passenger's request in the same compartment in which he intends to travel; and they will not be liable to compensate him if luggage so placed is lost or stolen without any negligence on their part: *Bergheim* v. *Great Eastern Railway Company*, Law Rep. C. P. Div.

REPLEVIN. See *Lien.*

SALE.

False Representation—Contagious Disease, Animals affected with—Sale in Market—Implied Representation that Animals not suffering from Disease.—The defendant sent for sale to a public market, pigs which he knew to be infected with a contagious disease; they were exposed for sale, subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs, which became infected; some of the pigs bought from the defendant and also some of those with which they were put, died of the contagious disease. The plaintiff having sued to recover damages for the loss which he had sustained: *Held*, that the defendant was not liable to the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease: *Ward* v. *Hobbs*, Law Rep. 3 Q. B. Div. (Ct. App.)

Of Goods—Passing of Property in—Bill of Lading, Goods delivered to Order.—P. shipped six hundred tons of umber upon a vessel chartered for the plaintiff. The bills of lading made the umber deliverable to the order of P. or assigns. The plaintiff insured the umber. A bill of exchange drawn by P. on the plaintiff which had been discounted by the defendant's bank, to whom the bills of lading had been transferred, having been refused acceptance, a second bill was drawn by P. to the order of C. on the plaintiff, and was given to the defendants in exchange for the first bill, upon the terms that the plaintiff should accept and pay the second bill against the delivery of the bill of lading. The umber and the bill of exchange reached their destination at the same time, but the plaintiff declined to accept the bill. The umber was, therefore, entered at the custom house in the defendant's name. Subsequently the plaintiff tendered the amount of the bill of exchange and demanded the bill of lading, but the defendants refused to give up the bill of lading; the

plaintiff offered a guarantee for the freight, which offer was not accepted by the defendants, and they sold the cargo. *Held*, in an action by the plaintiff for the value of the umber so sold by the defendants, that the property in the umber passed to the plaintiff, and that, therefore, the plaintiff was entitled to recover: *Mirabita* v. *Imperial Ottoman Bank*, Law Rep. 3 Exch. Div.

SALVAGE. See *Admiralty.*

SHIPPING.

Charter-party—Description of Vessel—Warranty.—A description in a charter-party that a vessel is of a particular class is not a continuing warranty, but applies only to the classification at the time the charter-party is made: *Hurst* v. *Usborne*, 18 Q. B. 144, approved of: *French* v. *Newgass*, Law Rep. 3 C. P. Div.

Charter-party, Construction of—Despatch Money for Time saved in loading and discharging Cargo.—A charter-party contained the following clause: "Demurrage, if any, at the rate of 20*s.* per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Despatch money 10*s.* per hour on any time saved in loading or for discharging." Four days were saved in loading and five days in discharging cargo, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours a day 108 hours: *Held*, that "despatch money" was payable under the charter-party at the rate of 10*s.* per hour per day of twenty-four hours: *Laing* v. *Hollway*, Law Rep. 3 Q. B. Div.

TRIAL.

Agent—Fraudulent Use of Principal's Property to Pay his own Debt.—If the owner of an article of personal property delivers it to another to sell, the latter has no right to deliver it to his creditor in payment of his own pre-existing debt; and if he does so, the owner may maintain trover against the creditor without a previous demand: *Rodick* v. *Coburn*, 68 Me.

TROVER.

When a Case may be withheld from Jury.—Although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render: *Herbert* v. *Butler*, S. C. U. S. Oct. Term 1877.

WATER. See *Nuisance.*