

the reported facts, to make the defence set up in their plea and brief statement. *Holt v. Gage*, 60 N. H. 536, 541, 542; *Gage v. Dudley*, 64 N. H. 271; *Lang v. Gage*, 65 N. H. 173, 175.

Exception overruled: judgment for the sureties.

CLARK, J., did not sit: the others concurred.

Carroll, }
Dec., 1897. }

PITMAN v. MAURAN.

Whether a verdict should be set aside as against the evidence, is a question of fact determinable at the trial term.

Exceptions to instructions are waived, unless taken before the jury retire.

ASSUMPSIT. Trial by jury and verdict for the defendant. The day after the verdict was rendered the plaintiff moved to set it aside as against the law and evidence; and two or three days afterward filed a written motion to set it aside on the same ground and also in arrest of judgment and for a new trial, specifying certain particulars wherein he claimed it was against the law and the evidence. The errors of law claimed were in the instructions which the court gave or failed to give the jury. There were no exceptions to the charge, and no requests for instructions which were not granted. The motions were denied, and the plaintiff excepted.

George W. M. Pitman and Josiah H. Hobbs, for the plaintiff.

Fred B. Osgood, for the defendant.

WALLACE, J. Whether the verdict is against the evidence, is a question of fact to be decided at the trial term. *Fuller v. Bailey*, 58 N. H. 71; *Lefavor v. Smith*, 58 N. H. 125; *Kelley v. Woodward*, 58 N. H. 153; *Daniels v. Lebanon*, 58 N. H. 284; *Hovey v. Brown*, 59 N. H. 114; *Little v. Upham*, 64 N. H. 279; *Lucier v. Larose*, 66 N. H. 141.

If the plaintiff desired different or additional instructions, he should have asked for them at the trial. If an exception was desired to the charge, it should have been taken before the jury retired. If there was any error, it could have been, and doubtless would have been, corrected. Such exceptions not taken at

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70	625
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that time are waived, and cannot be taken afterward. Rules of Court, No. 54,—56 N. H. 590; *Moore v. Ross*, 11 N. H. 547, 557; *State v. Rye*, 35 N. H. 368, 381; *Boyce v. Railroad*, 43 N. H. 627; *State v. Gorham*, 55 N. H. 152; *Bank v. Ferguson*, 58 N. H. 403; *Dow v. Merrill*, 65 N. H. 107.

Exceptions overruled.

CLARK, J., did not sit: the others concurred.

Merrimack, }
Dec., 1897. }

FARNUM v. CONCORD LAND AND WATER POWER CO.

Counts in case and assumpsit for different causes of action not dependent upon substantially the same evidence cannot be joined; but a verdict for the plaintiff upon one count will not be disturbed for misjoinder if it appears that the defendant upon the trial was not prejudiced thereby.

One who maintains a curbing over a spring on land of another, by virtue of a license to his grantor, is bound to keep it in a reasonably safe condition.

CASE, for negligence in not keeping in repair the covering or curb over a spring, whereby the plaintiff's cow was injured, with a count in assumpsit for the use of water from the spring. Subject to exception, the defendants' demurrer on the ground of a misjoinder of counts was overruled. Evidence was introduced by the plaintiff on both counts.

Prior to 1883, B. L. Larkin, by the plaintiff's license, placed a box, covered with boards, in a spring on the plaintiff's land and conducted the water to his adjoining premises. In 1883, he conveyed the premises to another who, in 1892, conveyed them to the defendants. The spring furnished water to the Larkin premises all the time to August, 1894, and afterward. The defendants kept the aqueduct in repair and several times "fixed" about the box which covered and protected the spring. The court held that Larkin was bound to keep the box in a reasonably safe condition; that since the defendants, after their purchase of the premises, received the water as Larkin had received it and made repairs upon the aqueduct and about the spring, they must be regarded as holding under a license as Larkin did, and subject to the same duty to keep the box in a reasonably safe condition. They neglected to keep a proper cover on the box, and allowed it to become rotten and insufficient. The injury to the plaintiff's cow was due to their negligence in this