

But there is another reason why this position of the defendants can not avail them, that the action should have been in the name of White and Taylor, and that is, that such nonjoinder of plaintiffs could only be taken advantage of by plea in abatement. In this case it is too late to take that exception on trial. *Pitkin v. Roby*, 43 N. H. 138.

There must be judgment on the verdict.

BAILEY v. SMITH.

A declaration on an account annexed for the price of goods sold and delivered, with a count for goods bargained and sold, may, on review, be amended by adding a special count for not accepting and paying for the same goods.

THE facts sufficiently appear in the opinion of the court.

Burns & Fletcher, for the plaintiff.

Benton & Ray, for the defendant.

BELLOWS J. The action is for goods sold and delivered, and goods bargained and sold, and is brought to recover the price of certain telegraph poles. It having been held, as matter of law, that there was no delivery, the plaintiff moved to amend by adding the special count for not accepting the poles bargained, and paying therefor.

We think the ruling of the court, allowing the amendment, was right; that it was not introducing a new cause of action, within the principle of the decided cases, but that the court can see that the identity of the original cause is preserved; *Stevens v. Mudgett*, 10 N. H. 338; which we think covers the whole ground; and the cases where a general count is allowed to be filed, on failure to sustain a special count, or where the special contract has been rescinded, are in point. *Burnham v. Spooner*, 10 N. H. 165; *Wiggin v. Veasey*, 43 N. H. 313.

Exceptions overruled.