

was made, in which he gave them information as to the nature of his claim; and there was no evidence that his counsel derived any such information from any other source. There was no evidence of any special direction by the plaintiff as to the form of the writ or declaration.

At the close of his opening statement to the jury, the defendant's counsel was permitted, subject to the plaintiff's objection, to read to the jury the special count, on the ground that it was part of the record in the case, and that it contained statements inconsistent with the plaintiff's testimony and claim, and was, therefore, proper matter to be considered by the jury for its bearing upon the plaintiff's credit as a witness.

A verdict having been returned for the defendant, the plaintiff moved for a new trial.

*Lane*, for the plaintiff.

*Wheeler & Faulkner*, for the defendant.

FOSTER, J. It is customary and proper, under our practice, for the plaintiff's counsel to state his client's case in various forms in different counts, in order to meet the proof which he may encounter upon the trial. Such statements may be apparently inconsistent, if regarded as a narrative of facts instead of a mere form of pleading. At the trial, one count cannot be adduced as evidence against another; nor can the fact, that evidence was offered at one time to sustain such count, be regarded as an admission by the party, on a subsequent trial of the same cause, that the facts as charged in such count are true, and that therefore he cannot proceed to trial on a different count. The exclusion of the inconsistent counts as evidence is by force of an absolute rule of law, founded upon the policy of allowing a plaintiff, in his declaration, to state his case in inconsistent forms. *Cilley v. Jenness*, 2 N. H. 87; *Chapman v. Sloan*, 2 N. H. 467; *Bump v. Smith*, 11 N. H. 48; *Kimball v. Bellows*, 13 N. H. 58; *Buzzell v. Snell*, 25 N. H. 474; *Hull v. Clement*, 41 N. H. 168; *Keeler v. Bartine*, 12 Wend. 110; *Hughes v. Moore*, 7 Cranch 176; 1 Stark. Ev. 295; Gould's Pl. 432.

The verdict must be set aside, and

*A new trial granted.*

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STATE v. NICHOLS.

In an indictment properly laying an offence on a particular day, a *continuo* may be rejected as surplusage.

INDICTMENT, for embezzlement alleged to have been committed on a

certain day, "and on divers other days between that day, and a certain other subsequent day." The respondent moved to quash.

*Wheeler & Faulkner*, for the respondent.

*Woodward*, solicitor, for the state.

STANLEY, J. A day certain being named, and the *continuando* being rejected as surplusage, the indictment is good. *People v. Adams*, 17 Wend. 475; *Cook v. State*, 11 Ga. 53; *King v. Kixon*, 10 Mod. 335; *State v. La Coste*, 2 Mason 129; *Hawkins P. C.*, B. 2, c. 25, ss. 32, 74.

*Motion denied.*

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CAMP v. HILLIARD.

A review, whether prosecuted by writ or order, is so far a new action that a judgment in it is not secured by an attachment made in the original suit.

WRIT OF ENTRY, to recover a tract of land; attached when it belonged to one Cole, in a suit brought against him by the plaintiff. In that suit, the plaintiff recovered a judgment which was satisfied. Cole reviewed the action; the amount of the plaintiff's damages was increased, and an execution for the excess and costs was levied on the demanded premises, which Cole, before the rendition of the judgment in review, had conveyed to the defendant. The defendant had a verdict, and the plaintiff moved for a new trial.

*Barton and Wait*, for the plaintiff.

*Burke*, for the defendant.

DOE, C. J. The review, whether prosecuted by writ or order, was so far a new action that the judgment in it was not secured by the attachment made in the original suit. *Bell v. Bartlett*, 7 N. H. 178; *Badger v. Gilmore*, 37 N. H. 457, 463; *Sanford v. Candia*, 54 N. H. 419.

*Judgment on the verdict.*

STANLEY, J., did not sit.