

upon the ground, and was then and there and thereby greatly bruised, sprained, and injured, &c.

Mugridge, for the plaintiff.

By the amendment, the plaintiff seeks a remedy which she claims is furnished her at common law,—her position being, that upon the facts stated in the former case, under proper instructions from the court, the jury may find the city liable at common law. *Gilman v. Laconia*, 55 N. H. 130, and cases cited; *Wheeler v. Troy*, 20 N. H. 77; *Groton v. Haines*, 36 N. H. 388; *Thayer v. Boston*, 19 Pick. 511; *Stetson v. Faxon*, 19 Pick. 147; *Perry v. Worcester*, 6 Gray 544; *Haynes v. Burlington*, 38 Vt. 359; 2 Hill. Torts (3d ed.) 405, and cases cited; 1 Hill. Torts (3d ed.) 66, and cases cited; 3 Bl. Com. 219.

Sanborn & Clark, for the defendant.

DOE, C. J. The city could lawfully erect a hydrant, and attach a line of hose to it. The complaint is, that certain officers of the city used the hydrant and hose carelessly, and that the city suffered and permitted the careless use. We understand the averment of sufferance and permission to mean that the city did not prevent the use complained of. But there is no allegation of the city's duty of prevention, or of any fault in the city. The new count is insufficient, because it does not state that the city made the careless use, or that the act of the officers was the act of the city, or an act for which the city was responsible, nor state any facts showing the liability of the city for the act of the officers.

Case discharged.

FOSTER and ALLEN, JJ., did not sit: the others concurred.

MERRILL v. PERKINS.

The form of action may be changed by amendment; and the amendment may be made after verdict, without a new trial, when the verdict could not have been affected by the amendment if it had been made before the trial.

How far the cross-examination of a witness should be carried for the purpose of disparaging his credibility, is a question of fact to be determined at the trial term.

CASE, for entering the house occupied by the plaintiff and her husband and children, and taking out the doors and windows, tear-

59	343
67	409
67	416
68	344
59	343
69	172
59	343
70	275
59	343
71	508

ing up the floor, and making a noise and disturbance, whereby the plaintiff was exposed, frightened, and disturbed, prematurely delivered of a child, and seriously injured in health. The defendant's objection, that the plaintiff cannot recover in this form of action, was overruled.

On the cross-examination of the plaintiff's husband, the defendant asked him if he had been notified to quit every house he had lived in for ten years, and been put out by legal proceedings in every case. The question was excluded, and the defendant excepted. Verdict for the plaintiff.

Norris & Albin, for the defendant.

The action should have been trespass, and not case. *Mugford v. Richardson*, 6 Allen 76; *Curl v. Lowell*, 19 Pick. 25; *Curtis v. Galvin*, 1 Allen 215; *Meador v. Stone*, 7 Met. 147; *Whitney v. Swett*, 22 N. H. 10.

The inquiry of the husband, whether he had been notified to quit every house he had lived in for ten years, and been put out by legal proceedings in every case, was material and competent, upon cross-examination, for the jury to understand the character of the witness whom they were called upon to believe; and to know whether, although he had not been convicted of any crime, he had not in some measure rendered himself less credible by his disgraceful conduct. 1 Starkie Ev. 170; 1 Gr. Ev., s. 453.

Chase & Streeter, for the plaintiff.

The form of action is right. *Whitney v. Swett*, 22 N. H. 10. But if an error has been committed in this respect, it is apparent that practically it is one of form rather than substance, and justice requires that it should be cured by an amendment under the provisions of G. L., c. 226, s. 9, as interpreted in *Stebbins v. Lancashire Ins. Co.*, 59 N. H. 143, and by c. 7, Laws of 1879. The form of the action did not restrain or enlarge the rights of either party in the introduction of evidence or the conduct of the trial in any particular. There having been such a trial, it would be gross injustice to set aside the plaintiff's verdict because the refined distinction between the actions of trespass and case was not observed in drawing the declaration. The court, after verdict, will not look with eagle eyes to the form of action if the verdict is substantially right. *Ricker v. Freeman*, 50 N. H. 429, and authorities there cited.

The question put to the plaintiff's husband was properly excluded. Steph. Dig. Ev., Arts. 2, 10; 1 Gr. Ev., ss. 455, 458. If it could be allowed, it was within the discretion of the court to allow or exclude it.

DOE, C. J. The objection to the form of action might have been obviated at the trial by an amendment of the declaration, add-

ing a new count in trespass. *Stebbins v. L. Ins. Co.*, 59 N. H. 143. And as the amendment, if made before the trial, would not have affected the trial or the verdict, it may be made now without disturbing the verdict. *Roulo v. Valcour*, 58 N. H. 347. It does not appear to be necessary to inquire whether case, or trespass, is the right form of action.

The question put to the plaintiff's husband was asked for the purpose of disparaging his credibility. How far justice required the cross-examination should be allowed to go in that direction was a question of fact to be determined at the trial term. *Gutter-son v. Morse*, 58 N. H. 165. When the amendment is made, there will be

Judgment on the verdict.

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

PHOENIX MUTUAL LIFE INSURANCE CO. v. CLARK.

59	345
74	230

When the law of a case is fully, accurately, and clearly stated in instructions given to the jury, and each party has an opportunity in argument to apply the law to his view of the facts, it is not error of law for the court to refuse to instruct the jury on the application of the law to particular evidence.

A remark made to a juror during a trial by a person having no interest in the case, if it has no influence and does not affect the fairness of the trial, and the party gaining the verdict is not responsible for it, is not a cause for a new trial.

REVIEW of the action of debt on a bond, reported in 58 N. H. 164. Plea, *non est factum*, and a brief statement that the defendant's signature was obtained by fraud. Dudley was an agent of the plaintiff, and the bond was signed by Dudley as principal, and by Moore, and the defendant, and two others, as sureties; and the signatures were not denied. The condition of the bond was to pay the past and future indebtedness of Dudley to the plaintiff. To instructions given the jury, and a refusal to give instructions requested, the defendant excepted.

Moore, one of the sureties, was the plaintiff's general agent in New Hampshire, and was a member of the Young Men's Christian Association, and an important witness for the plaintiff; and it was his conduct that the defendant contended was fraudulent. At a recess during the trial, a deputy sheriff said to F., one of the jurors trying the case, in the presence of T., another juror, that he did not see how they happened to let him (F.) be on the jury. F.