

Sinclair having testified in substance that the Quimby note was to be held as collateral security for the Noyes acceptance, it was competent for the plaintiff to contradict him by showing that he had made statements and admissions contrary to his evidence upon the stand. Such was the effect of the testimony of Cummings.

When Quimby entrusted Sinclair with his note, he gave him an implied authority to deal with it as he pleased,—to make such contract with the bank concerning it as Sinclair might find to be for his advantage. It is not intimated that Quimby gave any directions that it should be used only as collateral security for the Noyes acceptance, or that he had any knowledge that it was intended to be so pledged, or that it was not discounted and its avails placed to the credit of Sinclair. But it is held, that where a surety confides to the principal the power of making a contract, he confides to him the power of furnishing evidence of the contract; and that if the contract be made by parol, subsequent declarations of the principal are admissible in evidence, though not conclusive. 1 Greenl. Evid., s. 187; *Meade v. M'Dowell*, 5 Binn. 195; *Joslyn v. Smith*, 13 Vt. 353; *Wilson v. Green*, 25 Vt. 450; *Brown v. Welch*, 38 Vt. 241.

Upon the same ground, and as a part of the *res gestæ*, the evidence of Leslie concerning the actual contract, as indicated by the books of the bank and the absence of a mark upon the note, such as designated notes held as collateral, was properly admitted.

It therefore follows, that after the application of the \$6,750, as before indicated on Sinclair's \$12,000 note, and on the Pierce and Quimby notes, the plaintiff will be entitled to judgment in all three of these actions.

Cases discharged.

STANLEY, BINGHAM, and CLARK, JJ., did not sit: the others concurred.

RUTHERFORD v. WHITCHER.

Counts in trover and assumpsit may be joined in a declaration on a single cause of action.

TROVER, for 200 cords of hemlock bark, and ASSUMPSIT, for \$1,000, the proceeds of the bark. Demurrer, for a misjoinder of counts in different forms of action.

Carpenter, for the defendant.

Bingham, Mitchell & Batchellor, for the plaintiff.

The action is for a single cause, stated in two ways. A plaintiff must often allege a contract in various different modes. It is often impossible for him to tell how his evidence will meet the case, whether as applicable to one count or another; and his counts may not only differ one from the other, but may be contradictory. *Kimball v. Bellows*, 13 N. H. 58, 68; *Larry v. Herrick*, 58 N. H. 40, 41. A count on a judgment rendered on a note may be joined with a count on the note. *Downer v. Shaw*, 23 N. H. 125. Debt on a judgment and debt on a simple contract, though requiring different pleas, may be joined. *Morrison v. Bedell*, 22 N. H. 234, 243. Debt and detinue, though different forms of action, may be joined. *Morrison v. Bedell*, 22 N. H. 234, 243; *Dame v. Dame*, 43 N. H. 37, 43. By amendment, the form of action may be changed from assumpsit to covenant. *Stebbins v. Ins. Co.*, 59 N. H. 143. And as a count cannot be substituted or added unless it could have been originally joined (*Goddard v. Perkins*, 9 N. H. 488, 490), there may be a joinder of counts in assumpsit and covenant, or assumpsit and trover, for one cause.

FOSTER, J. If either of the counts in trover or assumpsit had been omitted, it could have been inserted by amendment. *Stebbins v. L. Ins. Co.*, 59 N. H. 143; *Merrill v. Perkins*, 59 N. H. 343. After the entry of the action, the declaration could be made what it might originally have been. But the statute of amendments, being a reenactment of a common-law judicial duty of disregarding or correcting errors and inefficiencies, does not affect a case like this, in which no amendment is needed. This declaration in trover and assumpsit on a single cause of action is authorized by a general common-law rule, which, in many cases of erroneous or inefficient pleading, operates by amendment, because justice requires an alteration of the pleading, putting it in the form in which it should have been originally drawn. The doctrine of amendments is a mere application of the general law of the original form. That general law would govern in this case if all amendments were constitutionally prohibited. In any suit wherein the common law is not narrowed by legislation, one cause of action may be set out in different forms of action, because, by a fundamental principle, asserted and acted upon at the introduction of common-law modes of pleading and practice, a legal right is entitled to an adequate remedy for its infringement, and to the use of convenient modes of procedure for establishing and defending itself, and obtaining its remedy; and a declaration in different forms, claiming a single right and demanding its remedy, is a convenient mode of procedure, reasonably necessary for the enjoyment of the right. In many cases rights have remedies without any counts or any judicial proceeding, because it would be unreasonable to require a resort to litigation. *Haley v. Colcord*, 59 N. H. 7, 9. In such a case as this, there is no restriction of a right of action to one form of

action, because it would be unreasonable, by such a restriction, to subject the right to the hazard of defeat without a trial of the merits. The common law of remedy by process and pleading is as rational as the common law of remedy without process or pleading. In this state legal rights are no longer sacrificed by unauthorized judicial legislation, prohibiting their use of modes of procedure reasonably necessary for their vindication. *Metcalf v. Gilmore*, 59 N. H. 417; *Davis v. Bradford*, 58 N. H. 476, 480; *Webster v. Hall*, ante, 7; *Buzzell v. State*, 59 N. H. 61.

Demurrer overruled.

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

MARSTON & a. v. STICKNEY & a.

A builder has no lien upon a house for labor performed and materials furnished under a contract with a holder of the mere legal title, whom the equitable owner, in the open, visible, and exclusive possession, employs to build it, and whom he supplies with means of doing it.

BILL IN EQUITY for partition. William W. Stickney purchased for his mother, Lucinda Stickney, and Cyrus W. Smith, defendants, with their funds and at their request, a lot of land in Lebanon, taking the deed in his own name. Mrs. Stickney moved into the old house upon the premises soon after, and occupied it until it was repaired. After it was repaired she lived in a part of it, the rest being let to tenants, until she moved into a new house which was built upon the lot by William. The firm of which William was a member had funds belonging to his mother, which it was understood he would use in building the house, and she afterwards furnished him more money for the purpose of completing it. She purchased of Smith his half of the premises, and received from him an obligation to convey upon payment of the purchase-money. A few days afterwards the plaintiff Marston contracted with William to perform labor and furnish materials for erecting the house. William did not disclose that he was acting in any other capacity than as owner of the premises; and Marston made no inquiries as to the ownership, but understood from what was said and done by William that the title was in him. Until after the house was built Marston had no notice that Mrs. Stickney was the owner of the premises. The plaintiffs sued William, and attached the house to secure liens which they claimed for labor