

there was one month and five days between the date of the issue of the bonds and the time when the 30 years commenced to run, when they began to draw interest. In this case the interval was a little longer, but the cases, it seems to me, rest upon the same general principles. It is true, the court says it did not appear when they were issued and delivered. In this case they were issued on the day of their date; and in the case referred to, in the absence of evidence of the time of delivery, the presumption would have been that they were issued and delivered on the day of their date. If that be so, the cases are mainly the same. But however that may be, I do not think two months and three days between the date of the bonds and the time they commenced to draw interest in the hands of the persons purchasing them, is a material fact in the case. How it would have been if the bonds had been drawn so as to run and draw interest for any number of years more than the time specified in the act, the court is not called upon to determine.

As to the general question of the validity of these bonds, I think the case is ruled by *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. Rep. 736. That is the latest expression of the supreme court upon the question of the validity of a law of Illinois identical with this; and my judgment is it should be decisive of the validity of these bonds, and I have no doubt of the correctness of the principle which the supreme court has adopted in that and other cases. It seems to me very clear, on principle as well as upon the authorities, that wherever the legislature has power to authorize the different municipalities of the state to vote and issue bonds under authority of an act of the legislature, if the people vote those bonds voluntarily, and the action of the electors is afterwards confirmed and approved by the legislature, and their acts made binding upon the town by an express act ratifying their action, it stands precisely on the same footing as though there had been an enabling act in advance. I do not see why the vote of the town at a regular meeting, and subsequent ratification of the legislature, does not cover the whole question of power just as fully to all intents and purposes, and in the same manner substantially, as though the act had been authorized by the legislature in the first instance. That is what the supreme court decides in this case in 120 U. S. It is true, in some other cases the supreme court follow the decisions of the state courts upon those questions, where those courts have held a law unconstitutional before rights have become vested; but as far as anything appears to the court now, that case is decisive of the one at bar, and I think it is the duty of the court to direct the jury to find a verdict for the plaintiff for the amount of the coupons of which he was the owner at the time of the commencement of this suit.

WITTERS v. SOWLES *et al.*

(Circuit Court, D. Vermont. March 1, 1888.)

## NEGOTIABLE INSTRUMENTS—ASSUMPSIT—COMMON COUNTS AGAINST MAKER AND INDORSER—JUDGMENT—EFFECT.

Under Rev. Laws Vt. § 938, which provides for a judgment against the defendants found liable in an action founded on contract, and in favor of those who are not liable, a judgment in favor of one of the defendants, upon the report of a referee, in an action brought upon the common counts in *assumpsit*, in which plaintiff sought to hold the defendants as makers of a company note, given to one of the defendants and indorsed to plaintiff, is not a bar to a judgment, in the same suit against the indorser, the indorsement being within the scope of the cause referred, since a common count may be amended so as to cover a count upon an indorsement of a note.

## Exceptions to Report of Referee.

*Chester W. Witters, pro se.**Edward A. Sowles, pro se.*

WHEELER, J. This action was brought upon the common counts in *assumpsit*. By agreement of the parties it was referred to a referee, who has made report. It has now been heard on exceptions of the defendant Sowles to the report. From the report it appears that the Glens Falls Shirt Company made a note payable to defendant Sowles or order, which was indorsed by him to the bank of which the plaintiff is receiver. The plaintiff claimed that the defendants were the Glens Falls Shirt Company, and that they were liable as makers of the note. The referee has found against this claim, and that they were not so liable. On that finding the defendant Burton has judgment in his favor.

The plaintiff claims to hold the defendant Sowles as indorser. The defendant Sowles claims that he is not liable as indorser upon the common counts, and that the judgment in favor of the other defendant is a bar to any judgment against him in this suit. By the statutes of the state provision is made for judgment against the defendants found liable in an action founded on contract, and in favor of those who are not. R. L. Vt. § 938. The procedure of the state courts is adopted in common-law cases in the United States courts. Rev. St. U. S. § 914. Therefore that judgment in favor of defendant Burton was proper, and has no effect upon the liability of the defendant Sowles. Also, by that procedure, when a cause is referred, all is referred that belongs to it, and which might be brought into it by any proper amendment of the pleadings. *Eddy v. Sprague*, 10 Vt. 216; *Granite Co. v. Farrar*, 53 Vt. 585. The common counts may be so amended as to cover a count upon an indorsement of a note. *Austin v. Burlington*, 34 Vt. 506. Therefore this indorsement was within the scope of the cause referred to the referee. The exceptions to the report merely raise these questions.

Exceptions overruled, and judgment on report for the plaintiff against the defendant Sowles, for the amount of the note, \$5,736.44, ordered.