

WIGGIN *v.* LEWIS.

In actions commenced since the passage of the act of September 30, 1841, 2 N. H. Laws, ch. 601, the plaintiff is entitled to try by the jury the question of the liability of the trustee, upon compliance with the terms of that statute; and the passage of the Revised Statutes pending the action, does not change the rights of the parties.

FOREIGN ATTACHMENT. The action was entered at the August term 1842, and was continued to the February term 1843; which term was held in April 1843, in consequence of an alteration in the terms of the courts made by the Revised Statutes.

At the term last mentioned, the plaintiff elected to take the disclosure of the trustee, which was completed at the April term 1844. The plaintiff then moved to be permitted to pay the trustee's costs to that time, and that the question whether he is trustee or not be tried by the jury. The trustee objected, that by the laws of the State when this process was served upon him and after it was pending in this court, the plaintiff was not permitted to try the question of the liability of the trustee by the jury, after having elected to take his disclosure; and that the proceedings must be finished according to the provisions of the then existing laws; which objection was sustained by the court. The trustee was to be discharged, or the question of his liability to be tried by the jury, as the opinion of this court should be upon the foregoing case.

Haseltine, for the plaintiff.

Sawyer and *Brown*, for the trustee.

WOODS, J. This action, which was entered at the August term 1842, must of course have been commenced subsequently to the 30th of June 1841, when an act was passed, of which the 28th section of the 108th chapter of

 Wells v. Goffstown.

the Revised Statutes contains some of the provisions. By the 7th section of the act first named, it is provided that "upon disclosure made by any person summoned as trustee, the creditor may move the court that the question whether such person is trustee or not, be tried by the jury; and upon the payment of the trustee's costs up to the time of filing such motion, an order shall be made and an issue framed, for that purpose," &c. The words of the Revised Statutes referred to are nearly the same, and no room is afforded for any such question as the case presents.

The objection was erroneously sustained by the court below, and the plaintiff being entitled to a trial of the issue by the jury upon his motion, and upon compliance with the terms prescribed by the statute, it must be ordered accordingly.

Trial by jury ordered.

 WELLS v. GOFFSTOWN.

16	53
66	310

Selectmen have no authority to repair highways at the expense of the town, until the money raised by the vote of the town for that purpose has been expended.

Surveyors of highways are authorized to purchase at the expense of the town, all such timber, plank, &c., as may be necessary for the repair of roads and bridges in their respective districts.

As incidental to that authority, they are fully authorized also, to cause the lumber so purchased to be surveyed at the charge of the town, as a proper means of determining its quantity and value.

In the exercise of this authority, they are not limited by law to the employment of sworn surveyors, but may employ others; nor have selectmen any power to limit them in this particular.

ASSUMPSIT on an account annexed to the writ, and for work and labor. The specification under both counts