

that fund were C. A. Minot and the plaintiff; and by the modification of the trust, assented to by them, as expressed in the new declaration prepared by Josiah Minot at the request of C. A. Minot subsequent to November 29, 1882, covering both estates, a new trust was perfectly created, which could be revoked only by the consent of all the beneficiaries; and the attempted revocation by C. A. Minot alone, February 3, 1883, by directing the trustee not to sign or deliver any receipt or agreement, was of no effect. The trustee could not by withholding his assent prevent a modification of the trust by the beneficiaries. Notice to the trustee and acceptance by him are not essential to the validity of a voluntary trust as against the settlor, if it is otherwise perfectly created. 1 Perry Tr., s. 185.

There is no suggestion that C. A. Minot was induced to assent to the modification of the terms of the trust through fraud, accident, or mistake, or undue influence, or that he did not act understandingly in affixing his approval and seal to the paper prepared as a substitute for the original declaration. A trust thus created is irrevocable except with the consent of all the beneficiaries. 1 Perry Tr., s. 104; *Stone v. Hackett*, 12 Gray 227; *Viney v. Abbott*, 109 Mass. 300; *Sewall v. Roberts*, 115 Mass. 262. The fact that the trustee declines to execute the modified declaration does not defeat the trust or affect the rights of the beneficiaries. 2 Pom. Eq., s. 1007. The trust was admitted and declared by the original declaration, and it appearing that its terms have been rightfully modified by the consent of all the beneficiaries, equity requires a corresponding modification of the declaration evidencing the trust.

*Decree for the plaintiff.*

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

*Wm. L. Foster*, for the plaintiff.

*Bingham & Mitchell*, for the defendant Tilton.

STATE v. JENKINS.

An erroneous statement in the caption of an indictment, of the year in which it was found, does not furnish ground for a motion to quash. Such an erroneous statement, if it were a defect, might be cured by amendment under Gen. Laws, c. 260, s. 13. An indictment which charges the keeping for sale of "a large quantity of malt liquor known as ale, to wit, ten gallons of ale," sufficiently describes an offence against Gen. Laws, c. 209, s. 13.

64	375
66	580

64	375
70	455

64	375
74	127

1. INDICTMENT, for unlawfully keeping for sale ten gallons of spirituous liquor. The indictment was found at the April term, 1887, and the caption is as follows :

“State of New Hampshire.

“Merrimack ss. *At the Supreme Court holden at Concord within and for the county of Merrimack aforesaid, on the first Tuesday of April, in the year of our Lord one thousand eight hundred and eighty*

“The Grand Jurors of the state of New Hampshire upon their oath present,” &c.

The defendant moved to quash. The motion was denied, and leave to amend, by inserting the word “seven” after the word “eighty” in the caption of the indictment was granted, and the defendant excepted.

2. A second indictment charged that the defendant, not being an agent of any town, place, or city for the purpose of selling spirit, with force and arms did then and there unlawfully, knowingly, and criminally keep for sale a large quantity of malt liquor known as ale, to wit, ten gallons of ale.

The defendant moved to quash the indictment because it does not sufficiently inform the defendant of the offence with which he is charged, and does not identify the offence so as to protect him from a subsequent prosecution for the same offence, or enable the court to render a proper judgment upon it.

*H. G. Sargent, Solicitor, and the Attorney-General, for the state.*

*Leach & Stevens and H. Robinson, for the defendant.*

BLODGETT, J. The motion to quash the first indictment because of an erroneous statement in its caption of the year in which it was found was rightly denied. The caption is no part of an indictment: its office is to state the style of the court at which, and the time and place when and where, the indictment was found, with reasonable certainty. *State v. Gary*, 36 N. H. 359. In our practice, however, it is customary to affix a caption to every indictment, and when this is done the caption may doubtless be referred to in order to ascertain the court in which and the time and place at which the indictment is found. But in these matters, and especially in that of time, the caption is not the sole evidence, and if it is defective the defect may be supplied by the general records of the term (*State v. Gary*, 36 N. H. 361, *Com. v. Hines*, 101 Mass. 33, *Com. v. Smith*, 108 Mass. 486), or by other competent evidence. And if this were not so, the amendment was clearly authorized by s. 13, c. 260, Gen. Laws, which provides that “No indictment, complaint, return, process, judgment, or other proceeding, in any

criminal case in the courts or course of justice, shall be abated, quashed, or reversed for any error or mistake, where the person or case may be rightly understood by the court, nor through any defect or want of form or addition; and courts and justices may, on motion, order amendments in any such case." Besides, *State v. Blaisdell*, 49 N. H. 81, is directly in point.

The motion to quash the second indictment is not well founded. The indictment charges the respondent with unlawfully keeping for sale a large quantity of malt liquor known as ale, to wit, ten gallons. The keeping of malt liquor for sale is thus set forth plainly, fully, substantially, and formally, as art. 15 of the constitution requires, and it is unquestioned by the respondent that such keeping is unlawful. His sole contention in argument is, that it does not appear whether the offence alleged is a violation of s. 15, c. 209, Gen. Laws, or of s. 13 of the same chapter, in which the penalty is different, and consequently that the indictment is bad for uncertainty. But s. 13 applies to spirituous or intoxicating liquors only, so that an indictment under that section must allege that the liquor sold or kept for sale is intoxicating; and this indictment contains no such allegation. On the other hand, s. 15 prohibits the sale or keeping for sale of "lager beer or other malt liquors not included in the list of those already prohibited by law" (that is, by s. 13), and from necessity, therefore, is applicable only to such malt liquors as do not fall within the prohibition of that section. In brief, both sections prohibit the sale and keeping for sale of malt liquors; but the prohibition in s. 13 is against such as are intoxicating, while that in s. 15 is against such as are not intoxicating. Hence an indictment under the latter section must not allege that malt liquor is intoxicating, while an indictment under the former must so allege, as before stated.

For these reasons we are of opinion that it sufficiently appears that the respondent is charged with the violation of s. 15.

*Exception overruled in the first case.*

*Motion to quash denied in the second case.*

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

#### STICKNEY v. BURKE.

The notice requisite under the statute to determine a tenancy at will may require the tenant to quit on any day therein named.

ACTION, upon the statute of landlord and tenant. The defendant occupied the plaintiff's store as a tenant at will. The rent for