

could be first tried, and before the trial thereof." The act was made applicable to pending suits, and this case was subject to its provisions at the September term. It evidently was one of the objects of the act to provide a remedy for the evil of the tardy removal of suits under the former law. After keeping a suit in the state court as many terms as possible, and putting the plaintiff to costly preparation, the defendant could, at the last moment before trial, retreat into the federal court for the purpose of completing the exhaustion of his opponent, and defeating justice by intolerable expense and delay. If the same course is now open to him at any time before he can, in fact, be forced to trial, the evil remains substantially unabated. A case cannot, in fact, be tried at a term at which it is continued on a motion grounded on the absence of a witness, or any other impediment held by the court to be cause for a continuance.

The act of 1875, construed reasonably in suppression of the mischief at which the alteration of the former law is aimed, requires the petition to be filed before or at the term at which the cause can, in contemplation of law, be first tried,—the first term at which the parties, being in court, or being legally bound to be there, are not prevented, by the law of procedure, from going to trial. Each party then has a reasonable opportunity to remove the cause before employing all the means of delay of which he may be able to avail himself in the state court. Considering the defect of the former law, and the manifest remedial purpose of the act of 1875, we think it was not the duty of the court, in this case, to accept the petition after the September term at which, so far as the state of the cause depended upon the law, it could have been tried. The exception is overruled.

II. The replication of waiver is bad, because it does not set forth facts that constitute a waiver.

III. The replication of fraud is bad, because it is, in substance, a bill in equity, asking for the reformation of the written contract on which the suit is brought. A court of law may construe and enforce the instrument as it stands, or may set it aside altogether if there be adequate cause; but it cannot compel an alteration of it to be made, nor annul a part of it and enforce the rest. *Adams Eq. 168; Prescott v. Hawkins*, 12 N. H. 19; *Butler v. Hildreth*, 5 Met. 49, 51.

Demurrer sustained.

STANLEY, J., did not sit.

STATE v. GORMAN.

Evidence, tending to show that the defendant kept ale for sale in his house at a certain time, is competent on the question whether spirituous liquor, which he kept there at the same time, was kept for sale.

INDICTMENT, for keeping spirituous liquor for sale. Officers who had searched the defendant's house, testified that they found in it a counter like a bar, a jug of whiskey, two jugs of gin, a barrel of ale on draught, a pitcher and two pails containing ale, and two tumblers with the froth of ale fresh upon them; and that the defendant, who was sitting with two other men near the bar at the time of the search, said to the officers,—“You've caught me fair.” The defendant excepted to the admission of that part of the evidence relating to ale.

G. W. Burleigh, for the defendant.

The Solicitor, for the state.

SAWYER, J. The evidence, tending to show that the defendant kept the fermented liquor for sale in his house, was competent on the question whether the spirituous liquor, which he kept there at the same time, was kept for sale. *State v. LaPage*, 57 N. H. 245, 287, 301, 305.

Exception overruled.

ALLEN, J., did not sit.

GOVE v. VARRELL, *Pr.*, INS. CO., *Trs.*, and VARRELL, *Claimant*.

A claim for unliquidated damages cannot be attached by the trustee process, but if the damages are liquidated before the taking of the trustee's deposition, the agreed sum will be held by the attachment as money of the defendant in the trustee's hands at the time of the taking of his deposition.

May 1, 1876, the trustees insured the defendant in their company for \$350, on personal property. On the twentieth of the same month, a portion of the property was burned. On the twenty-fifth, the loss was adjusted by the parties at \$241.25. The writ was made and served on the twentieth, after the loss. Varrell claimed the money as assignee, but proved no assignment of it.

Hibbard, for the plaintiff.

Gale, for the defendant.

BINGHAM, J. The right of the defendant, in the hands of the trustees at the time of the service of the writ, was a claim for unliquidated damages, and was not attachable by the trustee process. *McKean v. Turner*, 45 N. H. 203. The trustees must be discharged, unless they can be charged on the ground that the parties adjusted the damages between them before the taking of the deposition. Prior to the passage