

was incumbent on the other party to rebut and control it, or else it would be conclusive." The same explanation of the use of the phrase "burden of proof" in the former decisions is given by Gray, C. J., in the case of *Holmes v. Hunt*, 122 Mass. 505, 514.

The auditor's report was, in effect, made *prima facie* evidence, and the plaintiffs, having legal evidence on all points necessary to maintain the issue, would prevail unless that evidence was met by evidence of at least equal weight from the defendant. The report was not evidence which could be explained away or contradicted like other evidence, nor could the credit to be given to it be lessened by showing error or mistake in the proceeding before the auditor, or that he failed to correctly weigh the testimony before him. *Bellows v. Woods*, *supra*. No distinct and separate issue could be made on the finding of the auditor. *Brewer v. Hyndman*, 18 N. H. 9, 18. The report was evidence, and when introduced was a measure of the plaintiffs' case, which the defendant, to prevail, must fill with other evidence. The practical effect of the instructions being not that the auditor's report shifted the burden of proof in any technical or legal sense, but made for the plaintiffs a *prima facie* case, conclusive unless met and controlled by the defendant's evidence, there is no sufficient reason for disturbing the verdict. The exceptions are overruled, and there must be

Judgment on the verdict.

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

WHITCOMB v. STRAW.

In an action of tort, the plaintiff may amend his writ before trial by reducing the *ad damnum*, and, if this is reduced to \$100, the action may be referred without the consent of the parties.

CASE for slander. On the plaintiff's motion, he was permitted to amend his writ by reducing the *ad damnum* to \$100, and the action was referred. The defendant excepted.

Barnard & Barnard, for the defendant.

Currier and Shirley, for the plaintiff.

ALLEN, J. An amendment increasing the *ad damnum* in a writ may be allowed, sometimes even after verdict. *Taylor v. Jones*, 42 N. H. 25. The reasons for permitting the reduction of the *ad damnum* are still stronger. The defendant cannot be

harméd by such an amendment. He has a smaller claim to meet. The declaration is single, upon a single tort, and the part stricken out cannot be made the subject of a future action, for there can be but one recovery. The plaintiff could waive a part of his claim, and at the trial demand a smaller sum than he sued for, and the defendant cannot object to the plaintiff's making that demand of record, and becoming estopped from claiming more. The amount in controversy being reduced to \$100, the case was properly referred.

Exceptions overruled.

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

ALDRICH, v. MONROE.

The failure to adopt a known and uniform usage among travellers in the management of loaded teams upon a steep part of the highway is competent evidence of negligence.

CASE, for damages from a defective highway. The plaintiff's horses, attached to a heavily loaded wagon, were thrown down and injured while passing down a steep hill upon the highway. The defendant claimed that the plaintiff was not in the exercise of ordinary care in not chaining his wagon-wheel before descending the hill. At a trial before the referee, evidence of the custom of persons for many years travelling upon the hill with loaded teams to chain their wheels was excluded, subject to the defendant's exception.

Carpenter, for the defendant.

E. W. Farr, for the plaintiff.

ALLEN, J. The question whether the plaintiff at the time of the accident was in the exercise of ordinary care, was a question of the care of men of ordinary prudence, that is, of men in general. *Tucker v. Henniker*, 41 N. H. 317. Conduct in the management of teams, of a character so uniform as to become usage, would include the average conduct of mankind in that particular within the locality where the usage prevailed, and a departure from such usage, when known, would be evidence of a want of ordinary care. If the plaintiff knew the prevailing usage, as to chaining wheels upon a loaded wagon in descending the hill, when he met with the injury (residing or doing business in that vicinity he was presumed to know), a failure on his part to adopt the usage was evidence of