

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.

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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

negligence. The usage being material, it was competent to show it, and the exclusion of evidence upon that point was error.

*Referee's report set aside.*

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

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BUCKLIN *v.* POWELL, AND N. H. FIRE INS. CO., *Trustee.*

An insurer is not chargeable as trustee of the insured while the amount due from the former is unliquidated.

FOREIGN ATTACHMENT. Facts found by the court. The defendant's buildings were insured by the trustee, and burned June 28, 1878. Writ dated July 15, 1878. The defendant brought no suit for the recovery of the loss, and the time within which he can has by the terms of the policy expired. The plaintiff took the deposition of the trustee, and elected to try the question of the trustee's liability by the jury. The trustee denied its liability, and claimed that the question could not be tried in this suit. The court so decided, and the plaintiff excepted. The policy and deposition make a part of the reserved case.

*A. P. Carpenter*, with whom was *J. D. Weeks*, for the plaintiff.

I. No good reason has been or can be assigned for holding a trustee not chargeable, merely because the amount for which he is liable to the principal defendant is unliquidated, that is to say, unadjusted and uncertain, or, in other words, because the amount must be settled by a jury or some other tribunal.

1. The question has never received any scrutinizing examination in this state. In *Paul v. Paul*, 10 N. H. 117, and in *Despatch Line v. Bellamy Co.*, 12 N. H. 205, it was held that damages arising from torts are not attachable by the trustee process. In *Foster v. Dudley*, 30 N. H. 463, and *Getchell v. Chase*, 37 N. H. 109, the same is said *obiter* in respect to unliquidated damages generally; and such is assumed without discussion to be the law in *Rand v. Railroad*, 40 N. H. 79, *McKean v. Turner*, 45 N. H. 203, and *Gove v. Varrell*, 58 N. H. 78, solely upon the strength of the *dicta* above mentioned. Whether, therefore, unliquidated damages arising from a breach of contract can be held by trustee process, must be treated as an open question in this state.

2. The language of the statute ("any money, goods, chattels, rights, or credits"—G. L., c. 249, s. 22) is certainly broad enough to cover unliquidated as well as liquidated claims. It is a remedial