

admitted will be taken as the true amount of the unlawful interest.

Such seems to us to be the meaning of this statute; and the replication in this case, when compared with these rules, will be found to be altogether defective. Nothing could be more evasive. The plaintiff swears, that at a particular time and place, a particular sum was not reserved in the note, above lawful interest, for the forbearance of another particular sum, for a particular time. Now if the time, and place, and precise sum were essential to be alleged in the plea, in order to entitle the defendant to a deduction, such a replication might be well enough. But there is no pretence for this. Whatever is stated in the plea should be stated truly; but it is not essential, that it should be so stated. A mistake, in stating the circumstances, is not to prejudice the party.

This is a very gross instance of a negative pregnant.— The replication may be in all its parts true; yet, the sum of \$50, may have been unlawfully reserved in the note, and the defendant entitled to the deduction he prays us to make. It would be absurd to permit the law to be evaded by such a departure from the spirit and letter of the statute; and we have no hesitation in pronouncing the replication to be altogether insufficient.

ABNER FORBES vs. SAMUEL MARSH, jun.

In a suit upon a promissory note between the maker and an endorsee, a plea of usury will be rejected, if the endorsee will make oath that the note was *bona fide* transferred to him, before due, for a good consideration, without notice of any usury in the note.

But, in such a case, the plaintiff must not demur.

This was an action of assumpsit upon a promissory note, made by the defendant, for \$600, dated April 1, 1822, payable to one *James Powers* in one year, and by him endorsed to the plaintiff.

The defendant filed a plea, in which he alleged, that, in pursuance of a corrupt agreement between him and the payee, more than lawful interest had been reserved in and by the note; and he prayed a deduction of three times the

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amount of the sum thus unlawfully reserved, from the sum, that might be found lawfully due, and offered to verify his plea by his own oath, in pursuance of the statute.

To this plea the plaintiff demurred; and the defendant joined in demurrer.

*Leland*, for the plaintiff.

*Upham*, for the defendant.

*By the court*.—We have decided, that in an action between the endorsee and the maker of a note, if it appear, that the note has been *bona fide* transferred to the endorsee, without notice of the usury, the maker cannot set up usury as a defence. 2 *N. H. Rep.* 410, *Young vs. Berkley*. We are aware, that this principle, when it becomes generally known, may be used by usurers to evade the statute. This however may be easily prevented, by throwing upon the endorsee, when a plea of usury is offered, the burthen of shewing, that the note has been *bona fide* transferred, before due, for an adequate consideration. This may be done by his affidavit. If he will, under oath, state, that the note was *bona fide* transferred to him, before due, for a full consideration, and not to evade the statute, the plea must be rejected. But otherwise it is to be received. We are not aware, that this course will have any greater tendency to introduce perjury, than the provision in the statute, which authorizes the payee to clear himself of the usury by his own oath.

The demurrer, in this case, is not well taken. But the plaintiff may withdraw the demurrer, and shew, if he can, that the plea ought not to be received.



JONATHAN PHILBRICK, *adm'r.* vs. MOSES HAZEN, Jun.

When a suit is brought by a person as administrator, before he obtains letters of administration, and administration is afterwards granted to him, the defendant, in order to avail himself of this matter, may crave oyer of the letters of administration and demur.

**ASSUMPSIT.** The defendant craved oyer of the plaintiff's letters of administration, by which it appeared, that he was