

Forbes  
vs.  
Marsh.

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

not administrator at the time when he commenced this suit, and then demurred, and the plaintiff joined in demurrer.

*Held*, for the plaintiff.

*Story*, for the defendant.

*By the court*.—When a plaintiff sues as administrator, when in fact he was not administrator until after the commencement of the suit, the correct mode of pleading this matter seems not to be well settled. In *Harker vs. Moreland* (2 *Levintz* 19,) the defendant in such a case cravedoyer of the letters of administration, and then pleaded the matter in abatement after an imparlance. The court held the plea to be bad, but abated the writ, because it appeared that the action was prematurely commenced. When an action is prematurely brought, it may be pleaded in abatement, and is also good ground of demurrer, or of a nonsuit. 1 *Chitty's Pl.* 442. —4 *Mass. Rep.* 479.

We entertain no doubt, that the mode of pleading, adopted in this case, is correct, and that there must be

*Judgment for the defendant.*

THOMAS SHAPLEY vs. THOMAS FELT.

To a plea of *actio non accrevit infra sex annos*, in assumpsit, it is not sufficient to reply, that the defendant was out of the state at the time the cause of action accrued, and left no property in the state: the replication must allege, that he continued out of the state, till within six years before the commencement of the action.

In such a case, a rejoinder, "that more than six years before the commencement of the action, the defendant returned into the state and resided within the same," was held to be sufficient, without alleging that the return was open, or that the plaintiff had notice of it.

**ASSUMPSIT.** The declaration contained several counts. The defendant pleaded in bar, that the several supposed causes of action, in the declaration mentioned, nor any of them, did not accrue to the plaintiff within six years before the commencement of the action.

To this plea the plaintiff replied,

I. That he ought not to be precluded from maintaining his action on the first count, because the cause of action, therein mentioned, did accrue within six years, &c., and upon this issue was joined.