

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.

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II. That he ought not to be precluded from maintaining his action upon the second and third counts in his declaration, because, at the time the said causes of action in said counts mentioned accrued, the said *Felt* was without the limits of this state, and did not leave property or estate therein, that could, by the common and ordinary process of law, be attached.

To this the defendant rejoined, that after the said supposed causes of action, in the said second and third counts mentioned, accrued, and more than six years next before the commencement of this action, to wit, on the 2d November, 1814, he, the said *Felt*, returned into this state, and resided within the limits of the same.

To this rejoinder, the plaintiff demurred.

N. Cook, for the plaintiff.

J. Parker, for the defendant.

By the court.—The replication in this case is insufficient, both in form and in substance. It is double. *2 Mass. Rep. 81, Perkins vs. Burbank*. But this is only a defect in form. It is however an objection to the matter of the replication, that there is no allegation, that the defendant continued out of the state, till within six years before the commencement of the action. *Story's Pl. 82*. We entertain no doubt, that this objection to the replication must prevail; and, as this is the first fault in the pleadings, the defendant is entitled to judgment. *2 Chitty's Pl. 607*.

But, as the plaintiff may move us to grant him leave to amend his replication, we have thought it might be useful to examine the rejoinder. It is objected, that the rejoinder contains no allegation, that the plaintiff had notice of the return of the defendant into this state, on the 2d November, 1814. But we are of opinion, that there is nothing in this exception. If the defendant returned and resided openly in the state, the statute of limitations began to run, whether the plaintiff had notice or not. It is also objected, that the rejoinder does not allege, that the defendant returned and resided openly in the state. It is not doubted, that a return of a debtor, from which the statute of limitations begins to run, must be such a return, as will enable his creditor, using

reasonable diligence, to arrest his body. 3 *Mass. Rep.* 271, *White vs. Bailey*.—1 *N. H. Laws* 165. Yet still the manner of the return need not be alleged in the rejoinder. In proof, to support his rejoinder, the defendant must shew such a return, as the statute intended : but, in pleading, it is sufficient to allege generally a return. Such is the usual form of pleading. *Story's Pleading* 82.—2 *Chitty's Pl.* 663.

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After this opinion was delivered, the plaintiff became nonsuit.



GARDNER SHATTUCK vs. ANTIPAS MAYNARD.

Where an individual, having a wife residing in *G.*, went to *K.*, and there labored eight months, returning to *G.* on Saturday nights, and passing Sundays with his wife—it was held, that he was liable to do duty in the militia in *G.*, and not in *K.*

THIS was an appeal from the judgment of a justice of the peace, in this county, and was submitted to the decision of the court, upon the following facts.

Shattuck is the clerk of the first company of infantry in Keene ; and the defendant, being enrolled in said company, and duly warned to appear on parade on the 6th May, 1823, neglected to appear ; and this prosecution was brought to recover the forfeiture supposed to be incurred by *Maynard*, for neglect of military duty on that occasion. *Maynard* removed to Gilsum, in this county, with his parents some time about the year 1808, he being then of about the age of seven years, and resided there until the year 1822. In February, 1822, he went to Ashburnham, in Massachusetts, with the intention to make that place his permanent residence ; but in the November following, he changed his intention and returned again to Gilsum. In December, 1822, he married a woman, belonging to Ashburnham, and brought his wife and furniture to Gilsum, where he and his wife resided in the family, and had a room in the house, of a Mr. *Kilburn*, until March, 1823, when *Maynard* went to Keene, and contracted to labor in Keene, for a Mr. *Holbrook*, eight months ; but it was agreed, that *Maynard* should be absent from Sat-