

TOMES *et al.* v. BARNEY.

(Circuit Court, S. D. New York. April 9, 1888.)

## 1. LIMITATION OF ACTIONS—DISABILITIES AND EXCEPTIONS—ABSENCE FROM STATE.

Under section 100 of the New York Code of Procedure, as amended July 10, 1851, which provides for an extension of the time limited to six years by section 91 of that Code for the commencement of actions therein specified, by the departure from and residence out of the state of a person after a cause of action has accrued against him, mere absences of such person from the state for business or pleasure, without any intention of remaining away, and respectively followed by a return thereto as his place of residence, though aggregating twelve months in seven successive years, do not constitute departure from and residence out of the state within the meaning of section 100, and such period of twelve months is not to be added to the six-years limitations prescribed by section 91.

## 2. COURTS—FEDERAL—FOLLOWING STATE DECISIONS.

Where a question arising under a statute of a state has been passed upon by a federal court in that state in the light of apparently conflicting opinions of the state courts, the federal court will, in a subsequent case involving the same question, where its attention is called for the first time to a decision of the state court of last resort definitely interpreting that statute, reverse its former decision, and follow the ruling of such state court notwithstanding the fact that that ruling was made prior to the earlier decision of the federal court.

## At Law.

This action was commenced February 3, 1868, by the service upon the defendant, Hiram Barney, of a summons issued out of the superior court of the city of New York, in the state of New York, to recover, besides other things, "fees" illegally exacted from the plaintiffs' firm by the defendant as collector of customs at the port of New York in said state, for oaths to entries, stamps on invoices, and delivery orders in case of various importations made between April 8, 1861, and June 30, 1864, from a foreign country or countries to the United States at said port. Certain of these "fees" were exacted more than six years prior to the commencement of this action, viz., February 3, 1868. February 17, 1868, this action was duly removed by writ of *certiorari* from said superior court into this court. March 11, 1868, the plaintiffs filed and served a common-law declaration in *assumpsit*, which alleged indebtedness as existing January 2, 1868, and was for money had and received. Subsequently the following pleadings were filed and served: *First.* Defendant's plea of the general issue, and that the supposed causes of action in said declaration mentioned did not any of them accrue to the plaintiffs at any time within six years next before the commencement of this suit. *Second.* Plaintiffs' replication that, after the causes of action had accrued, defendant departed from and resided out of this state for several successive periods, amounting in the aggregate to twelve months, and this suit was brought within six years and twelve months after the said several causes of action and each and every thereof accrued. *Third.* Defendant's rejoinder that defendant did not depart from and reside out of this state for several successive periods, amount-

ing in the aggregate to 12 months, in manner, form, etc.; concluding to the country. Upon the trial the defendant, Barney, testified as follows: That he was collector of customs at the port of New York, from April 8, 1861, to September 8, 1864. That for the past 50 years he had always had an office in the city of New York, and had always resided in the state of New York, at Kingsbridge, in the county of Westchester, (now part of New York city,) with the exception of from 1842 to 1852, when he resided in Brooklyn, in that state. During this whole time he never resided or voted elsewhere. That at each election from 1861 to 1870, (*i. e.*, from before the accruing until after the commencement of this action,) he voted at Kingsbridge, with the exception of the November election in 1868, (*i. e.*, after the commencement of this action,) when he was in Iowa on a matter of business, probably two or three weeks; though if there was any other election in 1868 than the November election he voted at Kingsbridge. That at different times from April 10, 1861, to April 10, 1868, (the seven years prior to the commencement of this action,) he was temporarily absent from the state of New York (but in the United States) on private business or for pleasure; never for any other purpose, and never with the intention of remaining away. That these absences consisted mainly of brief visits to Washington, D. C., during the first four years, (*i. e.*, during his term of office as said collector,) and of visits to the states of Iowa and Wisconsin, and to the south, during the following years. Though frequent, they were for short periods, varying from one day to perhaps forty or more days; probably not more than two or three as long as forty days; not more than one over fifty days, and this, the defendant thought, was less than ninety days. These absences, he estimated, averaged two months a year from April 10, 1861, to April 10, 1868. It did not appear that at any time any attempt was made to commence this action by placing the summons therein in the hands of the sheriff or other officer, as provided by section 99 of the New York Code, as amended by section 5 of the act of April 25, 1867, (2 Laws N. Y. 1867, p. 1921.) It did, however, appear from the evidence of the plaintiffs' witnesses that a summons was made out in 1866 for the purpose of commencing this action, and placed for service in the hands of one of the plaintiffs' attorney's clerks, neither of whom was ever a sheriff or other officer of the county of New York or of Westchester; that it was subsequently torn up without being served; and that a new summons was made out, dated January 2, 1868, which was served as aforesaid upon the defendant on February 3, 1868. At the close of the trial, the defendant moved the court to direct the jury to find in his favor as to the items of fees exacted prior to February 3, 1862, on the grounds that, under the pleadings and proof in the case, the same were barred by the New York statute of limitations.

*Stephen A. Walker*, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for the motion.

The following laws should be considered in determining the question involved in this motion: Section 34, Act Sept. 24, 1789; 1 U. S. St. at Large, 92; (Section 721, Rev. St.,) which provides that "the laws of the several states, v.35F.no.2—8