

Farnum et a.
 v.
 Bell.

There is a further objection to this *scire facias*. It is not alleged, that this defendant endorsed the original writ, as attorney of the plaintiff, in that writ; nor that the plaintiffs, in this suit, were defendants in that. There is nothing alleged in this *scire facias*, from which it can even be inferred, that *Evans* was plaintiff, and these plaintiffs defendants in the original suit, except the allegation, that these plaintiffs recovered judgment for costs against *Evans*, and that *Bell* became liable by endorsing the writ, to pay the costs these plaintiffs might recover against *Evans*. As the *scire facias* is given by the statute to the defendants in the original suit, against the agent or attorney of the plaintiff in the original suit, nothing can be clearer, than that the relation, in which these parties stood to the former suit, must be alleged with reasonable certainty, and that the want of such an allegation cannot be supplied by any vague inference from the facts alleged. The *scire facias* is then in this respect defective in substance. 2 *Mass. Rep.* 521, *Stilson vs. Tobey*.

The plaintiffs' counsel, after the above opinion was delivered, moved for leave to amend.

By the court—As it appears, from the *scire facias*, that *Evans* was an inhabitant of this state, and might have endorsed his own writ, we are of opinion, that after a joinder in demurrer, no leave to amend ought to be given to the plaintiffs.

Judgment for the defendant.



SAMUEL YOUNG vs. JOSEPH TILDEN, jr. et a.

Where one has been called before a judge of probate, on a complaint for embezzlement of the goods of a person who is *non compos mentis*, he can maintain no action against those upon whose complaint he was called, to recover his fees for travel and attendance.

THIS was an action of assumpsit, and was submitted to the decision of the court, upon the following facts.

Thomas Waterman was appointed guardian of *Joseph Tilden, senior*, a person *non compos mentis*; and the plaintiff, being suspected of having embezzled some of the goods of the *non compos mentis*, was, upon the complaint of the defendants, as next of kin to the said *Joseph*, the *non compos*, called

before the judge of probate, in this county, on the 8th July, 1823, to answer, on oath, concerning the said supposed embezzlement. This action is brought to recover the plaintiff's travel and attendance on that occasion; and it was agreed, that if the court should be of opinion, that the action could be maintained upon these facts, judgment should be rendered for the plaintiff, otherwise for the defendants.

Cartland, for the plaintiff.

W. Smith, for the defendants.

RICHARDSON, C. J. The case of this plaintiff is not analogous to the case of a witness, who has been summoned to give a deposition, or to testify in a cause between third persons. The witness is called to testify in a cause, in which he has no interest, and is not, by law, compelled to attend, until his fees for travel and attendance have been paid to him. As he attends merely for the benefit of others, when he attends without receiving his fees previously, the law will raise a promise by implication to pay him, and upon that promise he may maintain an action.

This plaintiff, being suspected of having embezzled the goods of the *non compos mentis*, was, upon the complaint of these defendants, called to appear before the judge of probate, to answer, on oath, to the complaint, agreeably to the statute of February 9, 1791, sec. 2. 1 *N. H. Laws* 227. He was not called to testify in a case, where he had no interest; but, in fact, to answer for his own conduct, and to clear himself from suspicions that had been excited against him; or furnish evidence, which might enable those, whom he had secretly defrauded, to obtain redress for the injuries he had done them. His case is, therefore, more analogous to the case of one, who has been called before a court to answer for an offence, than to that of a witness. The statute makes no provision for the payment of fees in a case of this kind; and we apprehend, that there is nothing in the nature of the case, from which a promise to pay on the part of these defendants can be inferred. If the plaintiff was able, by his oath, to clear himself before the judge of probate, from the suspicion that existed against him, he has his reward; and if not, the presumption is, that it was, because the suspicion was well

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founded, and that the expenses he incurred were the consequence of his own misconduct.

Judgment for the defendants.



LEMUEL SMITH vs. ZIBA HUNTINGTON.

Replevin does not lie in any case for goods taken upon mesne process.

REPLEVIN, for several cows. The defendant avowed the taking as a deputy sheriff, from the possession of the plaintiff, by virtue of a writ of attachment, in favor of one *Abel Stone*, against one *Lemuel Pulsifer*. Upon opening the case, as the validity of the writ, under which the cows were taken, was admitted, the court directed a nonsuit to be entered, subject to the opinion of the court, upon the question, whether replevin lies in any case, where property is taken by valid mesne process?

Bell, for the plaintiff.

Smith, for the defendant.

RICHARDSON, C. J. delivered the opinion of the court.

The question, which this case presents for our decision, is, whether replevin can be maintained, in any case, for goods which have been seized by virtue of valid mesne process? If the process, by which goods are seized, is void, there is no doubt that replevin lies. 19 *John. 7, Mills vs. Martin.*—*Comyn's Rep. 274, Mariott vs. Shaw.* And if replevin lies in any case, where the goods are seized upon mesne process, it lies in favour of this plaintiff; for the goods were taken by virtue of a writ, which run not against his goods, but the goods of a third person, and they were taken from the possession of the plaintiff.

It has been decided in New-York, that replevin lies for goods taken upon execution, if taken from the possession of the plaintiff in replevin, by virtue of an execution running against another person. 14 *Johnson 84, Thompson vs. Button.* But in the case of *Eastman vs. Molony*, Strafford, February term, 1822, we decided, that replevin would not lie in such a case, in this state. It is, therefore, to be con-