

CHESHIRE, OCTOBER TERM, 1825.

THE JUDGE OF PROBATE vs. BRIGGS.

Where the question for the jury was, whether an administrator had accounted in the probate court for a sum of money, which he had received from a debtor of his intestate, it was held, that parol evidence was inadmissible to prove, that the judge of probate had made a decision, that he had been accounted for. The decisions of the probate court can be proved only by the record of its proceedings.

DEBT upon a probate bond, given by the defendant, upon taking upon himself the administration of the estate of *Timothy Lovell*, deceased.

The defendant pleaded *omnia performavit*.

The plaintiff in his replication alleged, as a breach of the condition of the bond, that the defendant, having received of one *J. Weatherbee*, a debtor of the intestate, \$50 76, had refused to account for it; and the issue joined involved the question, whether the defendant had accounted for that sum.

The cause was tried here at May term, 1825; when the defendant shewed in evidence, that, in a hearing before the *Judge of Probate*, in this county, in March, 1821, the question, whether this sum had been accounted for, was considered by the *Judge of Probate*, who decided that it had been accounted for, and no appeal was claimed from the decision.— But as it did not appear, by the account settled at that time in the probate court, that any claim for this sum was then made, and there being no other evidence to prove the decision than parol testimony, the court rejected the evidence; and the jury having returned a verdict for the plaintiff, the defendant moved the court to grant a new trial.

J. H. Hubbard, for the plaintiff.

Upham, for the defendant.

By the court. The court of probate is not a court of record, in the common law sense of the terms; yet it has always been the custom to keep a record of all its proceedings. And we are clearly of opinion, that parol evidence is

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not admissible to prove a decision in that court, in order to bar a claim, which would otherwise seem to be founded in justice. There is much good sense in the remarks of *Parker, C. J.* in the case of *Chase vs. Hathaway*, (14 *Mass. Rep.* 222,) on the subject of probate records; and we have no hesitation in ordering, that there be, in this case,

Judgment on the verdict.



LYNDS WHEELOCK vs. TIMOTHY HALL.

Where a sheriff returned upon an execution, that he had given notice to bail, and under date of the return day, returned "*non est inventus*," but did not state that he had kept the execution in his hands during the intermediate time, in a *scire facias* against the bail it was held, that it must be presumed, that the sheriff kept the execution in his hands during the intermediate time, and the return was held to be sufficient.

THIS was a *scire facias* against bail, and was submitted to the decision of the court upon a statement of facts, in which it was agreed, that the defendant became bail; that judgment had been rendered against the principal; that execution had issued and had been delivered to a deputy sheriff, who had returned, that he had given notice to the bail, that he had the execution, &c. and, under the date of the return day, he returned "*non est inventus*," but did not state in his return, that he had kept the execution from the time, when he gave notice, until the return day; and the question was, whether this return was sufficient to charge the bail?

Alexander, for the plaintiff.

J. Parker, for the defendant.

By the court. This case differs from the case of *Butterick vs. Atkinson*, lately decided in Hillsborough county. In that case, there was no date to the return. But here, it appears, that the officer had the execution in his hands on the return day; and the question is, whether we can presume from this, that he had kept it in his hands from the time he gave notice to the bail, until he returned it? And we are of opinion, that it may be presumed, that he so kept the exe-