

Judge Prob.  
vs.  
Briggs.

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-

cution. It is in his hands when he gives notice ; and also on the return day. There is no reason why we should suspect, that it might have been out of his hands in the intermediate time. Although it would have been better, if the officer had returned the fact expressly, that he kept the execution ; still we are, on the whole, of opinion, that the return is sufficient.

Wheelock  
vs.  
Hall.

*Judgment for the plaintiff.*



SAMUEL ANDERSON vs. EDMUND WALKER.

In a prosecution on the statute of 1820, *cap. 36* to recover a fine from a private, for non-attendance at an annual training, the complainant is liable to cost, if he fail to sustain the prosecution.

In this case a complaint was filed with a justice of the peace, in pursuance of the statute of 1820, *cap. 36*, against *Walker*, for non-attendance at an annual training. Upon the trial before the justice, judgment was rendered in favor of *Walker* ; from which judgment *Anderson* appealed to this court, and, after having entered his appeal here, became nonsuit ; upon which the appellee moved for costs.

*J. C. Chamberlain*, for the appellant.

*H. Hubbard*, for the appellee.

*By the court.* In this case the appellee has moved the court to allow him costs ; and the question whether his motion ought, or ought not, to prevail, must be determined by the statute of 1820, *cap. 36, sec. 50 and 51*. It is very clear from the provisions in those sections, that it was the intention of the legislature, that the complainant should recover costs. But nothing is said with respect to the costs of the respondent. We should, therefore, conclude, that the intention of the legislature was, that the respondent should have his costs, as in other cases. And it is a circumstance decisively in favor of such conclusion, that the statute of 1819, *cap. 1, sec. 49*, provided, that no clerk should be liable to pay any defendant cost, in any case, in which the commanding officer of