REPORTSOFCASES IN THE SUPREME COURT OF

Trinity Term, 6 William 4th.

FOWLIE vs. STRONACH and ANOTHER, Administrators of English.

In this case a Rule Nisi was obtained in last Michaelmas Term, by N. Parker and Wilmot for Defendants, to set aside the Writ of defects and irregularities apparent on the face of them.

The Solicitor General and J. A. Street shewed cause in Hilary In 1 Dowl: P. R. 29. Mr. J. Taunton says, "there is this dif-Term.

Cur. adv. vult. until this Term, when the Judgment of the may be waived but a nullity cannot."

Court was pronounced. ment of Damages was issued, directed to the Sheriff of the County rected to summon the Jury and the Judge to make the Inquiry, was proper for the purpose, and according to the latest book of of Northumberland, and to the Justices assigned to take the assi- and return the Inquisition under his hand and seal. The action practice, though he is now satisfied he was mistaken. zes in and for the said County, bearing date the twelfth day of July is covenant in which the damages are to be assessed in the ordinain the fifth year of His Majesty's reign, and returnable the second ry way, and not debt on Bond with breeches assigned, for which made absolute, but without costs: If we do not so interfere what Tuesday in October then next tollowing. That the Sheriff was a particular mode of Inquiry is appointed by statute. We are to can the Plaintiff do? It is not a case in which the Court could commanded to summon a Jury to appear before the said Justices of determine whether the Writ and the proceedings thereon are a assess the damages, for supposing that we have the power, which Assize, who were commanded to certify the Inquisition: and it mere nullity or only an irregularity. tice of Assize who signed and certified the same.

of improper rejection of Evidence by the Judge of Assize.

cannot be amended, cured or waived.

With respect to the Writ of Inquiry and the Return thereto, I or some special enactment. am of opinion that they are defective—that the Judge of Assize The Sheriff, where he is not an interested person, is the known offihad no power, neither could he derive any, under the Writ of In- cer of the Court to whom the duty of Inquiry of the Damages in or- if that course is imported into other cases not specified in the same quiry-that he could only act as an Assistant to the Sheriff, agree- dinary cases, as well as the execution of other Writs, must be assign- tute, the statutes of Jeoffails will not cure the defect. The present able to what is said by Holt, Chief Justice, in an anonymous case, ed, and we have no power to substitute the Judge or any other proceeding is coram non judice, and must be set aside. (12 Mod. 610) " A Judge at Nisi Prius upon trial of a Writ of In- person; we can no more I conceive award a Writ to the Judge to "quiry, is only an Assistant to the Sheriff, and has no Judicial make the inquiry in ordinary cases, than we can authorise the "power." The Writ of Inquiry and proceedings under it being Sheriff to do it under the stat. of Wm. 3d. relative to Bonds. The defective and not merely irregular, I am of opinion that they could Sheriff under the Writ now before us was functus officio after renot be waived by any of the steps taken by the Defendants. In turning the jury, if he appeared at the Inquisition, it was wholly Massey and Wilson, 5 T. R. 254, a distinction was taken be- without authority as the Writ gave him none: the Judge and not tween a mere irregularity in the mode or time of the proceedings, the Sheriff has the judicial authority by the Writ to swear the Jury and a defect in the proceedings themselves, that the latter kind and Witnesses, and he alone has made the return. I cannot but could not be waived by the adverse party, though the former think the whole proceedings were coram non judice, and are consemight, and this distinction was allowed by the Court.

which had issued to assess damages (after Judgment on demurrer) who has no authority, it is error as in an Inferior Court if it is diand the Inquisition thereon, the action being in covenant on a lease. rected to the Serjeant at Mace, and is executed before the Mayor It appeared that the Writ was directed to the Judge of Assize and who is Judge of the Court, Yelv. 69." In the case in Yelverton, not to the Sheriff, and that it was executed before the Judge of the Court said, "An Inquiry before the Mayor is not warranted Assize, and the Inquisition was under the hand and seal of the by any Writ, and by consequence judgment to recover such dama-Judge of Assize—and that the Defendant appeared and made de- ges placed before a wrong officer is erroneous." fence at the execution of the Writ. It is clear that the direction Judge of Assize could not have power to take the Inquisition.

ther this defect in the proceedings, was not one which should be Sheriff could appoint no more than one under Sheriff extra. taken advantage of by another method then motion to set aside whole proceedings under this Writ are not irregular only, but mistakes the form of the Writ. wholly defective, ab initio: and that therefore the subsequent steps the proceedings.

On this ground, I think the rule should be made absolute.

PARKER, J .- I am quite of opinion that the Defendants in the present case, are not entitled to any favor from the Court, they appeared by their Counsel at the execution of the Writ of Inquiry; made no objection whatever to the form of the Writ or the proceeding thereon, went into their defence—it was moreover at their instance that the Judge of Assize was associated with the Sheriff; and under such circumstances all mere irregularities must be considered waived; and the Plaintiff is entitled to his judgment, unless the defect be of such a nature as to render the whole proceeding as form, extend now to cases where judgment is given by default, for Defendants. On the 2d, as to part of the Timber therein mennull and void. I would here observe that I do not agree with the confession or on demurrer, as well as those after verdict. learned Counsel for the Desendant in his position, that in all cases I have carefully examined the statutes of Jeoffail, and find that On the 3d and 4th. issues for the Desendants: and on the 5th for before they are upon the record. In all such cases the Court must were equally cured by judgments of confession, default, &c.; exercise a sound discretion, and in one like the present should cer- but it is not until the statute 5 Geo. 1, c. 13, that defects in sub- lary, to show cause why the Postea should not be given to the tainly not interfere to deprive the Plaintiff of any benefit which stance in judicial Writs are aided; and this is expressly confined Defendants. Cause was shewn at this Term by Wilmot for Plaintiff of any benefit which stance in judicial Writs are aided; he might derive from those statutes. Indeed I am of opinion that to cases after verdict. But independent of this statute, there is a tiff. the Court would, if the defect were amendable, allow the Plain- great distinction between Writs of venire, &c. which do not convey tiff to amend, although he has made no direct application for leave the power under which the trial is had; and Writs of Inquiry so to do.

My reason for thinking the rule obtained in this case must be ment it must be erroneous; that seeing this the Court will not allow de novo. him to incur useless trouble and expence, but in order that he

may have his damages paperly assessed, will set aside the Writ which p. 878, it is said the want of a Writ of Loquiry is aided a the statute of Jeoffails; and the other P. 1077, where the Writ and Inquisition.

It is clear from all the muthorities, that there is a great distinc- Inquiry had been lost, and the Court made a rule for a new W the latter may be waived the former cannot be. Sell. Pr. 100. 5 loosely reported, and the first contains no statement of the protion between a defect in the proceedings and a mere irregularity; T. R. 254, 4 T. R. 349 Mr. Sellon says, "The time of taking ceedings, nor does it inform us of the nature of the action, or how. advantage of any irregularity depends on the nature of the defect, the damages were assessed, or the record made up. The las whether it be such as viliates the proceedings m toto so as to render them null and void, or own such an irregularity as may be cured or waived by south Document act of the parties, for there Inquiry for the Assessment of Damages, and the return thereto, for is a distinction between a defect in the proceedings and a mere ifregularity."

ference between an irregularity and a nullity, -an irregularity

In the present case a Writ of Inquiry has issued, directed to Botsford, J.—It appears that a Writ of Inquiry for the Assess- the Sheriff, and the Judge of Assize, by which the Sheriff is di-

It is contended by the Counsel for Defendants, that the Writ is, whether that circumstance makes any difference in the nature Writ of Inquiry. Can be award a proper Writ on his roll, and ought to have been directed to the Sheriff alone, who is the person of the proceedings on the record. It appears clearly from all the enter that which has issued; or can be enter a different Writ from designated by law to hold the Inquest—that the Judge at Nisi Books of practice, that the Writ and Inquisition are precisely the that under which he has proceeded? I think not: if we discharg. Prius is only an assistant to the Sheriff, by whom the return ought same, whether taken in presence of the Judge or not : The Sheriff ed the present rule obtained at the Defendants' instance, the Plain. to have been made. The irregularity is admitted by the Counsel is the officer in either case, in whom the judicial power is vested, tiff must himself ask it of us if he wishes to proceed. Were it its for the Plaintiff, but it is contended, that the same was waived by and the Inquisition is returned under his hand and seal, and those cessary indeed the Court might I think ex officio award a new will the Defendants whose Counsel were present, and who attended on of the jurors. In 12 Mod. 610, Holt, C. J., said, "a Judge of Nisi but there is no occasion for that being done. their behalf, before the Judge of Assize on the taking of the Inqui- Prius upon trial of a Writ of Inquiry, is only an assistant to the sition, and by taking subsequent steps in giving notice of an inten- Sheriff, and has no judicial power." In this Province the Judges but I fully concur in the opinions expressed by their Honors, ded motion to this Court to set aside the Inquisition, on the ground sit at Nisi Prius under the act of Assembly, 26 Geo. 3, c. 8, by which they are empowered to try causes brought to issue in the Su- amount of damages the Plaintiff has sustained by reason of the To this it is answered, that the proceedings are defective, and preme Court. Any other power by them to be exercised on the premises. Circuit, must be derived from the established practice of the Court. A particular statute has altered the common law in some

quently defective. In support of this opinion I find it laid down in CARTER, J.-This was a motion to set aside a Writ of Inquiry, 6 Com. Dig. 289, "If Writ of Inquiry be executed before him

In Comyn, it is further said, "If a Writ of Inquiry is erroneous of this Writ was wrong, and that this was a case in which the it shall not be amended, but the Plaintiff may have another writ." In 2 Wils. 378,—An Inquisition taken before two under-Sheriffs In considering this case, I have had considerable doubts whe- extraordinary was set aside, the Court holding that the High

the proceedings; but on the whole, I am led to conclude that the Clerk to be amended did not extend to a case where the Clerk the Sheriff of Carleton, and was served in the Parish of Queens-

The case of Grant vs. Bagge, 3 East, 128, is important to shew. & S. 442, & 4 M. & S 412, and 1 Arch. (Ch. Ed. 1835,) 520. taken by the Desendants, which would clearly have been a waiver that a Writ directed improperly to an officer not accustomed to Rule nisi granted, which by consent of Wilmot for Plaintiff, was of an irregularity, do not waive this, which is a complete defect in receive such would be quashed on motion quia improvide emanarit, made absolute in the first instance. and would not justify the officer who took upon him to execute it.

In the Queen vs. Tuelein 1 Salk, 51, Lord C J. Holt and Powel & Powys J. say, that though a misawarding of Process on the roll might be amended at common law of the same term, because it was the act of the Court, yet if any Clerk at common law issued out an erroneous Process on a right award of the Court, that was never amended in any case at common law.

Some cases have been cited of Amendments in Jury process, such as the distringus and veniri after verdict; and it has been argued that the statutes of Jeoffail curing defects in substance as well

where defects are cured by the statutes of Jeoffails, the Court will, the position is not exactly correct; by stat. 4 & 5, Ann. c. 16, it is Plaintiff. A question thereupon arose as to who was entitled to nevertheless, set the proceedings aside, if application be made true all omissions or defects which were then cured after verdict the record, and which Party should recover costs. which are the direct authority to the officer for his proceeding.

In Crowder vs. Rooke, 2 Wils. 144, where the cause was tried made absolute, is, that the defect is of such a nature as cannot be at a certain sitting, subsequent to that for which the nisi prius Rewaived, and would not be aided by any of the statutes of amend- cord, &c. were made up, the Court considered the trial as coram ment or Jeoffail; that if the Plaintiff proceeded to enter up his judg- non judice, refused leave to amend; but ex officio awarded a venire so, the Defendant may enter up the judgment.

and Inquisition from the Sheriff's notes. Both cases are very turned evidently on the ground that the proceedings had been to gular, though the Writ and Inquisition were lost: and the only ground on which I can conceive the first to have been decided that the Court would presume that a Writ had issued, and that is was a proper Writ; but we can make no such presumption here as we have the defective Writ before us, and can presume no other In truth this is not the case of a mistake or misprision of the Clerk, but an intentional application of a Writ provided by statute

for one purpose, to another, for which it is not warranted; I so

appears by the return that the Inquest was holden before the Jus- As a rule was obtained for having the Inquisition taken in pre- c. 21, and the uniform practice in this Province are considered. sence of the Judge at the circuit, the first point for consideration the Plaintiff has not called on us to do this, but has resorted to

CHIPMAN, CHIEF JUSTICE. - I was not present at the argument A proceeding after default is necessary to inform the Court what

proceedings therein especially mentioned; in those laws, everything

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The Solicitor General and J. A. Street for Plaintiff. N. PARKER, WETMORE, and WILMOT, for Defendants.

WILMOT v. BABINO and CORNWALL.

The Solicitor General moved in last Easter Term, on behalf of the Detendants, for relief under the Insolvent Act; but after argument the Court dismissed the application (vid. ante). Notice was given to Plaintiff's Attorney of a further application at this Term: but copies of the affidavits to support same, were not delivered. The Solicitor General was about to call the attention of the Count to the former affidavits and to some further statements-Sed.

This must be entirely a new application, and it does appear convenient that we should pursue the practice which has been estab. lished of giving notice and communicating copies of all the Applicant's affidavits to the opposite party, that he may be prepared to answer them: the course has been not to grant a rule nisi, but to take the matter into consideration in the first instance.

BRAYDON v. MOREHOUSE.

Berron moved to set aside Service of Process in this cause will In Blakamore's case, 2 Rep. 310, it is held that misprision of a costs, on the ground that the Capias ad resp. was addressed bury in York County. He cited 1 Arch. 345, 8 T. R. 235; 1 M.

DICKINSON v. KETCHUM.

Replevin for divers quantities of Timber. Defendant pleaded as to part of the Timber, non cepit. 2d. As to another part, Property in himself. 3d. As to another part, non cepit.

4th. As to another part, Property in himself.

And 5th. As to another part, the same. At the Trial before CHIPMAN, CHIEF JUSTICE, at the Carleton Circuit in September last, a Verdict was found, on the first issue tioned for the Plaintiff, and as to the remainder for the Defendant.

The Solicitor General for Defendant obtained a Rule in He

Per curiam.

Each party is entitled to costs on the issues, determined in his favor, see 2 Bos & Puller, 368; as to taxing costs in replevin, see Liter, 1190, confirmed in 4 B. & A. 43. The Plaintiff having carried down the Record, let him have the Postea for one month to enter up the judgment, and after that time if Plaintiff shall neglect to do

Wilmot for Plaintiff. Solicitor General and C. Wetmore for Defendant.

FOR SALE. CRES of Wild Land, well co-A vered with Hard Wood, convenient for hauling to Fredericton, and lays in rear of the Property on which the Hon. F. P. Robinson now resides; granted to Peter Clements, who offers the same on reasonable terms. For particulars apply to WILLIAM March 10. J. BEDELL, at Fredericton.

PAINTING, GLAZING, &c. HE Subscriber has removed his PAINT-ING ESTABLISHMENT in rear of Mr. JAMES TAYLOR'S Store, where any work entrusted to his care will be done with the utmost punctuality and at very reduced charges. CHARLES P. SMILER. Predericton, 28th July, 1835 .- 3w.

LAND FOR SALE. OBERT RANKIN & Co. have a number of Lots of LAND in the County of Carleton, which they wish to dispose of. Any Person wishing to purchase will be informed of the situations and conditions, by applying to WILLIAM J. BEDELL at Fredericton. 24th March, 1835.

NOTICE.

LL Persons having any demands against A the Estate of Doctor CHARLES L. GUNTHER, of Fredericton, deceased, will present them to the Subscriber, duly attested, within Three Months, and all Persons indebted to the said Estate are desired to make immediate payment to

ASA BLAKSLEE, JUN. Administrator, St. John. Fredericton, July 10, 1835 .- 3m.

Smoked Salmon, JUST RECEIVED

FOR SALE BY M. MACKINTOSH. Fredericton, 8th July, 1835.

FOR SALE. THOS, LIME, 15 Chests Low priced TEA, 126 Smoked SALMON, 100 Boxes ditto HERRINGS. ASA COY.

Fredericton, 1st August, 1835,

NEW GOODS.

Two cases have been cited from Strange's Reports, in one of

HE Subscriber respectfully informs the Public that he has recommenced business in the Store in Carleton Street, lately occupied by Mr. Wm. SIMPSON, Druggist, where he offers for Sale a variety of Fashionable, Fancy and other Dry Goods,

-ALSO-Groceries and Liquors, at the lowest prices, WILLIAM GROSVENOR. Fredericton, 13th May, 1835.

LAND FOR SALE.

town of Coodstock, County of Car- MILL and Carding Mill. leton-containing 550 acres, about ten acres This property is situate thirty miles above of which is cleared. ALSO-150 acres of ex- Fredericton, on the left or Eastern bank of the cellent Land in the Parish of Wicklow, in said River, on which it has a front of about three County, adjoining Mr. Milberry. For further quarters of a mile. particulars please inquire of RALPH M. JAR. Terms of payment will be made per-VIS, Esq. of Saint John, or MARK NEEDHAM, fectly easy. For particulars enquire of JAMES of Fredericton

Frederician, 10th March, 1835.

MEDICAL ANDESURGICAL DISPENSARY.

R. COY, SURGEON, and Successor to Mr. G. E. BALDWIN, informs his friends and the public, that he has purchased the above Establishment, where he will keep a constant supply of the best Patent and other MEDI-CINES; DRUGS; PAINTS; DYE STUFFS, &c. G-Physicians and Family Prescriptions ac-

curately prepared. * * Advice to the Poor gratis. Fredericton, 2d February, 1835.

FARM & MILLS, FOR SALE. TO BE SOLD AT EASY PAYMENTS. THE GOACK FARM and MILLS, con-A very valuable tract of LAND, L. sisting of 800 acres of LAND of a supe-in the Parish of Wakefield, in rior quality, about 100 of which are cleared; a the Land tier of Lots near the Farm House, two good frame BARNS, a Saw

TAYLOR, Esquire, Fredericton. July 14, 1835.

THE ROYAL GAZETTE

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