REPORTS OF CASES
IN THE SUPREME COURT OF
NEW BRUNSWICK.

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 Inquiry for the Assessment of Damages, and the return thereto, for defects and irregularities apparent on the face of them.

The Solicitor General and J. A. Street shewed cause in Hilary Term.

Cur. adv. vult. until this Term, when the Judgment of the Court was pronounced.

Botsford, J.—It appears that a Writ of Inquiry for the Assessment of Damages was issued, directed to the Sheriff of the County of Northumberland, and to the Justices assigned to take the assizes in and for the said County, bearing date the twelfth day of July in the fifth year of His Majesty's reign, and returnable the second Tuesday in October then next following. That the Sheriff was commanded to summon a Jury to appear before the said Justices of Assize, who were commanded to certify the Inquisition: and it appears by the return that the Inquest was holden before the Justice of Assize who signed and certified the same.

It is contended by the Counsel for Defendants, that the Writ ought to have been directed to the Sheriff alone, who is the person designated by law to hold the Inquest—that the Judge at Nisi Prius is only an assistant to the Sheriff, by whom the return ought to have been made. The irregularity is admitted by the Counsel for the Plaintiff, but it is contended, that the same was waived by the Defendants whose Counsel were present, and who attended on their behalf, before the Judge of Assize on the taking of the Inquisition, and by taking subsequent steps in giving notice of an intended motion to this Court to set aside the Inquisition, on the ground of improper rejection of Evidence by the Judge of Assize.

To this it is answered, that the proceedings are defective, and cannot be amended, cured or waived.

With respect to the Writ of Inquiry and the Return thereto, I am of opinion that they are defective—that the Judge of Assize had no power, neither could he derive any, under the Writ of Inquiry—that he could only act as an Assistant to the Sheriff, agreeable to what is said by Holt, Chief Justice, in an anonymous case, (12 Mod. 610) "A Judge at Nisi Prius upon trial of a Writ of In-"quiry, is only an Assistant to the Sheriff, and has no Judicial "power." The Writ of Inquiry and proceedings under it being defective and not merely irregular, I am of opinion that they could not be waived by any of the steps taken by the Defendants. In Massey and Wilson, 5 T. R. 254, a distinction was taken between a mere irregularity in the mode or time of the proceedings, and a defect in the proceedings themselves, that the latter kind could not be waived by the adverse party, though the former might, and this distinction was allowed by the Court.

Carter, J.—This was a motion to set aside a Writ of Inquiry, which had issued to assess damages (after Judgment on demurrer) and the Inquisition thereon, the action being in covenant on a lease. It appeared that the Writ was directed to the Judge of Assize and not to the Sheriff, and that it was executed before the Judge of Assize, and the Inquisition was under the hand and seal of the Judge of Assize—and that the Defendant appeared and made defence at the execution of the Writ. It is clear that the direction of this Writ was wrong, and that this was a case in which the Judge of Assize could not have power to take the Inquisition.

In considering this case, I have had considerable doubts whether this defect in the proceedings, was not one which should be taken advantage of by another method than by motion to set aside the proceedings; but on the whole, I am led to conclude that the whole proceedings under this Writ are not irregular only, but wholly defective, *ab initio*: and that therefore the subsequent steps taken by the Defendants, which would clearly have been a waiver of an irregularity, do not waive this, which is a complete defect in 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 null and void. I would here observe that I do not agree with the learned Counsel for the Defendant in his position, that in all cases where defects are cured by the statutes of Jeoffails, the Court will, nevertheless, set the proceedings aside, if application be made before they are upon the record. In all such cases the Court must exercise a sound discretion, and in one like the present should certainly not interfere to deprive the Plaintiff of any benefit which he might derive from those statutes. Indeed I am of opinion that the Court would, if the defect were amendable, allow the Plaintiff to amend, although he has made no direct application for leave so to do.

My reason for thinking the rule obtained in this case must be made absolute, is, that the defect is of such a nature as cannot be waived, and would not be aided by any of the statutes of amendment or Jeoffail; that if the Plaintiff proceeded to enter up his judgment it must be erroneous; that seeing this the Court will not allow him to incur useless trouble and expence, but in order that he may have his damages properly assessed, will set aside the Writ and Inquisition.

It is clear from all the authorities, that there is a great distinction between a defect in the proceedings and a mere irregularity; the latter may be waived the former cannot be. Sell. Pr. 100. 5 T. R. 254, 4 T. R. 349 Mr. Sellon says, "The time of taking advantage of any irregularity depends on the nature of the defect, whether it be such as vitiates the proceedings *in toto* so as to render them null and void, or only such an irregularity as may be cured or waived by some subsequent act of the parties, for there is a distinction between a defect in the proceedings and a mere irregularity."

In 1 Dowl: P. R. 29. Mr. J. Taunton says, "there is this difference between an irregularity and a nullity,—an irregularity may be waived but a nullity cannot."

In the present case a Writ of Inquiry has issued, directed to the Sheriff, and the Judge of Assize, by which the Sheriff is directed to summon the Jury and the Judge to make the Inquiry, and return the Inquisition under his hand and seal. The action is covenant in which the damages are to be assessed in the ordinary way, and not debt on Bond with breeches assigned, for which a particular mode of Inquiry is appointed by statute. We are to determine whether the Writ and the proceedings thereon are a mere nullity or only an irregularity.

As a rule was obtained for having the Inquisition taken in presence of the Judge at the circuit, the first point for consideration is, whether that circumstance makes any difference in the nature of the proceedings on the record. It appears clearly from all the Books of practice, that the Writ and Inquisition are precisely the same, whether taken in presence of the Judge or not: The Sheriff is the officer in either case, in whom the judicial power is vested, and the Inquisition is returned under his hand and seal, and those of the jurors. In 12 Mod. 610, Holt, C. J., said, "a Judge of Nisi Prius upon trial of a Writ of Inquiry, is only an assistant to the Sheriff, and has no judicial power." In this Province the Judges 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 Supreme Court. Any other power by them to be exercised on the Circuit, must be derived from the established practice of the Court, or some special enactment.

The Sheriff, where he is not an interested person, is the known officer of the Court to whom the duty of Inquiry of the Damages in ordinary cases, as well as the execution of other Writs, must be assigned, and we have no power to substitute the Judge or any other person; we can no more I conceive award a Writ to the Judge to make the inquiry in ordinary cases, than we can authorise the Sheriff to do it under the stat. of Wm. 3d. relative to Bonds. The Sheriff under the Writ now before us was *functus officio* after returning the jury, if he appeared at the Inquisition, it was wholly without authority as the Writ gave him none: the Judge and not the Sheriff has the judicial authority by the Writ to swear the Jury and Witnesses, and he alone has made the return. I cannot but think the whole proceedings were *coram non judice*, and are consequently defective. In support of this opinion I find it laid down in 6 Com. Dig. 289, "If Writ of Inquiry be executed before him who has no authority, it is error as in an Inferior Court if it is directed to the Serjeant at Mace, and is executed before the Mayor who is Judge of the Court, Yelv. 69." In the case in Yelverton, the Court said, "An Inquiry before the Mayor is not warranted by any Writ, and by consequence judgment to recover such damages placed before a wrong officer is erroneous."

In Comyn, it is further said, "If a Writ of Inquiry is erroneous it shall not be amended, but the Plaintiff may have another writ."

In 2 Wils. 378,—An Inquisition taken before two under-Sheriffs extraordinary was set aside, the Court holding that the High Sheriff could appoint no more than one under Sheriff extra.

In Blakamore's case, 2 Rep. 310, it is held that misprision of a Clerk to be amended did not extend to a case where the Clerk mistakes the form of the Writ.

The case of Grant *vs.* Bagge, 3 East, 128, is important to shew that a Writ directed improperly to an officer not accustomed to receive such would be quashed on motion *quia improvide emanarit*, 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 *distringas* and *veniri* after verdict; and it has been argued that the statutes of Jeoffail curing defects in substance as well as form, extend now to cases where judgment is given by default, confession or on demurrer, as well as those after verdict.

I have carefully examined the statutes of Jeoffail, and find that the position is not exactly correct; by stat. 4 & 5, Ann. c. 16, it is true all omissions or defects which were then cured after verdict were equally cured by judgments of confession, default, &c.; but it is not until the statute 5 Geo. 1, c. 13, that defects in substance in judicial Writs are aided; and this is expressly confined to cases after verdict. But independent of this statute, there is a great distinction between Writs of *venire*, &c. which do not convey the power under which the trial is had; and Writs of Inquiry which are the direct authority to the officer for his proceeding.

In Crowder *vs.* Rooke, 2 Wils. 144, where the cause was tried at a certain sitting, subsequent to that for which the nisi prius Record, &c. were made up, the Court considered the trial as *coram non judice*, refused leave to amend; but *ex officio awarded* a *venire de novo*.

Two cases have been cited from Strange's Reports, in one of which p. 878, it is said the want of a Writ of Inquiry is aided by the statute of Jeoffails; and the other P. 1077, where the Writ of Inquiry had been lost, and the Court made a rule for a new Writ and Inquisition from the Sheriff's notes. Both cases are very loosely reported, and the first contains no statement of the proceedings, nor does it inform us of the nature of the action, or how the damages were assessed, or the record made up. The last turned evidently on the ground that the proceedings had been regular, though the Writ and Inquisition were lost: and the only ground on which I can conceive the first to have been decided, is that the Court would presume that a Writ had issued, and that it 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 say intentional, for the Plaintiff's Counsel at first insisted that the Writ was proper for the purpose, and according to the latest book of practice, though he is now satisfied he was mistaken.

The rule to quash the Writ and Inquisition, must I think be made absolute, but without costs: If we do not so interfere what can the Plaintiff do? It is not a case in which the Court could assess the damages, for supposing that we have the power, which may be questioned, when the provision of the act 26 Geo. 3, c. 21, and the uniform practice in this Province are considered; the Plaintiff has not called on us to do this, but has resorted to a Writ of Inquiry. Can he award a proper Writ on his roll, and enter that which has issued; or can he enter a different Writ from that under which he has proceeded? I think not: if we discharged the present rule obtained at the Defendants' instance, the Plaintiff must himself ask it of us if he wishes to proceed. Were it necessary indeed the Court might I think *ex officio* award a new writ; but there is no occasion for that being done.

Chipman, Chief Justice.—I was not present at the argument, but I fully concur in the opinions expressed by their Honors.

A proceeding after default is necessary to inform the Court what amount of damages the Plaintiff has sustained by reason of the premises.

A particular statute has altered the common law in some proceedings therein especially mentioned; in those laws, everything is mentioned to be done according to the form of the statute, and if that course is imported into other cases not specified in the statute, the statutes of Jeoffails will not cure the defect. The present proceeding is *coram non judice*, and must be set aside.

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 Defendants, 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 Court to the former affidavits and to some further statements—*Sed.*

Per curiam.

This must be entirely a new application, and it does appear convenient that we should pursue the practice which has been established 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.

Berton moved to set aside Service of Process in this cause with costs, on the ground that the *Capias ad resp.* was addressed to the Sheriff of Carleton, and was served in the Parish of Queensbury in York County. He cited 1 Arch. 345, 8 T. R. 235; 1 M. & S. 442, & 4 M. & S 412, and 1 Arch. (Ch. Ed. 1835,) 520.

Rule nisi granted, which by consent of Wilmot for Plaintiff, was made absolute in the first instance.

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 for Defendants. On the 2d, as to part of the Timber therein mentioned for the Plaintiff, and as to the remainder for the Defendant. On the 3d and 4th. issues for the Defendants: and on the 5th for Plaintiff. A question thereupon arose as to who was entitled to the record, and which Party should recover costs.

The Solicitor General for Defendant obtained a Rule in Hilary, to shew cause why the Postea should not be given to the Defendants. Cause was shewn at this Term by Wilmot for Plaintiff.

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 Later, 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 so, the Defendant may enter up the judgment.

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