

---

 Bell v. Aydelott.
 

---

JAMES BELL and JOHN BELL, Plaintiffs in Error, v. ZADOCK AYDELOTT, Defendant in Error.

ERROR TO GALLATIN.

The long and uniform practice in this state, has been to execute writs of inquiry of damages, in the presence of the court, and there is no irregularity in it.

AYDELOTT brought an action of assault and battery, in the Gallatin circuit court, against the Bells. Judgment was entered against them for default of a plea, and the court, on motion of the plaintiff, ordered the sheriff to impanel a jury *instanter* to ascertain the damages. The jury, *instanter*, and in the presence of the court, assessed the damages, upon which the court rendered a judgment. The error assigned was, that the court ought to have awarded a writ of inquiry to the sheriff, who should have executed it by a jury, not in the presence of the court.

*Opinion of the Court by Justice JOHN REYNOLDS.* The long and uniform practice in this state has been for the jury to inquire of damages in the presence of the court. This mode is the more easily given in to, when we reflect that this inquiry of damages is had, in the presence, and under the immediate care and direction of the court. If it be absolutely necessary from the old law, as it was contended, for this writ to be executed in the presence of the sheriff, this likewise is done, for generally the sheriff is in the court. This will answer the ends of form, and form it must be, as the substantial ends of justice will be answered by the assessment of damages before the Court. We are therefore of opinion, that the judgment of the circuit court be affirmed. (a) (1)

*Judgment affirmed.*

---

(a) The executing a writ of inquiry is an inquest of office, and the officer who presides, acts *ministerially*, and not *judicially*. 2 Johns. Rep., 63. If it appears that important questions of law will arise on the execution of the writ, the court will order it to be executed by a judge at the circuit. *Ibid.*, 107. Tidd's Prac., 513. 4 T. R., 275. 2 Bos. & Pull., 55.

(1) A writ of inquiry may be executed in vacation, as well as in term time. It may be executed at any place within the sheriff's bailiwick. The statute has not changed the common law in this respect. *Vanlandingham v. Fellows et al.*, 1 Scam., 233.

If any irregularity take place in the execution of a writ of inquiry, the proper way is to apply, upon affidavit, to the circuit court to set the inquest aside. *Id.*

A writ of inquiry may be executed before the sheriff at any place within his bailiwick, and a want of notice to the defendant, on executing the writ, can not be assigned for error; nor can the sufficiency of the writ, the proper practice being to move the court below to quash it. *Moore v. Purple*, 3 Gilm., 149.