CARNALL *vs.* CRAWFORD COUNTY.

The act of 21st December, 1846, (Digest p. 313, sec. 12) investing appellate jurisdiction in the circuit courts over orders and judgments of the county courts, held to be in accordance with the provisions of the constitution. *Miller vs. Heard & Co.* 1 *Eng. R.* 73, *cited.*

The appellate jurisdiction thus conferred upon the circuit courts was absolute, and its rightful exercise was not dependent upon future legislative regulations, though such were at the legislative will.

It was an additional investiture of judicial power in the circuit court to be exercised by means already provided to give effect to the powers of that court, and if these were not commensurate, then by such additional means known to the law as were necessarily granted as incident to the appellate powers granted.

Therefore the circuit court has ample power, in order to carry such appellate jurisdiction into effect to issue any necessary and appropriate writ known to the law, and to make such additional orders as may be appropriate to secure costs and the interest of the parties litigant.

In general, the writ of *certiorari,* with or without supersedeas clause, according to the circumstances of each case grounded upon petition and exhibits, and granted upon such conditions for the security of costs, the prosecution of the appeal, and for the indemnity of the adverse party, as in the discretion of the court or judge, to whom the application for the appeal is made may be deemed proper, would be the most appropriate means to be adopted.

This process would bring up the appeal to the circuit court, temporarily superseded or not according as the supersedeas clause has been inserted or omitted in the writ of *certiorari,* to be there quashed and remanded for further proceedings, or affirmed and remanded that the county court might execute its own judgment, in case pending the appeal the execution had been suspended—the circuit court rendering no other judgment than a general judgment of quashal or affirmance and for costs in that court, for which the bond required is a security.

Where a judgment of a county court is thus removed into the circuit court by *certiorari,* there is in no case, under our practice, a trial *de novo.*

The use of the writ of *certiorari* as to such appeals from the county court, will in no way conflict with the decision of this court in *Levy vs. Lyschinski,* 3 *Eng. R.* 113, because this would not be a use of that writ in virtue of the power of superintending control vested by the constitution in the circuit court, but would be such one in virtue of pure appellate powers vested in the circuit court by the statute. Digest page 313, sec. 12.

But although it might directly conflict with that decision this court would not the less indicate the use of the writ to the circuit court; because it is clear

that that decision is founded upon a radical misconception of the true character of the powers or superintending control over the county courts and justices of the peace, which by the constitution is vested in the circuit courts.

The superintending control given by the constitution to the circuit courts over county courts and justices of the peace is of the same character, though not to the same extent, as that which has been exercised in England by the court of King's Bench over inferior tribunals for many centuries.

The terms "superintending control over the county courts" &c., are used in sec. 5, of art. 6 of the constitution in their common law sense, and it is proper to look to the common law for their meaning.

The power thus conferred upon the circuit courts over these inferior tribunals is not altogether a grant of original jurisdiction, but is also supervisory in its character, and may be exercised by process affecting cases and parties litigant as well as the tribunals themselves.

The superintending control of the King's Bench over subordinate tribunals has never been confined to that which alone could be effected by process running directly to the tribunal, but in much the larger number of cases by judicial action upon the case itself and the parties; and the writ of *certiorari* has been the most usual instrumentality of effecting this control.

Doubtless, however, the powers of superintending control, designed as they are to keep subordinate courts in due bounds, should rarely, if ever, be exerted either by the circuit courts over the county courts and justices of the peace, or by the supreme court over the latter, otherwise than in harmony with ordinary appellate jurisdiction as regulated by law; and therefore before final judgment nothing short of a clear defect of power in subordinate courts, or clear breach of duty and irreparable mischief by delay, should make a case for interposition; otherwise the extraordinary powers of superintending control would conflict with and in effect supersede the ordinary appellate jurisdiction as regulated by law.

Levy as ad. vs. Lyschinski, 3 *Eng. R.* 113, and so much of *Anthony Ex parte*, 5 *Ark. R.* 363 as is in conflict with the doctrine herein held, are overruled; that the circuit courts may resume the exercise of their constitutional powers as to a superintending control over the county courts and justices of the peace.

The legal effect of the act of 4th January, 1849, entitled "An act allowing appeals from the county and probate courts" (Pamph. Acts of 1849, p. 59) is simply to provide an additional mode by which the cases specified in it may be taken within the influence of the appellate jurisdiction of the circuit court that had been conferred by the act of 1846, and by no means excludes the more efficient mode, by *certiorari*, already within the effective power of the circuit court.

The circuit court possessing appellate jurisdiction in such cases, the right of appeal existed before the passage of the act of 4th January, 1849.

The term "allowances", as used in said act embraces two distinct classes

of cases: 1st. Cases where orders of allowance are made or refused touching claims against the county or its treasury, and the action of the court is confined to such allowance or refusal to allow: 2. Cases where judgments have been rendered touching fiscal matters in the grounds of which are included any allowance or refusal to allow such claim.

The former would embrace the ordinary claims of individuals against the county or its treasury which the court would simply have to order to be paid, or refuse such order: while the latter would embrace settlements with officers chargeable with or holding moneys payable into the county treasury who might have claims touching services, fees or other matters to be allowed to them by way of deduction or set-off, and the balance to be due liable to be finally matured into a judgment under the provisions of the statute.

And these two classes would seem to embrace all final orders or final judgments of the county court made in its character of Fiscal court except those in which appeals are prohibited by law, or are exclusively restricted to the jurisdiction of the county courts.

It follows that an appeal may be taken, under the provisions of said act, from the final judgment of the county court ascertaining the balance due by a collector of revenue to the county, and fixing upon him the penalties of the law for failing to settle in due time.

As that statute does not point out the mode of proceeding on appeal from the county to the circuit court, this court declares it to be the proper practice for the circuit court to inspect the transcript from the county court, and if there appears to be no material error of law or fact to affirm the judgment of the county court, but if such error of law or fact appear, to set aside the judgment of the court below, and grant a trial *de novo*—the same practice directed by statute on appeals from the probate court.

Where a collector of revenue fails to settle and pay over the amount with which he is chargeable, at the time prescribed by law, it is made the duty of the county court (Digest p. 862) to adjust the accounts of such delinquent according to the best information that can be obtained, and ascertain the balance due the county; but such adjustment being but a preliminary step to other legal proceedings against the delinquent, he is not entitled to previous notice of such adjustment, as held in *Trice vs. Crittenden county*, 2 *Eng. R.* 162.

Where a collector fails to settle at the November term of the county court, as required by law, such preliminary adjustment of his account may be made by the court at a subsequent term: *Trice vs. Crittenden county, ub. sup.*

One of the associate justices of the county court being disqualified to sit in a case, a justice of the peace of the county was summoned in his stead, and the case was determined by the presiding judge, one of the associates, and the justice of the peace so summoned: HELD, that the court so organized

was competent—the presiding judge, and any two justices of the county constituting a quorum for the transaction of business. *Digest p.* 309, *sec.* 4.

In a settlement made by the county court of a delinquent collector's account, he was charged with "amount of the tax book as per assessment list filed" &c.: it was objected, on error, that this charge was not sufficiently explicit; that it did not exclude the idea that the collecor was charged with the amount assessed for the State as well as for the county: HELD, that this court should presume in favor of the correctness of the action of the county court in the premises, its jurisdiction over the subject matter being manifest of record.

Where the delinquent collector fails to show cause to the contrary at the next term of the county court after his account is adjusted, the statute authorizes judgment against him for the amount found due, twenty-five per cent penalty thereon, and fifty per cent. per annum upon the amount due and penalty: Digest page 863, sections 36 and 37.

If the delinquent collector fails to pay the amount found due against him within ten days after his account is adjusted, he is chargeable with the penalty of twenty-five per cent. (Digest p. 863, sec. 36,) and this may be done without notifying him of the adjustment, as it constitutes part of the preliminary proceedings that may be conducted *ex parte;* and any objection for want of such notice should come from him at the succeeding term of the court when summoned to show cause why judgment should not be rendered against him for the amount due together with the penalty; and if want of knowledge of such adjustment is shown by him, as to the penalty, and is disallowed as a defence, he should spread the facts upon the record by bill of exceptions.

Writ of Error to Crawford Circuit Court.

This was an appeal from the county to the circuit court of Crawford county. The transcript filed in the circuit court shows the following proceedings, in substance:

"At a county court begun and held at the court house of Crawford county &c., on the first Monday of April, 1850, present the Hon. Reuben P. Pryor judge, and Josiah Wynn and Joseph W. Spivey Esqrs., associates; amongst others, the following proceedings were had, to-wit:

"MONDAY MORNING &C.

Now on this day the court proceeded to settlement with John Carnall, late sheriff and collector of the county of Crawford, and find that he was indebted for the year 1849, at November term

of this court, held on the 12th day of November, A.D. 1849, in the sum of three thousand five hundred and ninety-seven dollars and eighty-three cents ($3597.83) at which term of said court the said John Carnall, sheriff and collector, wholly failed to settle and account for, as follows, to-wit:

April 2	To amount of grocery license of Wm. H. Phillips	$	10.00
" "	" Ferry license of Yuke Burns		3.00
" 5	" " " Sarah P. Gibson		10.00
" 6	" " " Joseph M. Hemm		15.00
" "	" Grocery " " Willard Ayres		10.00
" 10	" Auction " " T. A. Reeder		10.00
Mar. 26	" " " " Edwards & Jansenburg		10.00
" "	" " " " George S. Bernie		10.00
July 2	" Grocery " " Peter O'Conner		10.00
" "	" " " " Little & Gonger		10.00
" "	" " " " Michael McDonald		10.00
Sept. 12	To amount of tax book as per assessment list filed 27th August, 1849		3364.79½
Oct. 4	" " Ferry license collected of John F. Wheeler		10.00
" 5	" " collected of T. A. Reeder, duty on am't of sales at auction on license		3.06
" "	" " of Jansenburg & Edwards, do. do.,		7.12
" "	" " " George S. Bernie, do. do.,		43.18
" "	" amount collected on delinquent list for 1847, as per statement		3.74
" "	" amount collected of B. Hinkle for house rent		48.87
" "	" " assessed on merchandize, per statement		9.25
			$3597.83

"And further that since the said 12th day of November, 1849, and previous to the present term of this court, the said John Carnall, as sheriff and collector as aforesaid, is indebted in the following amounts, to-wit:

December. 1850.	To amount additional assessment on merchandize, from 1st April to 1st Oct. 1849	$	654.34¾

January.	To this amount of fine collected of W. R. Simmons....$	10.00
February.	" this amount of fine of C. B. Johnson................	50.00
"	" " " " " " C. A. Berrin.................	50.00
"	" " " " " " Henry Bechel................	50.00
		$ 814.34¾
		$4412.18

1850. Cr.

Jan'y.	By A. J. Ward, Treasurer's receipt..............$	713.56	
April 3.	" 2½ per cent commissions for assessing $4019.13, 1849	100.47	
	" 5 per cent. commissions for collecting $233.04 on auction sales, ferry licenses &c............	11.65	825.68
			$3586.50

"Whereby it appears to the satisfaction of the court here on settlement that there is in the hands of the said John Carnall, late sheriff and collector of the county of Crawford aforesaid, the sum of three thousand five hundred and eighty-six dollars and fifty cents ($3586.50) unpaid and unaccounted for.

"Cr. By error between $713.56 and $731.56 treasurer's receipt 8th January, 1850.................................$ 18.00

April 14. To 25 per centum for failing to pay $3568.50 within 10 days after settlement, and filing treasurer's receipt .... 892.12——$4460.62½

"At a county court which was begun and held at the court house, at &c. in the county of Crawford, on Monday the 1st day of July, 1850, present the Hon. Reuben P. Pryor, judge, and Mitchell Sparks and Josiah Wynn, Esqrs., associate justices; amongst others the following proceedings were had, to-wit:

"STATE OF ARKANSAS, }
County of Crawford. } *S. S.*

The State of Arkansas, to the Sheriff of the County of Crawford aforesaid—Greeting:

WHEREAS, at the April term, 1850, of the county court of said county of Crawford, the accounts of John Carnall, late sheriff and ex-officio collector of said county were adjusted by the county court, when the balance due from said Carnall as such collector to said county was ascertained to be three thousand five hundred and eighty-six dollars and fifty cents ($3586.50); and whereas the said Carnall having wholly failed and neglected to pay into the treasury the balance so found due as aforesaid, and having also failed to produce the treasurer's receipt therefor within ten days after said balance was ascertained, the clerk of said court, according to the form of the statute in such case made and provided, charged said Carnall as a penalty for such failure twenty-five per cent. on the amount then due: You are therefore hereby commanded to notify the said John Carnall that unless he shall appear on the first day of the next term of said county court, which will be begun and held at the court house in said county of Crawford on the first Monday of July, A. D. 1850, and show good cause for setting aside said settlement, judgment will be entered up against him for the amount so ascertained to be due, with the penalty added thereto by the clerk as aforesaid, and fifty per percentum thereon until the same shall be paid. You are further commanded to make due return of this writ to our said court.

In testimony whereof, &c., &c., this 28th May, 1850.

[L.S.] A. McLEAN, *Clerk.*"

Which summons is endorsed executed by the sheriff, 10th June 1850.

"FRIDAY MORNING, 10 o'clock, 5th July, 1850.

Court met pursuant to adjournment: present the Hon. Reuben P. Pryor, judge, and Mitchell Sparks and Joseph Wynn, Esqrs., associates, and Andrew Martin, Esqr.

County of Crawford
vs.
John Carnall, late Sheriff and collector &c.

Now on this day it appearing that Mitchell Sparks, one of the associate justices of this court is legally disqualified from sitting on the trial of this cause, by the direction of the court the sheriff summoned Andrew Martin, Esqr., an acting justice of the peace in and for the county of Crawford aforesaid to sit on the trial of this case. And the said John Carnall being duly summoned according to law, wholly failed to show cause why the settlement made with the said John Carnall at the last term of this court should be set aside: it is therefore considered and adjudged by the court that said county of Crawford do have and recover against the said John Carnall, late sheriff and collector of taxes in and for the county aforesaid, the sum of four thousand four hundred and sixty dollars and sixty-two and a half cents, together with fifty per cent. per annum on said sum of four thousand four hundred and sixty dollars and sixty-two and a half cents until the same shall be paid, together with all her costs in and about this suit laid out and expended."

From the above judgment, the transcript shows that Carnall appealed to the circuit court, making the usual appeal affidavit, and entering into bond for costs of the appeal, &c.

In the circuit court, at the appeal term (August 1850) presiding, the Hon. W. W. FLOYD, Judge, Carnall, the appellant, moved the court to quash the proceedings of the county court had in said case, which motion the court overruled.

Crawford county, the appellee, then moved the court to dismiss the appeal, on the ground that the county court had no legal authority to grant said appeal; and that the circuit court could not acquire jurisdiction of said cause; which motion the court sustained, and ordered the case to be stricken from the docket.

S. H. HEMPSTEAD, for the appellant. An appeal is allowed from the county to the circuit court from all orders and judg-

ments (*Digest* 313, *sec.* 12) and the circuit court, instead of dismissing should have tried the appeal *de novo*. *Dig. sec.* 183, *p.* 669.

The motion of Carnall to quash the proceedings of the county court ought to have been sustained,—1st. Because in the settlement of the 3d April, 1850, it does not appear that Carnall was present or had any notice thereof, and the same appears to have been *ex parte;* Carnall should have been cited to appear and make settlement. 2d. Because it is only at the November term that a sheriff is bound to settle and account for moneys. (*Lawson's case,* 3 *Ark. R.* 8) and this settlement appears to have been made at a different term. (2 *Eng. R.* 164.) 3d. Because the judgment does not appear to have been rendered by a competent court. The presiding judge and the two justices elected for that purpose, alone constitute a legal court. *Digest* 309, *sec.* 4. *Trice's case,* 2 *Eng.* 164. *County of Pulaski vs. Lincoln,* 5 *Eng.*

WATKINS & CURRAN, also for the appellant, objected to the judgment of the county court, that the error of $18.00 in the treasurer's receipt had not been credited, but was increased by the penalties of 25 and 50 per centum: that the charge for the amount of the tax book as per assessment list, might have included the State as well as the county revenue; that the 50 per centum was awarded on the "amount due" and the penalty of 25 per cent. added together, whereas under *sec.* 37, *ch.* 138, *Dig.* the 50 per centum per annum should have been only on the "amount due"; and argued that, the circuit court, in exercising a superintending control over the inferior tribunals, acts not in the exercise of appellate but of original jurisdiction. (*Anthony Ex parte,* 5 *Ark.* 364); that according to our constitution and laws, the circuit courts can in no case act as a court for the correction of errors; and in the absence of any express intention to the contrary the term "appeal" involves the right of trial *de novo* or re-examination of the facts of the case, (*Com. vs. Penn.* 5 *Wheat.* 424. 4 *Cond. Rep.* 716. *U. S. vs. Wanson,* 1 *Gall. C.*

C. R. 12) and therefore the circuit court should have proceeded to a trial *de novo* upon the merits of the case.

Mr. Justice SCOTT delivered the opinion of the Court.

By the act of the legislature of the 21st December, 1846, (Digest, p. 313, sec. 12) appellate jurisdiction was granted to the circuit court from all orders and judgments of the county court in all cases not exclusively restricted to the jurisdiction of that court nor prohibited by law. The capacity of the circuit court to be invested with such jurisdiction and the constitutional power of the legislature to grant it was settled by the case of *Miller vs. Heard & Co.,* (1 *Eng.* 73.) The grant thus made was absolute and its rightful exercise was in no way necessarily dependent upon future legislative regulations although all such were at the legislative will. It was then but an additional investiture of judicial power in the circuit court to be exercised by means already provided to give effect to the powers of that court, and if these were not commensurate, then by such additional means known to the law as were necessarily granted as an incident to the appellate powers granted. (*Moore vs. Woodruff,* 5 *Ark.* 215 and cases there cited as to this point.) Doubtless therefore the circuit court has ample power in order to carry this appellate jurisdiction into effect to issue any necessary and appropriate writ known to the law and to make such incidental order as might be appropriate to secure costs and the interests of the parties litigant.

In general the writ of *certiorari,* with or without a supersedeas clause, according to the circumstances of each case, grounded upon petition sustained by accompanying exhibits and granted upon such conditions for the security of costs, the prosecution of the appeal and for the proper indemnity of the adverse party, as in the judicial discretion of the court or judge, to whom the application for the appeal is made, may be deemed proper, would be the most appropriate means to be adopted. This process would bring up the appeal to the circuit court, temporarily superseded or not according as the supersedeas clause had been

inserted or omitted in the writ of *certiorari,* to be there quashed and remanded for further proceedings, or affirmed and remanded that the county court might execute its own judgment, in case pending the appeal the execution had been superseded. The circuit court rendering no other judgment than a general judgment of quashal or affirmance and for costs in that court, for which the bond required is a security.

We are aware that in several of the States the practice has been adopted of giving a new trial (*de novo*) in all cases removed by *certiorari* after judgment from an inferior into a superior court, but this does not seem warranted by the uniform course of practice in England. There, when cases are thus removed before judgment in the inferior court, the proceeding is *de novo,* so that if the case is at issue when removed the plaintiff must declare *de novo.* (*Tidd's Practice,* 349, 350.) But there is no warrant in the practice of the English courts for a trial *de novo* after judgment in the inferior court, and this is doubtless the foundation of the practice long established in this State, to take no other action in such than to quash or affirm, (*County of Pulaski vs. Irvin,* 4 *Ark.* 487) regarding the process when running to a court moving in a new course different from the common law as performing the same functions as a writ of error running to one moving in the course of the common law. *Groenvelt vs. Barwell,* 1 *Salk.* 263.

The use of the writ of *certiorari* as to such appeals from the county court will in no way conflict with the decision of this court in the case of *Levy vs. Lyschinski,* (3 *Eng.* 113) because this would not be a use of that writ in virtue of the power of superintending control vested by the constitution in the circuit court, but would be such one in virtue of pure appellate powers vested in the circuit court by the statute. (*Digest* 313, *sec.* 12.) But although it might directly conflict with that decision we would not the less indicate the use of the writ to the circuit court. Because we feel clear that that decision is founded upon a radical misconception of the true character of the powers of superintending control over county courts and justices of the peace,

which by the constitution is vested in the circuit courts. And so long as it shall be regarded as law and the doctrine upon which it is founded as a true constitutional doctrine that these tribunals will continue to be unlawfully prohibited from the use of their most efficient powers for effectuating the superintendency that as to them was designed to be set on foot by the framers of the constitution: which was, as we think, beyond all doubt, a superintendency and control of precisely the same character, though not to the same extent, as that which has been exerted in England by the court of King's Bench for many centuries. Feeling as sure that when the framers of the constitution used the terms "superintending control over the county courts," &c., they used these terms in their common law sense as when, in a subsequent part of the constitution they used the terms "all writs and other process" that they were used in that sense. And consequently it would be as unwise to look any where else than to the common law for the meaning of one of these terms as for the other. And in either equally as unwise as it would be to look by the light of reason alone for the meaning of the word "Christian" in a pagan land, where Christianity had never been planted, instead of looking in a Christian land in the light of Holy Writ. That misconception consists in the supposition (based simply upon the foundation that there is nothing is express terms in this connection which embraces "parties litigant" and "cases pending") that these powers of superintendency and control are purely and exclusively powers of original jurisdiction having no connection with parties or cases, but relate altogether to tribunals; and consequently that these or the incumbents of them must necessarily be made the defendants in any proceedings set on foot under these powers.

No authority or known principle has been cited for the supposition, and no reason advanced for its support other than that mentioned, and that, it must be conceded, is any thing but satisfactory; because is allowed alike sway as to all the powers of the supreme court as expressed in the constitution, most if not all these would have to be confined to tribunals only, and would

have but little to do with "parties litigant" or "cases." The very generality of the terms themselves "superintending control," would seem utterly to exclude the idea of a restriction to only one class of powers: must less, a restriction still farther that this class should be exerted only upon tribunals and should not be exerted upon parties and cases. And indeed it is difficult to conceive how powers of original jurisdiction only are to be made efficient against tribunals when "parties litigant" and "cases" are left out of view. Doubtless to some extent one tribunal may act upon another through the instrumentality of process running to the tribunal only and by this means exert control; still such exertion of control must in the nature of things be predicated upon some case upon which there has been action or refusal of action.

But although control thus in reference to "parties litigant" and "cases" may be thus exerted to some extent by process running to tribunals or the incumbents, this by no means proves that a similar control may not be exerted by a direct action upon the case itself and the parties, and that in some cases such might not be indispensable to the exertion of control itself. When a case had not passed beyond the powers of a subordinate court it might undo its erroneous action, but when beyond this boundary it is difficult to see how it could be merely stimulated to do, in virtue of its own powers, an act which it has no power or authority to do. To effect control in such case, action by the superior court either upon the case itself or upon the parties litigant would be indispensable. Accordingly the superintending control of King's Bench over subordinate tribunals has never been confined to that which alone could be effected by process running directly to the tribunal, but in much the larger number of cases by judicial action upon the case itself and upon the parties: and the writ of *certiorari,* which has been heretofore disallowed to our circuit courts under the doctrine we are combating and the decision founded upon it, has been the most usual instrumentality of effecting this control. In the case of *The King vs. Reeves, Morris, Osborn et al.* (1 *Black. R.* 231) Lord

Mansfield said, "But this court hath an inherent power to issue *certiorari* in order to keep all inferior courts within due bounds, unless expressly forbid to do so by the words of the law. If the justice had done right below you may show it and quash the *certiorari*. But if there be the least doubt this court will grant the writ."

The true distinction upon this subject, as will be manifest by an examination of various cases where King's Bench has from time to time exerted its superintending control over subordinate courts, is that these powers of superintending control, so far from being all powers of primary and original jurisdiction, are for the most part in their essence and nature revisory powers, as well over cases as over tribunals and are to be exerted as well upon the one as the other, according to the exigency of the matter to be controled. (See dissenting opinion as to this point in the case of *Amour Hunt, Ex parte,* 5 *Eng.* 288. 1 *Tidd's Pr.* 333, 334.) Accordingly the supreme court of Alabama has held in various cases, and shown by judicial action upon cases presented under precisely such an investiture of powers of superintending control as to that court, as is by our constitution not only made as to our supreme court; but also as to our circuit courts, that such of these powers as are powers of original jurisdiction will never be exerted unless there is no subordinate court competent to administer justice by reason of some inherent defect in the tribunal or incompetency of the incumbent: while the great mass of their powers which are in their nature revisory are ever ready to be exerted either upon tribunals or cases, to keep subordinate tribunals in due bounds whenever they act beyond their power or refuse to act at all. *Simonton, Ex parte,* 9 *Porter* 383. *Mansong, Ex parte,* 1 *Ala. R.* 98. *The State vs. Williams, ib.* 342. *The same vs. Porter, ib.* 688. *Tarlton, Ex parte,* 2 *Ala. R.* 35. *Chaney, Ex parte,* 8 *Ala. R.* 424. *Grant, ad vs. McCord,* 6 *Ala. R.* 91.

Doubtless, however, the powers of superintending control, designed as they are only to keep subordinate courts in due bounds, should rarely if ever be exerted either by the circuit courts over the county courts and justices of the peace, or by the supreme

court over the latter, otherwise than in harmony with ordinary appellate jurisdiction as regulated by law: and therefore before final judgment nothing short of a clear defect of power in the subordinate court or clear breach of duty and irreparable mischief by delay should make a case for interposition; otherwise the extraordinary powers of superintending control would conflict with and in effect supersede the ordinary appellate jurisdiction as regulated by law.

In the light of these views then, entertaining no doubt as to the erroneous character of the doctrine, as to the point examined, promulged in *Ex parte Anthony* (5 *Ark.* 363, 364) and applied in the case of *Levy as ad. vs. Lyschinski* (3 *Eng.* 113), the rule as to that doctrine and the latter case must be overruled, that the circuit courts may resume the exercise of the constitutional powers as to a superintending control over the county courts and over justices of the peace, and that citizens may have justice in matters within the cognizance of these tribunals without the expense and delay of a direct resort to this court.

But as to the case before us, although it was within the range of the appellate jurisdiction conferred upon the circuit court by the act of 1846, first referred to, and might have been brought up for adjudication by writ of *certiorari* in the manner indicated, in virtue of that appellate jurisdiction thus conferred or in like manner in virtue of the superintending power of the circuit court, it seems from the record to have been otherwise brought before the circuit court. The record shows that an appeal was prayed of the county court and was granted in the manner pointed out by the act entitled "An act allowing appeals from the county and probate courts," approved the 4th January, 1849, Pamphlet Acts of 1849, page 59.

The legal effect of this act is simply to provide an additional mode by which the cases specified in it may be taken within the influence of the appellate jurisdiction of the circuit court that had been conferred by the act of 1846, and by no means excludes the more efficient mode already within the effective power of the circuit court; nor does it in any way indicate the mode of

trial in the circuit court of a case thus removed otherwise than by the use of the term "appeal," which is more particularly a term of the civil than the common law. Nor can it be supposed that this act conferred on parties a right of appeal that before did not exist, although appellate jurisdiction as to such cases was vested in the circuit court. Because the right of appealing to the courts of justice both of original and of appellate jurisdiction for the redress of injuries is one of the fundamental absolute rights of the citizen; and consequently when a new court is opened or when additional jurisdiction is conferred upon one already open, the citizen has a right to resort to it if his case is within its jurisdiction, without any affirmative legislation to confer such a right upon him, any thing that may seem to be to the contrary notwithstanding in the case of *Hays vs. Pope county,* (5 *Ark.* 308.) Because "since the law is the supreme arbiter of every man's life, liberty and property, courts of justice must at all times be open to the subject and the law be duly administered therein. The emphatical words of *Magna Charta* spoken in the person of the King, who, in judgment of law (says Sir Ed. Coke) is ever present and repeating them in all his courts are these: *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*"

As the record shows that the terms of the last mentioned act was complied with and the case was regularly certified into the circuit court and two motions therein entertained; the first of which was refused and the second granted, the only question that can arise as to the validity of the appeal is whether or not the case was one of those embraced by the second section of the last cited act. ,

The term "allowances," from an order or judgment making or refusing to make such, an appeal is granted, is an indefinite one; yet in the connection in which it is used in this statute it evidently has a direct relation to fiscal matters. Because it is known that one of the most important functions of the county court has a direct relation to the fiscal concerns of the counties respectively and the State, being entrusted by the constitution with all matters relating to county taxes, the disbursement of

money for county purposes and with all matters touching the internal improvement and local concerns of the county, and by the legislature with various matters touching the assessment and collection of the State revenue, and with all matters of settlement and allowances with sheriffs and other officers touching the assessment and collection of county revenue, and with a great variety of matters touching claims and charges upon the county treasury. Thus the county court, under our policy is the fiscal court and has a very general jurisdiction as to these concerns; and it would seem evident that the term "allowances," from an order or judgment making or refusing one, an appeal is to be granted, relates to these concerns; but what fiscal matters it embraces and what it excludes is by no means certain. It does seem clear enough, however, that it was used in some general sense; because it authorizes an appeal from all action of the county court, whether in favor of or adverse to any application for an allowance made by any person whomsoever and whether that action be in the form of an order or of a judgment of that court.

The subject matter of an allowance, in the sense of the statute, must necessarily then embrace within its scope what may be the subject matter of a judgment as to the fiscal affairs committed to the jurisdiction of the county court, and in doing so seems inevitably to embrace all judgments that presuppose and include any action of the court granting or refusing an allowance against the revenue or the treasury. And this seems to exclude the idea that, in such cases, separate appeals would lay as to each item allowed or disallowed in the investigation and judicial adjustment of matters that would result in an aggregate balance and be the foundation of a judgment; because such would be so contrary to the known principles of the common law and practice of the common law courts that it could not have countenance unless founded upon clear and distinct legislative enactment to this effect.

In the light of these views then and feeling fully authorized by law to give this statute a liberal construction, because it is a

statute purely remedial and is evidently designed to advance the right of appeal which is clearly included in the general "right of applying to the courts of justice for the redress of injuries," which, as we have already remarked, is one of the fundamental absolute rights of the citizen, we hold that the term "allowances" as used in this statute embraces two distinct classes of cases: 1st. cases where orders of allowance are made or refused touching claims against the county or its treasury and the action of the court is confined to such allowance or refusal to allow: 2d. cases where judgments have been rendered touching fiscal matters in the grounds of which are included any allowance or refusal to allow any such claims. The former would embrace the ordinary claims of individuals against the county or its treasury which the court would simply have to order to be paid or to refuse such order: while the latter would embrace settlements with officers chargeable with or holding moneys payable into the county treasury who might have claims touching services, fees or other matters to be allowed to them by way of deduction or set-off, and the balance found to be due liable to be finally matured into a judgment under the statute. And these two classes would seem to embrace all final orders or final judgments of the county court made in its character of fiscal court except those in which appeals are "prohibited by law or are exclusively restricted to the jurisdiction of the county courts." Under this construction of the statute it is clear that, in the case before us, the appeal was regular.

This case then being regularly before the circuit court, the next question is, how was it to be disposed of? The statute is altogether silent upon this subject. It is insisted however that, as the civil law term "appeal" is used, we must apply the same rule of construction that we have already applied in this case to the terms "superintending control," and thus derive an unqualified trial *de novo.* This doubtless would be a correct position if the term "appeal,' as used in this statute, was an entirely new one in our jurisprudence, but that is by no means so, and therefore our course of legislation in reference to this term and our

course of judicial decision must essentially modify the application of the rule invoked.

So far as inferences are to be drawn from our course of legislation they are any thing but in favor of the construction that the term appeal necessarily imports a trial *de novo* upon the merits; because the provisions of every statute passed wherein this term has been used is inconsistent with such a construction. Nor has our course of judicial decision given any countenance to such construction. And in our system, in reference to this state of things, doubtless the true doctrine is that appeals in reference to actions at law, although expressed by a term originally derived from the civil law, are purely creatures of our statute law, and consequently that our various statutes must be construed together in order to determine correctly the import of the term in any given statute. When the term is used in the statute providing for the removal of cases to this court it is conceded that it does not import a trial *de novo;* but it is insisted that that proves nothing because this is an appellate court, yet this is not a conclusive answer because this court, besides its appellate power, has uniformly exercised original jurisdiction in a variety of cases. Nor does it import an unqualified trial *de novo,* when used in the statute provided for the removal of cases from the probate to the circuit court. It does, however, by the affirmative provisions of the statute, import such trial when used in the statutes providing for the removal of cases from the courts of justices of the peace to the circuit courts. It has then no uniform import as to the mode of trial in our system, whatever may have been its technical import in the civil law from whence it is derived; and to give it the civil law import as to this would be to hold the common law *pro tanto* repealed.

Under this state of things we shall adopt, as the most reasonable construction, the import of the term, as to the mode of trial, that is fixed by the provisions for removing cases from the probate to the circuit court, and that is a trial *de novo* upon the merits, after it shall have been first ascertained by the circuit court on inspection of the record that the county court had erred

in some material matter of law or fact. And this mainly because in appeals from the probate court like those appeals no bond is required for the indemnity of the adverse party as is required in appeals from justices of the peace, where the right to trial *de novo* is absolute. The distinction resting in this, that a judgment regularly obtained shall not be nullified or in legal construction become inoperative as a judgment until either ample security be given for its amount or else a material error in it of law or fact be first judicially ascertained. This seeming to be the discriminating line kept in view by the legislature between an absolute and a qualified trial *de novo:* and this will be the result under the construction that we have given as to the import of this term in regard to the mode of trial. Because under this construction, until the circuit court shall judicially ascertain from the face of the record sent before it that a material error, either in law or fact, had been committed by the county court, the judgment will remain in full force and its execution would be not even stayed unless upon a proper case the circuit court should have interposed upon terms of ample security to the adverse party and superseded its execution until the case could be heard. And thus the judgment of the county court would remain on the same footing as a judgment of the probate court appealed from would rest; the law in such case staying the execution which could only be effected as to judgments of the county court in the manner indicated. But in neither case would the appeal invalidate the judgment until after the ascertainment of material errors and the consequent award of a trial *de novo* upon the merits.

In this view of the case before us then we will proceed to examine the face of the record to ascertain if there be any such errors as would authorize the award of a trial *de novo.*

The first objection urged by counsel is that Carnall does not appear to have been present when the county court went into the settlement in which he was concerned at the April term, 1850. This objection is untenable according to the views of this court expressed in *Trice vs. Crittenden county,* (2 *Eng. at p.*

102) in which views we fully concur, because that was but a preliminary proceeding not unlike the act of an individual stating an account against his debtor preliminary to the institution of a suit against him.

The next objection is that such a settlement could have been lawfully made only at the November term annually and *Lawson's case* (3 *Ark. R.* 8) is cited as authority for this position. This objection is alike untenable as was also ruled correctly, we think, in the case of *Trice vs. Crittenden county* (*at page* 164); because the rule has no reference to a delinquent officer, who may have failed to settle his accounts at the time prescribed by law. And therefore in the case of such delinquency the preliminary settlement may be made at any subsequent term. In the case before us the record distinctly shows that there had been a failure to settle at the preceding November term, and therefore the settlement at the following April term was regular.

It is then objected that the judgment was rendered by an incompetent court, because it appears by the record that one of the regularly elected associates was disqualified by law to pass upon the case, and another justice of the peace in and for the county was summoned to take his place, and the cause of *Trice vs. Crittenden county* (*at p.* 164) and the case of *Pulaski county vs. Lincoln* (4 *Eng.* 320) are cited as authority for this position. These authorities certainly do not sustain this objection. In the first at page 164 it is distinctly stated that "It requires the presiding judge and two justices of the peace to constitute a court for the transaction of business;" but it is nowhere intimated in that case that these two justices must necessarily be regularly elected associate justices. On the contrary, so far as inference of that may be drawn it is directly to the contrary of this, because the incompetency of the court in that case was put entirely upon the ground that the record showed no one else present but the presiding judge. And besides, in the case of *Ferguson vs. Crittenden county* (1 *Eng.* 479) it was expressly held that even in the absence of the presiding judge, a majority of the justices of the county would constitute a competent court. Nor does

the case of *Pulaski county vs. Lincoln* contradict any of these doctrines, because it will clearly appear that by the expression used in that case, "We have seen that it required the presiding judge and two associate justices to constitute a legally organized court," that the term "associate" was there used in its common and not its technical import and pointed directly to the statute that had been literally quoted in the second preceding page (p. 324), providing that "the presiding judge of the county court and any two justices of the county shall be a quorum to transact business." Then there is nothing in the objection of counsel as to the incompetency of the court which rendered this judgment.

It is next objected that the error of $18, in favor of the appellant specified in the record as an error relating to the treasurer's receipt is not deducted out of the balance found against him, and that this error is multiplied by the succeeding charge of 25 per cent. penalty and 50 per centum per annum interest adjudged against Carnall. This is a mistake of counsel in point of fact which no doubt has been fallen into unintentionally and is grounded perhaps upon an erroneous recital in the process of summons that went out and was executed upon Carnall as to the amount claimed. The record shows distinctly that the $18 were deducted, and that it was only upon the balance that the 25 per cent. penalty was charged and the judgment of the court is in accordance with this.

It is next objected that the appellant is charged with the "amount of the tax book as per assessment list filed" &c., and insisted that this is not sufficiently explicit; because such a charge does not exclude the idea that he may not have been charged with the amount assessed for the State as well as for the county. It seems to us that this objection would be equally applicable to almost every item of the settlement; and if held good, could only be so upon the ground that we would presume against the county court. So far from doing this we feel bound to presume in favor of the correctness of its doings inasmuch as its jurisdiction over the subject matter is manifest by the record.

The last objection to the proceedings in the county court is

that interest at the rate of fifty per centum per annum is adjudged upon the aggregate of the sum found due and the penalty of twenty-five per cent. for failure to pay it within ten days; when, as it is insisted the interest should have been adjudged only upon the amount due exclusive of the penalty. And to sustain this, it is contended that the provision of the statute, which seems to authorize this judgment upon the aggregate of the sum due and the penalty, is not so entirely explicit as to exclude any possible intendment to the contrary and therefore as such a construction will operate penally in a high degree, it should be otherwise construed. It may be considered that these are highly penal provisions and that the language does not absolutely exclude a possible intendment to the contrary; but we think, when the entire section is read together, there can be no ground at all for doubt but that the legislature did actually enact precisely as the court enforced, and the power to do so cannot be questioned. And besides this a mere possible intendment to the contrary is fully repelled by the subject matter of the enactment and the public policy obviously designed to be subserved, that of securing a prompt collection and payment over of the public revenue. We are satisfied therefore that there is nothing in this objection.

We have also considered another question and that is whether the 25 per cent. penalty could be rightfully charged against the appellant before he had been notified of the settlement and thus had an opportunity to pay within the ten days: and have concluded that it was regular to do so, as this was but a part of the preliminary proceedings that may be lawfully conducted *Ex parte:* and that any objection for want of such opportunity should have come from him at the succeeding term when summoned to show cause why judgment should not be rendered against him for the amount due, together with the penalty; and if want of knowledge of such settlement had been shown by him as to the penalty and had been disallowed, he should have spread that upon the record by bill of exceptions, as he might

do of a refusal of a trial by jury if demanded by him and refused by the county court.

Finding then upon the face of the record no material error of law or fact in the doings of the county court, in our opinion the appellant was not entitled to have this case tried *de novo* in the circuit court. Nor were there any grounds for a quashal of the proceeding in the county court and therefore there was no error in the refusal of the circuit court to grant the motion to quash.

But there was manifest error in the dismissal of this case from the circuit court, because, instead of this action by that court there should have been a general judgment of affirmance and also a judgment for the costs in the circuit court against the appellant, the bond for costs executed in the county court to stand as security for the satisfaction of such judgment for costs. Therefore the judgment of the circuit court striking this case from its docket and dismissing it from that court must be reversed and the cause remanded with instructions to render a general judgment of affirmance and also for the costs of the appeal against the appellant.