PHILLIPS *v*. DESHA.

Opinion delivered December 2, 1893.

Certiorari—Practice.

> Where a writ of certiorari to the county clerk was ordered by
> the circuit court, but not issued, a response by the clerk that a
> transcript of the record in the case had been presented with
> the petition for a certiorari is insufficient; in the absence of a

waiver, the writ must be issued, and a transcript of the record returned with the clerk's response.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Blackwood & Williams for appellant.

The writ of *certiorari* must be issued, and the record returned with the response. 30 Ark. 152; *Ib.* 532; 21 *id.* 264; 23 *id.* 107; *Ib.* 228.

Vaughan & Collins for appellee.

This case is not parallel with the cases cited by appellant. The writ and return may be waived, where the record is presented duly certified and identified, as was done here. 23 Ark. 228.

WOOD, J. Desha filed his petition for a writ of certiorari to the county clerk; his petition was granted, and an order made that the writ issue. The county clerk, by attorney, James Coates, who also appears upon the record as attorney for petitioner, responded in writing that he had already filed a full and complete transcript of all the record of the Pulaski county court in relation to the removal of Albert Desha in the office of the clerk and numbered "165½." The transcript thus filed was an exhibit which he had furnished petitioner, and was attached to his petition nearly two months before writ was ordered. Appellant demurred to this response, which was overruled, and appellant, excepting and resting, appealed.

The writ was ordered but not issued. It was not waived, if it could be waived. There was no such record before the court as the law requires upon proceedings by certiorari, and the demurrer to the clerk's response should have been sustained. *McKay* v. *Jones*, 30 Ark. 152; *Marshall* v. *Ramsauer*, *id.* 532; *Rightor* v. *Gray*,

23 Ark. 228; *Derton* v. *Boyd*, 21 Ark. 264; *Dicus* v. *Bright*, 23 Ark. 107.

    Reversed and remanded.

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