EGNER, GUARD'N *vs.* MCGUIRE, AD'R.

Kelly, a minor, died, leaving his estate in the hands of Egner, his guardian; and letters of administration having been granted to McGuire, on his motion, and without notice to Egner, the probate court made a general order that he deliver to McGuire all the property and effects, both real and personal, in his hands or under his control as such guardian. On *certiorari*, order quashed, first, because there was no notice to Egner: second, it was made before Egner was required to make settlement of his guardianship: third, the order does not specify the effects to be delivered over by Egner: fourth, the order directs the real estate to be delivered to the administrator, when by law it descends to the heir (a), and finally that a proceeding so irregular, indefinite and summary is not authorized by sec. 22, chap. 72, Rev. Stat.

Held, further, that the correct practice in such case is to require the guardian to make settlement, ascertain what is in his hands, and order it paid to the administrator or other person authorized to receive it. If the order be not made at the term of settlement, the guardian should have notice of application for such order, and in all cases the order should specify the effects to be delivered over by him.

Certiorari to the Probate Court of Independence.

IN obedience to a writ of *certiorari*, the clerk of the probate court

(a) By Act of December, 1846, since this decision, lands are made assets in the hands of administrators, and they are given the same control of them as over personal property.

of Independence county returned to the present term of this court a transcript of the record in this case, from which it appears that on the 11th day of April 1845, the probate court of said county made the following order:

"It being represented and shown to the satisfaction of the court that JAMES DE WITT CLINTON KELLY, a minor, has departed this life having property and effects in the hands of Joseph H. Egner, his lawful guardian, and that Edwin R. McGuire has been appointed administrator of all and singular the goods and chattels, rights and credits of said James De Witt Clinton Kelly deceased; on motion of the said Edwin R. McGuire, as such administrator, it is ordered by the court that the said Joseph H. Egner, guardian as aforesaid, be required to deliver up to the said Edwin R. McGuire, as such administrator, all the property and effects both real and personal in his hands, or under his control, which were of the said James De Witt Clinton Kelly deceased, and take proper receipts therefor, which shall be sufficient vouchers in his settlement with this court of his said guardianship."

On the next day, Egner, who it does not appear from the transcript had any notice of the motion for the order, appeared, excepted to the decision of the judge in making the order, took a bill of exceptions, and prayed an appeal to the circuit court of the county, which was refused.

Certiorari granted by the chief justice on his application.

It is assigned for error, 1st, that the probate court took cognizance of said motion, and rendered final judgment thereon, without any statement in writing filed by McGuire, or notice to Egner, or appearance by him, to give said court jurisdiction: 2d, the court ordered Egner to deliver up all the effects of the deceased, real and personal, without designating the effects to be delivered up: 3d, the court ordered Egner to deliver up to said administrator, McGuire, all the real estate of the deceased, whereas by the law of the land an administrator is not entitled to possession of the real estate of his intestate, and 4th, the court refused Egner an appeal, &c.

FOWLER, for the plaintiff. Where inferior courts act in a sum-

mary method, or in a new course different from the common law, a certiorari lies after judgment, a writ of error does not. 1 *Tidd. Pr.* 331. 2 *Tidd. Pr.* 1051. 1 *Salk. Rep.* 144, *Groenwelt vs. Burwell,* 146, *case of Cardiffe Bridge.* 2 *Ark. Rep.* 334, 335, *Gibson & Moore, Adm'rs vs. Rogers*—500, *The Auditor vs. Davies et al.* 5 *Ark. Rep. Anthony, Ex-parte.*

This court, like the King's Bench in England, has "a general superintending control over all inferior and other courts of law and equity." *Const. of Ark. Art.* 6, *sec.* 2. 1 *Salk. R.* 144, 263, *Groenwelt vs. Burwell*—148, *Cross vs. Smith et al.* 4 *Ark. Rep.* 479 *et seq. County of Pulaski vs. Irwin.*

This judgment or order, it is presumed, is predicated on sec. 22, page 431, of the Revised Statutes: but that section of the statutes pre-supposes a proper case to be presented and proper parties before the court: and 1st, the application or motion should be in writing setting forth the plaintiff's right, the defendant's liability: the specific articles of which possession is sought: and 2d, the defendant should have notice of the application, so that he may show cause why the order should not be made.

In a summary proceeding, by motion or otherwise, the motion or application must be in writing, and set out the foundation of the claim with sufficient certainty to show that the court has jurisdiction of the subject matter upon which to render a judgment. 5 *Ark. Rep.* 411, *McKnight vs. Smith.*

The record should also show that the court had jurisdiction of the parties, either by service of a summons or notice, or by voluntary appearance; unless where the statute expressly dispenses with notice; and a judgment rendered without such notice, or appearance is null and void. In this case or class of cases there is no authority to render a judgment without notice. 1 *Littells Rep.* 118, *Delano vs. Gopling.* 2 *Ark. Rep.* 90, *Woolford & McKnight vs. Harrington*—62, *Smith vs. Dudley,* 126, 127, *Webb vs. Hanger & Winston. Litt. Sel. Cas.* 303, *Ormsby vs. Lynch.* 15 *John. Rep.* 121, *Borden vs. Fitch.* 2 *Ark. R.* 149, *Clark vs. Grayson.* 5 *Ark. Rep.* 308, *Sheppard & Pittman vs. Hill's adr.* 410, *McKnight et al. vs. Smith.* 15 *John. Rep.* 538, *Kinderhook vs. Claw.*

The appearance of Egner after judgment to take an appeal does not cure the want of notice: and so it has been expressly adjudicated by this court. 2 *Ark. Rep.* 29, 30, *Rose vs. Ford et al.*

The application should have shown, and the order should have specified, personal estate, monies, or choses in action, such as an administrator had a right to the possession of, and the order including also real estate vitiates the whole proceeding, as an administrator has no legal right to the possession of real estate. 5 *Ark. Rep.* 638, *Gray vs. Saffold's ad'r.* 616, *Hill's ad'r. vs. Mitchell et al.*

The term "real estate" used in *section* 22, *p.* 431 of the *Revised Statutes,* is no exception to the general rule, nor gives the administrator any control of such estate: because the term "executors" must be taken in connection with it. Executors under a will may control real estate: therefore these terms must be coupled and that of "administrators" excluded.

The record should show that the property in Egner's hands was not subject to the payment of the debts or necessary expenses of his ward; until this was done, he had a right to retain possession of a sufficiency of it, at least, to pay such liabilities: therefore an order to deliver the whole is improper, and should be set aside. McGuire in his application should have shown the death of Kelly, and his appointment as administrator.

OLDHAM, J. From the record it appears that James De Witt Clinton Kelly died during his minority, leaving his estate in the hands of Egner as his guardian, and that letters of administration were granted to McGuire. Upon the motion of the administrator the probate court of Independence county at the April term 1845, made an order without any notice to the guardian requiring him to deliver up to McGuire as administrator all the property and effects both real and personal, in his hands or under his control, belonging to the estate of the deceased. The record does not show what property, if any, was in the hands of the guardian.

This order it is supposed was based upon the 22d section of the 72d chapter of the Revised Statutes, title, Guardian and Wards. By a careful examination of that section with the whole act, it will be

readily perceived, that it does not warrant a proceeding so irregular, indefinite, informal and summary as the one here adopted.

It is the duty of every guardian to render an account of his guardianship at the end of one year from his appointment, and afterwards to render accounts and make settlements from time to time as the court of probate by order may direct, and if he fail or refuse to make settlement as required, he is liable to be attached and imprisoned until he make such settlement. *Rev. Stat. ch.* 72, *sec.* 31, 32. At the close of his guardianship it is the duty of the court, upon the motion of the ward, his executor or administrator, to order the guardian to render his accounts and make a final settlement of his guardianship, if he should fail to do so voluntarily, and the court may enforce compliance with the order by attachment. The order should be in the nature of a notice and served upon the guardian. Until such settlement shall be made, and it is thereby clearly ascertained and made to appear of record what effects of the ward are in the hands of his guardian, it is impossible for the court to make such order as is contemplated by the 22d section of the act above cited, or to compel the effective execution of it. After the settlement shall have been made, there will then be no difficulty in the court's making an order directing the property specified and ascertained by the accounts and settlement of the guardian, to be delivered to his ward, or other person authorized by law to receive the same.

If the court should not at the term at which final settlement of the guardianship may have been made, have made any order requiring the delivery of the property such order may still be made at any subsequent term of the court, due notice having first been served upon the guardian. But such order should in every instance specify what effects appear to be in his hands and which he is required to deliver up. This is the only mode in which the court can carry into effect the power conferred upon it by law with a due regard to the rights of all parties interested.

The order in this case is also erroneous in requiring the real estate to be surrendered to the administrator. Realty descends to the heir and not the administrator. Such an order would be proper

if the delivery were to be made to the ward himself, or to his executor: but not to the administrator. The proceedings of the probate court in this case being wholly irregular, erroneous and void, must be quashed.