

## LEVY AS AD'R vs. LYCHINSKI.

The superintending control over the County Courts and Justices of the Peace, with which the Circuit Courts are invested by the Constitution, is a grant of power over the tribunal, not over the case so as to re-adjudicate it. Writs of certiorari act upon the cause, not the tribunal, and the jurisdiction of a court, when acquired under such writ over the cause, is appellate, not original. The Legislature may invest the Circuit Courts with power to acquire jurisdiction under such writ, so as to adjudicate causes decided by inferior courts; but as there is no act of the Legislature authorizing the Circuit Courts to issue such writ for the purpose of adjudicating a cause, that court can acquire no jurisdiction under a writ of certiorari issued to an inferior court. *Anthony ex parte*, 5 Ark. R. 358, cited.

*Appeal from the Circuit Court of Pulaski County.*

At the May term of the Probate Court of Pulaski county, 1845, the  
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widow Esther Lychinski, by her attorney in fact Solomon Mitchell, filed a motion in said court against Jonas Levy, as administrator of Jacob Harris *alias* Lychinski, representing herself as the mother and only heir of said Jacob, and praying the court to order said Levy to pay over the balance in his hands as such administrator. Levy appeared to the motion, and the court, after hearing evidence, ordered him to file his account for final settlement, and to pay over the balance in his hands, when the amount should be determined on his settlement, to the said attorney in fact of said Esther. Levy filed his account accordingly, and at a subsequent term the court ascertained the balance in his hands, entered up judgment therefor in favor of said Esther, and ordered him to pay it over to her said attorney. After the adjournment of the term at which said order was made, on the petition of Levy, the case was removed into the Circuit Court by *certiorari*.

At the term to which the writ of certiorari was returned, the attorney of the widow Esther, moved to dismiss the case upon the following grounds, among others:

1st. There is no statute nor any clause of the constitution, authorizing the Circuit Court to bring up for revision an order of the Probate Court by the writ of *certiorari*.

2d. If the Circuit Court possess such power, it can only be exercised in a case where the Probate Court has proceeded without jurisdiction, which is not the case here as shown by the record.

3d. Judgments and orders of the Probate Court can only be removed to the Circuit Court for supervision by appeal.

The court sustained the motion to dismiss, and Levy appealed to this court.

CUMMINS, for the appellant. The proceedings in the Probate Court were mere nullities for want of notice to Levy. *Pennington's Ex'r v. Gibson*, 1 *Eng. Rep.* 447. *Breeding v. Hudson*, 2 *Eng. R.* 445. *McKnight v. Smith*, 5 *Ark. Rep.* 406. *Woods ex parte*, 3 *Ark. R.* 535. *The Mary, Cond. R.* 3 *Vol.* 312. *Welch v. Hanger & Winston*, 1 *Ark. Rep.* 126. *Murphy v. Williams*, 1 *Ark. Rep.* 384.

The superintending control given to the Circuit Court over inferior

courts, is co-extensive with that given to the Supreme Court; and a certiorari may well be issued by the Circuit Courts to quash the proceedings of inferior courts, where they act extra-judicially, in any case where this court could exercise the like power. *Art. 6, sec. 2, 5, Const. Ark. Wood ex parte, 3 Ark. Rep. 535. Anthony ex parte, 5 Ark. Rep. 364. Gibson v. Pulaski Co., 2 Ark. Rep. 309. Stevens et al. v. State, 2 Ark. Rep. 291. Breeding v. Hudson, ad. 2 Eng. Rep. 445.*

E. H. ENGLISH, contra. In a motion against an executor or administrator to pay over legacies or distributive shares, the statute requires no notice; he would, however, be entitled to notice on common law principles. But Levy waived notice by appearing to the motion.

In the absence of a statute authorizing it, the Circuit Court cannot issue a certiorari to a judgment of the Probate Court for re-adjudication, as clearly decided in *Anthony ex parte, 5 Ark. R. 358*. See, also, *Miller v. Heard & Co., 1 English R. 73*.

If it could, the party having the right of appeal, is not entitled to the writ. *Bacon Abr. tit. Certiorari, letter A. Rex. v. Sparrow, 2 Term. Rep. 169*.

OLDHAM, J. The proceedings in this case originated in the Probate Court of Pulaski County, and were carried from that court to the Circuit Court, by a writ of certiorari. The first question presented for the consideration of this court is, whether the Circuit Court can obtain jurisdiction of a cause by a writ of certiorari to an inferior tribunal, and re-adjudicate the same. This question was fully discussed by Ch. J. RINGO, in the case of *Anthony, ex parte, 5 Ark. R. 358*. After citing that clause of the constitution which declares that "the Circuit Courts shall exercise a superintending control over the County Courts and over Justices of the Peace, in each county, in their respective circuits, and shall have power to issue all the necessary writs, to carry into effect their general and specific powers," he says "the terms of the grant are general, but they import an authority as to the tribunal only and seem to us, to have no reference whatever to par-

ties litigant, or to cases pending in, or decided by them, and do not in any manner appear to contemplate any direct proceedings by the Circuit Courts either against the parties to controversies there pending, or determined, or in cases or matters there in controversy or adjudicated, and inasmuch as no appellate jurisdiction whatever appears to have been vested by the constitution in the Circuit Courts, we consider the power by virtue of this provision as extending only to the tribunals mentioned, and consequently the Circuit Courts can derive no jurisdiction therefrom, to adjudicate any case there determined, but are bound in the exercise of their superintending control, to confine their action to such process and proceedings, as may legally be taken against the tribunals themselves, and in such case the court acts not in the exercise of appellate, but of original jurisdiction; and notwithstanding the rights of others may be affected, the tribunal against which the proceeding is taken, or the individual composing it, must always, in such case, be the party defendant." And so the court held in that case, that by the constitution no appellate jurisdiction is conferred upon the Circuit Courts. A writ of certiorari is not a proceeding against the tribunal or individual composing it; it acts upon the cause or proceedings in the inferior court, and removes it into the superior tribunal for re-investigation. The jurisdiction so acquired is appellate and not original.

It has however been held by this court, in *Hays v. Pope Co.*, 5 *Ark. Rep.* 308, and in other cases, that it is competent, for the Legislature to provide other means than the use of those writs authorized by the constitution, for the purpose of revising the proceedings of inferior courts, and in such case the remedy so provided depends entirely upon the Legislature for its existence, who may modify or abolish it at pleasure. There is no act of the Legislature by which the Circuit Courts are authorized to issue writs of certiorari, for the purpose of obtaining jurisdiction of a cause, from the inferior courts, and until such power shall be conferred by Legislative authority, the Circuit Courts cannot assume or exercise it.

The judgment must therefore be affirmed.