

BUCKNER ET AL., *Ex Parte*.

Where a county court exceeds its jurisdiction, its acts are void, and this court has power, on the proper showing, to remove its proceedings by *certiorari*, and quash them.

Under the 42d chap. of the Digest, the county court has power to make an order for the building of a court-house whenever there is sufficient funds in the county treasury, not otherwise appropriated, for that purpose, or may levy a tax therefor, but such tax cannot be laid without an order of the court made after a notification of all the justices of the county to attend for that purpose.

It is possible, however, that a county may have an ample fund for the erection of a court-house, without a dollar in the treasury: an instance supposed by way of illustration.

In such case, the county court may order a court-house erected without a notification to all the justices to attend.

The statute requiring the commissioner of public buildings to take bond of the person who undertakes the erection of the court-house, is directory, and his failure to do so does not affect the jurisdiction of the county court over the subject matter.

*Petition for Certiorari.*

At the present term of this court (January, 1848,) A. H. Buckner, Milton Keese, Henry Harper, John Howell, James Norris, Eleanor Pratt, John Russell, and one hundred other persons representing themselves as tax-paying citizens of Union county, Arkansas, presented to this court, through their attorneys, Pike & Baldwin, a petition for *certiorari*, in substance as follows:

Petitioners represent that at the October term of the county court of said county of Union, 1846, present, Langford the presiding judge, and Pickering and Gill associate justices, it was ordered by said court that there be erected upon the public square in the town of El Dorado, as speedily as possible, a court-house of such size and style as might be thereafter approved and adopted: and John M. Brown was appointed commissioner of public buildings for said county, with power and authority to perform all the duties incumbent on him as such.

Whereupon, the said commissioner reported to said court a certain plan for the court-house so to be erected, which plan was spread upon the record of said court, as will appear by a transcript of said record presented as part of this petition: and thereupon, it was ordered that he advertise in a certain newspaper published in said town of El Dorado, and at the door of the court-house, for six successive weeks, that sealed proposals would be received for building and erecting a court-house in said town, and that he should exhibit said plan, and receive sealed proposals, until the second Monday of December, 1846, when he should open them in the presence of three disinterested householders, and award the contract to the lowest bidder, provided he should in five days give bond with good security in the sum of \$20,000, to perform his contract: on failure whereof, it should be awarded to the next lowest bidder, who should so give bond: and said commissioner was instructed not to receive any bid exceeding the sum of \$12,000; and was authorized to contract for the price in three equal annual payments, from the first day of January, 1847.

And at a term of said county court begun and held on the 11th January, 1847, present the said presiding judge, and Boyd-kin and Hadley associate justices, the bond of Wm. Davis as contractor for building said court-house, according to the plan recorded as aforesaid, for the sum of \$8,000, was presented and approved, except as to a provision contained therein in regard to the payment of any surplus which might be in the treasury at the end of the year.

And at the same time it was ordered by said court, with the consent of said contractor, that the plan aforesaid should be changed so as to reduce the size of the court-house from fifty to forty feet square, and to dispense with the cupola and two jury rooms: and that the contractor should build four chimneys with fire places in the upper rooms: and that the price should be reduced from \$8,000 to \$6,200: that the original plan, with these exceptions, should be observed; and the amount of windows reduced in proportion to the size of the building: all which will

fully appear by a copy of the entries of record above mentioned, which is annexed hereto, and prayed to be taken as part of this petition.

Petitioners further represent, that upon settlement made by the treasurer of said county with said county court, at the April Term, 1846, it appeared that so far from said treasurer having any county funds in his hands, the treasury was empty and the county indebted to him in the sum of \$14.12: for which a warrant was ordered to issue as will by the transcript aforesaid appear. And they further represent, that said transcript is a full and complete transcript of all the orders of said court, and of all its proceedings in regard to the matters aforesaid or in any way relating thereto.

And they represent, that under said proceedings the said Wm. Davis is proceeding to erect said court-house at the expense, in part, of your petitioners, who must necessarily be taxed to pay therefor, and as inhabitants and tax-payers of said county are parties to said proceedings.

And the said petitioners say that in the proceedings aforesaid, there is manifest error in this, *to wit*: That said original order, and all the subsequent orders in relation to the building of such court-house, were made by said county court before there were sufficient funds, or indeed any funds in the county treasury wherewith to erect the same, and before any order had been made by said court for the levying a tax wherewith to erect the same.

There is also manifest error in this, *to wit*: That although by the record aforesaid, it appears that there were no funds in the county treasury wherewith to erect said building, nor did said county court make any appropriation therefor out of any moneys in the treasury, yet a majority of the justices of the county did not concur in making such order for the erection of said building, and which order, if valid, authorizes the levying of a tax to pay the price of said court-house.

There is also error in this, *to wit*: that no notice whatever was ordered by said county court to be put up, as required by

law, in each or any township of said county, at any time previous to the making of such order, notifying all the justices of said county to attend at the term at which such order was made, and said court therefore had no power, authority or jurisdiction to make such order, which, if valid, created a debt upon the county after which taxation was a necessary consequence.

There is also error in this, *to wit*: That the final contract for erecting such court-house was made without any plan therefor, having been prepared and submitted by the commissioner of public buildings, or any estimate of the probable cost thereof having been made by him.

There is also error in this, *to wit*: That the final contract for the erection of such court-house was made without any advertisement for proposals therefor having been made, or any bids therefor received: nor was the same let to the lowest bidder: but by private contract made by said county court without any intervention of the commissioner whatever.

There is also error in this, *to wit*: That said county court concluded said contract with said William Davis without his giving any bond whatever therefor: and without requiring of him any bond whatever for the performance of the work according to the plan finally determined on.

There is also error in this, that the bond originally given by said Davis, was by such new contract entirely annulled as to his securities and they absolutely released and discharged therefrom.

Wherefore your petitioners, being greatly aggrieved by said proceedings of said county court, and liable to be taxed and amerced in consequence thereof, do pray the Hon. Supreme Court for a writ of certiorari, to operate as a supersedeas, directed to the presiding judge and associate justices of said county court, requiring them to send up to this Hon. court and hereto to certify a full, true and complete exemplification of the papers, orders, record and proceedings had in said court in regard to said court-house to the end that what may be needful may be here adjudged in the premises: and that by virtue of

said writ they desist from any further proceedings in said premises: and that all said proceedings and orders be reversed, annulled and wholly held for naught.

The transcript exhibited with the petition shows, *first*, a settlement made by the treasurer of Union county with the county court, at the April Term, 1846, in which he is charged with \$2,139.07½ and credited with \$2,153.19, leaving a balance in his favor of \$14.12½, and the clerk was ordered to issue a warrant to him for that sum.

2d. That at the October Term of said county court, 1846, present the presiding judge and two associate justices named in the petition, it was ordered that a court-house be erected, and John M. Brown was appointed commissioner of public buildings as stated in the petition. Whereupon said Brown reported to the court a plan for the court-house as follows, *to wit*: Said court-house to be built of good and well burned brick, fifty feet square from out-side to out-side, two stories high, foundation to commence three feet below the surface, lower story to be sixteen feet high, and the wall two feet thick to the top of the first story, the second story to be fifteen feet high and sixteen inches thick, to be covered with good heart-pine shingles, the roof to have four declivities or to be what is called a hipped roof; a cupola to be erected on the top of said roof in the centre—the building to be erected in the centre of the public square in the town of El Dorado—to be finished off with floors, doors, windows, &c., as will more fully appear from the draft and plan of said house on file in the office of the clerk of this court, which is this day adopted by the court and ordered to be filed.

It was thereupon ordered by the court, that said commissioner be required to advertise in the El Dorado Union, a newspaper published in the town of El Dorado, and also on the door of the court-house for six successive weeks, that sealed proposals would be received for building a court-house in El Dorado; and further ordered that said commissioner exhibit the plan adopted by the court as aforesaid whenever called on, and that the clerk

furnish him a transcript thereof. And the said commissioner was further authorized and required to receive sealed proposals as aforesaid, up to and until the second Monday of December, 1846; and on that day proceed to open, in presence of three disinterested house-holders, the said proposals for erecting said court-house; and to award to the lowest bidder the contract, provided the bidder came forward in five days and gave bond with good and sufficient security in the sum of \$20,000, conditioned for the performance of the contract, and in the event of non-compliance, to award the building to the next lowest bidder with the same requirements, and so on until there should be a contractor. And said commissioner was ordered and instructed not to receive any bid for the erection of said building exceeding the sum of \$12,000; and empowered to contract for the said building to the lowest bidder as aforesaid, payable in three equal annual installments from the first January, 1847.

3d. That at the January Term of said court, 1847, present the presiding judge and two associate justices named in the said petition, the clerk presented the bond of Wm. Davis, the contractor for the building of the new court-house, which was approved by the court, with the exception of so much thereof as required "a payment of a surplus which may be in the treasury before the first payment will fall due," which bond was ordered to be spread upon the record.

The bond is contained in the transcript—bears date 25th December, 1846. The condition recites the appointment of Brown as commissioner of public buildings, the order of the court requiring him to let to the lowest bidder the erection of the court-house, "of the dimensions and description specified in the plan annexed to the bond," the advertisement made by Brown in pursuance of the order of the court, the receiving of sealed proposals by him; that on the 13th December, 1846, he opened the bids as directed by the court, and found said Davis to be the lowest bidder, he proposing to build a court-house in the town of El Dorado, in accordance with the plan adopted by the said county court and annexed to the bond for the sum of \$8,000, to

be paid by said county in three equal annual installments from the first day of January, 1847, and "should there be a balance in the county treasury at the end of the year, it is to be paid to said Davis and credited upon the first payment," and conditioned that if said Davis should build said court-house in accordance with the plan thereto annexed by the first day of May, 1848, the bond was to be void. Signed and sealed by Davis and four securities. That at the said term of the court (January, 1847,) and after the approval of said bond, the court made an order by and with the consent of Davis, "that the present plan of a court-house to be built in the town of El Dorado, be and the same is hereby changed, so as to reduce the size thereof from fifty to forty feet square, and dispense with the cupola; and the two jury rooms in the court room are to be dispensed with; and that the contractor shall build four chimneys with fire places in the upper room to said court-house, and that the price of said building is reduced from \$8,000 to \$6,200, the original plan to be observed with the above exceptions, and the reduction of the amount of windows in proportion to the size of said building."

The written consent of Davis to said change in the plan of the building and reduction of the price was put upon the record.

The above is the substance of the entries contained in the transcript annexed to the petition.

PIKE & BALDWIN, for the petition. An order *coram non judice* and void is not the subject of an appeal. An excess of jurisdiction is correctable by *certiorari* only. *People vs. Judges of Suffolk*, 24 Wend. 252: and even if the order would be considered a nullity and impeachable collaterally, still the court would perform what is the main office of a *certiorari*—the keeping of inferior magistrates within the compass of their power. *id.* 253.

The supreme court of New York held that, under their general powers, their general superintending power to award a *certiorari*, not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of

the citizen, even in cases where they are authorized by statute finally to hear and determine, has been frequently exercised, is considered as well established by the common law, and can only be taken away by express words. *Le Roy vs. Mayor, &c., of New York*, 20 *J. R.* 435. *Laaton vs. Comrs. of Cambridge*, 2 *Caines* 131. Even if the statute says the decision of the court below shall be without appeal. 23 *Wend.* 287. *Rex vs. Plowright*, 2 *Shower* 458. *Rex vs. Morley*, 2 *Burr.* 1040. *Rex vs. Reeve*, 1 *W. Bla.* 231.

Wherever new jurisdictions are erected, by private or public act, they are subject to the inspection of the King's Bench by writ of error, certiorari or mandamus. 2 *Caines* 181. *Cardiffe vs. Budge*, 1 *Salk.* 146. 1 *Ld. Raym.* 580.

There can be no doubt of the power of this court, at common law, to review the proceedings of inferior jurisdiction by this writ. This power is not taken away by implication, by a similar power being given to another tribunal. *Stair vs. Trustees of Rochester*, 6 *Wend.* 566.

The same general principle was asserted in *People vs. Supervisors of Alleghany*, 15 *Wend.* 203; which was certiorari on application of an individual to bring up the whole assessment and apportionment of taxes for county purposes.

The court held, first, that the writ did not issue *ex debito justitiæ*, but only on application to the court, and for reasons shown, and might in its discretion be refused for reasons of public convenience. They relied for this on *Arthur vs. Comrs. of Lewers*, 8 *Mod.* 331. *Bac. Abr. Certiorari, A. Ludlow vs. Lord Com.*, 1 *Southard*, 387. *Lees vs. Childs*, 17 *Mass.* 351, and other cases.

They said they could not avoid the tax as to the relator without avoiding the whole county tax, a great part of which had been paid: and cause hundreds of suits against twenty-six different supervisors. And on these reasons and cases cited they denied the writ. The cases relied on certainly show that it was proper to deny the writ in order to quash a whole assessment. They go no further. *Rex vs. Inhab., &c.*, 2 *Str.* 932. *King vs. King et al.* 2 *T. R.* 234. 2 *Caines* 182. And this is the



very reason why we apply now. If we wait until the assessment list is made up, we shall have to pay an illegal tax without any remedy. To the same point is *People vs. Supervisors of Queen*, 1 *Hill*, 195.

It is the proper office of a certiorari to interfere where there has been an excess of jurisdiction, apparent on the face of the record. If it has to be made out by collateral facts the writ does not lie. *Ex parte Mayor &c. of Albany*, 23 *Wend.* 277. *Rex vs. Somersetshire Justices*, 6 *Dowl. & Ryl.* 469. 5 *B. & Cres.* 816. *Queen vs. Inhab. of Westham*, 10 *Mod.* 159.

The court will in no case go beyond the question of power, that is of jurisdiction: and will, for that, look solely to the record. 23 *Wend.* 287. *Rex vs. Morley*, 2 *Burr.* 1040. *Barnard vs. Fitch*, 7 *Metc.* 607.

In what cases will a certiorari lie? By persons aggrieved, against land commissioners, for illegally laying out a road. *Freetown vs. Co. Comrs. of Bristol*, 9 *Pick.* 46. 2 *Caines*, 181. Against corporate authorities, to set aside an illegal assessment for building a sewer. *Le Roy vs. Mayor &c. of New York*, 20 *J. R.* 429, 437; or for paving streets. *Bonton vs. President &c. of Brooklyn*, 2 *Wend.* 395. *Stair vs. Trustees of Rochester*, 6 *Wend.* 565. *Ex parte Mayor &c. of Albany*, 23 *Wend.* 277. To remove an appointment by two justices of an overseer of the Poor. *Rex vs. Standard Hill*, 4 *M. & S.* 378. To remove orders for laying out, or discontinuing roads or ways. *Hancock vs. Boston*, 1 *Metc.* 122. *Stone vs. Boston*, 2 *Metc.* 220. To county commissioners on an illegal refusal to abate one's taxes. *Gibbs vs. Comrs. of Hampton*, 19 *Pick.* 298.

Prohibition or mandamus will not lie here. 1 *Hill*, 200. Nor has chancery jurisdiction to grant an injunction. *Movers vs. Smedley*, 6 *J. C. R.* 30.

It makes no difference, as to the power of this court, that we pass by an intermediate court, and appeal directly to this. *Cardiffe vs. Pridge*, 1 *Salk.* 145. The jurisdiction of this court on certiorari to the county court has been deliberately settled. *Lawson vs. Pulaski Co. Court*, 3 *Ark.* 1. *Stevens et al. vs. The*

*State*, 2 *id.*, 291. *Gibson vs. Pulaski*, 309. *Pike vs. The State*, 5 *id.* 204. *Rex vs. Standard Hill*, 4 *M. & S.* 378. *Rex vs. Great Marloe*, 2 *East.* 244.

A certiorari is the only method of getting the judgment of a new jurisdiction reversed, in cases where the court or judge proceeds on a summary method, or other method different from the common law. *Holdipp vs. Otway*, 2 *Saund.* 101. *Com. vs. Ellis*, 11 *Mass.* 462. *Edgar vs. Dodge*, 4 *Mass.* 670. *Com. vs. Blue Hill Turnpike*, 5 *Mass.* 420. *Melvin vs. Bridge*, 3 *Mass.* 305. *Cook, Ex parte*, 15 *Pick.* 234.

S. H. HEMPSTEAD & E. H. ENGLISH, contra.

JOHNSON, C. J. It will be conceded, as contended by the counsel for the petitioners, that if the county court of Union have exceeded their jurisdiction, that their acts are void, and that this court, through its general superintending control over the inferior courts of the State, would be authorized upon a proper case made, to have the proceedings removed by a writ of certiorari, and to quash and set them aside. The petitioners have expressed apprehensions that they may be subjected to the payment of a tax for the purpose of erecting a court-house, and allege that the burthen is about to be thrown upon them without the authority of law. The 36th chap. of the Revised Code declares that "There shall be erected in each county, at the established seat of justice thereof, a good and sufficient court-house and jail;" that "As soon as the court-house and jail shall be erected and the circumstances of the county will permit, there shall also be erected a fire proof building at some convenient place near the court house, in which shall be kept the offices of the recorder and of the clerks of the several courts held in the county;" and that "whenever the county court of any county shall think it expedient to erect any of the buildings aforesaid (the building of which shall not be otherwise provided for) and there shall be sufficient funds in the county treasury which may be appropriated to the erection of county buildings,

or which are not otherwise appropriated, or if the circumstances of the county will permit the county court to levy a tax for the erection of said buildings, such court may make an order for the building thereof, stating in such order the amount to be appropriated for that purpose." The fourth section of the act also provides that, "Whenever the county court shall deem it expedient to levy a tax for the erection of any public building or the repair of the same, it shall require a majority of the justices of the county therein commissioned to concur in making any such order to levy such tax for erecting public buildings." Thus much of the statute is necessary to a correct understanding of the case now presented. The county court, under the third section of the act, have express authority to make an order for the building of a court-house whenever there shall be sufficient funds in the county treasury, which may be appropriated to the erection of county buildings, or which are not otherwise appropriated, or if the circumstances of the county will permit a tax to be levied for that purpose. True it is, that when it shall become necessary to levy a tax for the purpose of raising the funds, such levy cannot be made without an order to that effect, and that too with the concurrence of a majority of all the justices of the county, in case they shall attend after being notified in the manner prescribed by the statute. The obvious reason why a majority of the justices is required to concur in the order to levy the tax is, that the will of the people throughout the county may be expressed through the representatives of the several townships. But it is possible that the county should have an ample fund to erect a court-house, and at the same time not have one dollar in the treasury. It is often the case that donations are made consisting of town lots or other real estate for the avowed purpose of putting up the public buildings, and in such a case, if any individual, in whom the county court should see fit to confide, should agree to erect the buildings and to take such real estate, or the proceeds in case of their sale, we can perceive no good reason why they would not be fully authorized to enter into such an arrangement, and that,

too, without the intervention or concurrence of a majority of the justices of the county. It is not pretended by the petitioners, nor does it appear from the transcript of the record of the county court, that any steps have been taken towards the collection of a tax with which to erect the court house, nor is it shown that a resort to taxation will ever be necessary to effect the object. From the showing in this case the inference is strong that the county has some fund out of which to build the court house, without resorting to taxation, and that therefore the county court, as organized under the constitution, had the unquestionable right and power to order the house to be erected, and also to make the necessary appropriation for that purpose. Under this view of the case, there is no defect of jurisdiction, and consequently no good cause for a quashal of the proceedings. It is also insisted that, inasmuch as the original plan of the building was essentially changed, and as the commissioner did not again advertise for proposals, therefore the present contract with the undertaker is void: and for that cause the whole proceeding should be set aside. The answer to this question is, that whether the bond of the undertaker be binding or not in law cannot properly affect the question of jurisdiction. The statute in requiring the commissioner to take a bond from the undertaker, though it should be strictly obeyed, is merely directory, and the jurisdiction of the court over the subject-matter does not in the slightest degree depend upon the fact whether it is observed or not. It does not necessarily follow from the fact that the county court have made an order to erect a court house, that they will resort to taxation to carry that order into effect. We consider, therefore, that the application is premature, and that it would be time enough for all useful purposes to apply to have the order set aside after it has been made. The application is therefore refused.