

NEW JERSEY COURT OF ERRORS AND
APPEALS.

ARTHUR B. MELLOR, *et al.*,
Executors, etc.,
(*Plaintiffs in Certiorari*)
Respondents,

vs.

JOSEPH KAIGHN,
(*Defendant in Certiorari*)
Appellant.

ON APPEAL.
SUPPLEMENTAL BRIEF
FOR RESPONDENTS.

SUPPLEMENTAL BRIEF FOR RE-
SPONDENTS.

On the oral argument of this appeal, the Court raised the question of the power of the Supreme Court to review by certiorari the action of the Surrogate. Leave was thereupon given to counsel for the respondents (*plaintiffs in certiorari*) to submit brief in justification of the procedure pursued by them.

In the following brief we shall, therefore, treat of the right of the Supreme Court to review by certiorari the act of a Surrogate alleged to have been done in excess of his statutory jurisdiction. We shall also treat, in the event that the jurisdictional

question be resolved against us, of the present status of the appeal and urge that its decision by this Court is consistent both with the demands of justice and orderly procedure.

The facts involved in the issue are fully contained in the briefs of counsel already submitted. For convenience sake, we may repeat that the present appellant filed a petition before the Surrogate of Camden County to revoke his order granting probate to the will of Wm. B. Mellor. This petition was filed over a year after the granting of probate and beyond the period prescribed for appeal. On this ground, and on the further ground that the Surrogate had no jurisdiction to revoke an order or decree made by himself, the present respondents filed a special plea to the jurisdiction. This plea, the Surrogate undertook to strike out, and the writ of certiorari was directed against his action in so doing.

I. JURISDICTION OF SUPREME COURT BY CERTIORARI.

Aspect of The Question.

By direction of this Court, we are to deal with the question of the supervisory power of the Supreme Court by certiorari over a Surrogate who acts, or who is alleged to act, in excess of the jurisdiction confided to his office. The question may be put thus:

Has the Supreme Court of New Jersey power to review, by writ of certiorari, the order of a Surrogate which is alleged to have been made without jurisdiction?

It should be stated at the inception of this argument that we have been unable to find any direct authority which may be cited as directly determining the question. Our case, lying outside of the doctrine of *stare decisis*, we are compelled to address ourselves to other grounds of solution. We shall show that the functions of the Supreme Court and the nature of the writ which it employed justified its use in the present instance, and that control was properly exercised over the Surrogate.

We understand that the question is the general one of whether the Supreme Court has the right to issue certiorari in any case where a Surrogate is alleged to have acted beyond the bounds of his authority. We are not concerned with the propriety of the action of the Supreme Court Justice in allowing the writ in the case *sub judice*. That act, being discretionary, is not subject to review.

“Unless the discretion of the Court in allowing, refusing, sustaining or dismissing the writ or in determining disputed questions of fact involved is arbitrarily exercised or abused, a determination, made in the exercise of such discretion, will not be interfered with.”

6 *Cyc.* 842;

State vs. Jersey City, 43 N. J. L. 662.

We are concerned with *the right* of the Supreme Court to exercise the discretion and not with the actual exercise of such discretion.

We shall now discuss in order the appropriateness of the writ for the purpose used, the propriety of the Supreme Court's issuing it, and the amenability of the Surrogate to such process.

The Writ.

We find in *Bacon's Abridgement* the following definition of the writ of certiorari:

"A certiorari is an original writ issuing out of Chancery or the King's Bench directed to the Judges or officers of inferior courts; commanding them to return the records of a cause depending before them, to the end that the parties may have the more sure and speedy justice before him, or such other Justices as he shall assign to hear the cause."

2 *Bac. Abr.* 165.

The writ of certiorari springs neither from statutory nor constitutional authority; but is essentially a product of the system of common law inherited from our English ancestors. Thus we find no reference to it in the State Constitution, and legislation regarding it relates merely to matters of procedure.

"The writ of certiorari does not owe its existence to constitutional provision or statutory enactment. It is a common law writ, of ancient origin, and one of the most valuable and efficient remedies which comes to us with that admirable system of jurisprudence. The Supreme Court, the highest tribunal in the State, with appellate and supervisory jurisdiction over proceedings and judgments of all inferior courts has the inherent power to grant it whenever necessary in the exercise and enforcement of its jurisdiction."

Tenn. Central R. Co. vs. Campbell, 109
Tenn. 640; 75 S. W. 1012.

This process, which was known as the "strong right arm of the King's Bench," was fondly cherished by English Courts who showed their jealousy over any attempt at encroachment by Parliament. *Rex vs. Reeve*, 1 W. Bl. 231; *Queen vs. The Courts of Cheltenham*, 1 Q. B. 647. Though the omnipotence of Parliament has restricted in some manner the exercise of this writ, its authority was practically unimpaired at the time the Revolution made us independent of English law. *Vide* opinion of Van Syckel, J., in *Traphagen vs. West Hoboken*, 39 N. J. L., p. 234.

The writ has two functions:

"Certiorari is an extraordinary remedy resorted to for supplying defects of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceeding. The remedy by certiorari is also in the nature of that afforded by the writ of error."

4 *Encyc. of Pl. and Pr.* 9.

We are concerned only with the first of these functions.

The principal use of the writ seems to have been supplementary to the established forms of procedure. It was employed to meet those necessities of justice which lay without the beaten tracks of practice. Thus, it came to be the weapon for correcting wrong done by inferior tribunals created by statute and often uncontrolled by appellate process. To quote Chief Justice Ewing, in *Ackerman vs. Taylor*, 8 N. J. L. 305 (1826):

"This Court (the Supreme Court) on the principles of the common law exercises a superintending power and control over inferior tribunals created by statute or proceeding in a

summary manner. Even where their adjudications are declared to be final and conclusive, although we do not examine the merits of their decisions, from which we are restrained by the just effect of the final and conclusive quality attached to them, we nevertheless inquire *whether they have exercised or exceeded the jurisdiction given to them, whether they have used the powers granted in their creation or assumed others never confided to them.*"

See, too, Van Syckel, J., in *Traphagen vs. West Hoboken*, 34 N. J. L. 232, 234:

"No one will question the general proposition that the Supreme Court of this State originally had the right, through this writ, to superintend and review the proceedings of all inferior tribunals not proceeding according to the course of common law."

It seems to have been at all times recognized that the Supreme Court of this State, through this writ, had general jurisdiction "over inferior tribunals of statutory erection."

Tenbrook vs. McColm, 10 N. J. L. 333, 337 (1829).

To conclude this brief resumé of the functions of the writ—we find that the chief use to which it is put is the supervision of inferior statutory tribunals, and the chief occasion for its employment is the action of such inferior tribunals in excess of the jurisdiction committed to them by statute.

The Supreme Court—Its Inherent Powers.

Our next question is as to the power of the Supreme Court to wield the writ of certiorari. We have outlined the purposes of the writ and we shall look particularly to see by what right the Supreme Court issues this writ and what restrictions, if any, are placed upon its use.

The Supreme Court was created neither by Statute nor Constitution, but by Provincial Ordinance. The Ordinance of Lord Cornbury, enacted in 1704, provided that:

“There shall be held and kept at the cities or towns of Perth Amboy and Burlington, alternately, a Supreme Court of Judicature, which Supreme Court is hereby fully empowered to have cognizance of pleas, civil, criminal and mixed, as fully and amply to all intents and purposes whatsoever, as the Courts of Queen’s Bench, Common Pleas and Exchequer within her Majesty’s kingdom of England.”

Provincial Courts of New Jersey, Appendix, C. pp. 258, 260.

In the year 1714, Governor Hunter and his Council also passed an Ordinance “for establishing courts of judicature in the State of New Jersey,” and subsequently from time to time regulations were enacted by the King and his Council, though these did not change the essential nature of the Supreme Court. *Ibid*, Appendix E, F, & G, 4 Griff. L. Reg. 1168, Note 2.

When the Revolution made this country independent of England, no change was effected in the consti-

tution of the Supreme Court. It exercised at that time the full powers and prerogatives of the Court of King's Bench of that day. Of the authority of the English court, Chief Justice Beasley, in *State vs. Decue*, 31 N. J. L. 302, 307, had the following to say:

"In England, the ordinary jurisdiction of the King's Bench was shared, in a great measure, by the Common Pleas, and in a lesser degree by some of the other courts. But the authority which was exercised by means of the various writs of *mandamus*, *quo warranto*, *certiorari*, and others of a similar character, belonged to this high tribunal alone; and the ancient books tell us that these writs themselves were called prerogative writs, because the power to award them was not delegated by the Crown to the Judges of the common bench or the ordinary Judges between party and party, but was reserved for that court in which the Sovereign was supposed to be personally present, and on the ground that such writs are of grace and favor, and are grantable at discretion upon probable cause shown, and are not demandable as of right under the clause of the *magna carta*, by which the King is bound not to refuse or delay justice. It was thus the authority of this court was always held to be supereminent; its transcendent prerogatives were to keep all inferior jurisdictions within their bounds; to superintend all civil corporations; to command the performance of their duty by magistrates and others in all cases where there was no other specific remedy; and it originally possessed the exclusive power to protect the liberty of the subject by its summary interposition. It was also a court of appeal, into which could be re-

moved by writ of error, all determinations of the Court of Common Pleas and of all inferior courts of record in the kingdom. All these great powers were, by the ordinance of our first provincial governor, transferred to the Supreme Court, and were exclusively exercised by that tribunal from that time to the era of the new Constitution; and it was these extraordinary powers which belonged to it as a Supreme Court, which were not, as I think, intended to be granted to the Circuit Courts by that instrument."

In another and earlier case, *Tucker vs. Freeholders of Burlington*, 1 Eq. 282 (1831), the Court of Chancery refused to take jurisdiction of a bill for an injunction restraining a Board of Freeholders in the doing of an illegal act. The Court held:

"The Board of Freeholders having jurisdiction over the subject-matter, this Court cannot interfere upon the ground that their conduct has been arbitrary, or that the complainants have been denied a fair hearing. The right of supervision and correction is in the Supreme Court; it appertains to their general supervising jurisdiction."

"The principal is universal, that where the rights of an individual are invaded, by the acts of persons clothed with authority and who exercise that authority illegally, the persons aggrieved must seek redress by certiorari."

The Constitution of 1844 recognized the existence of the Supreme Court, but did not add to its functions or powers. *Article VI, Sec. 1*. This provision placed the Court on a higher sphere and as we shall later show rendered it unassailable by legislation.

Flanagan vs. Plainfield, 44 N. J. L. 118, 123. Whereas, in some of the earlier cases [such as *Ackerman vs. Taylor*, 8 N. J. L. 305 (1826)] before the Supreme Court had been established by the Constitution, a superior power in the Legislature over it had been suggested, this view, after 1844, it was impossible to maintain.

Ibid—Independence of Legislature.

It was suggested by the Court at the former argument of this case that certain provisions of the Orphans' Court Act providing for an appeal from the Surrogate might govern and oust the Supreme Court of any claim to jurisdiction by certiorari. It is important, therefore, to ascertain what control, if any, the Legislature of the State has over the inherent powers of the Supreme Court and how our courts have regarded legislative efforts to this end.

An early case, *Vunck vs. Whorl*, (1807) 2 N. J. L. 243, was as perhaps as emphatic as any on this subject. Certiorari was brought to review the action of a Justice to whom complaint had been made under the Apprentice Act. The following dicta of the Court state the holding:

“It has been said at the bar, that the party has mistaken his remedy; that he ought to have taken an appeal to the sessions—that a certiorari will not lie.

“This notion is founded on the 10th section of the Act, which says that no writ of certiorari or other process, shall issue or be issuable, to remove into the Supreme Court, any proceedings had in pursuance of this Act, etc. But the complaint here is, not that the Justices have pro-

ceeded erroneously, or judged wrongly in the subject-matter submitted to their cognizance by the act; it is because they have rendered judgment upon a matter not submitted to their cognizance by the act; because they have exceeded that jurisdiction. Suppose they had proceeded to punish Vunck as a criminal, to fine or to imprison him: certainly the mere pretence that they proceeded under this Act would not prevent this Court from looking into the proceeding and giving remedy. It is the duty of this Court to see that the inferior tribunals in no case exceed their jurisdiction; and that is to be done, in most instances, by certiorari only."

Following *Vunck vs. Whorl*, we find Chief Justice Beasley's opinion in *Harris vs. Vanderveer's Executors*, 21 N. J. Eq. 424 (E. & A. 1869), wherein he declares:

"The peculiar quality of a constitutional court, or of any other constitutional establishment, is this, that it is not susceptible of change in its fundamental principles, except in some prescribed mode. Thus, for example, the nature of this court, or the nature of the Supreme Court, cannot be altered in any way but one, that is, by a modification of the Constitution itself. It is presumed that no professional gentlemen would, for an instant, contend that the Legislature could deprive the decrees and judgments of this court of their quality of being conclusive, or would take from the Supreme Court any of those prerogative writs by which inferior jurisdictions are superintended and regulated. The power to do this would involve the power to modify in essential particulars the

constitution of these courts; a power not to be distinguished from an authority to supersede or abolish. It is entirely clear then that the Legislature has not the competency to impair the essential nature or jurisdiction of any of the constitutional courts. To this extent, it seems to me, the subject is too plain for discussion."

In the case of *Traphagen vs. West Hoboken*, 39 N. J. L. 232 (S. C. 1877), the opinion states the case to have been the first wherein the power of the Legislature to restrain the Supreme Court in the use of certiorari had been directly passed upon. That case is authority for the proposition that:

"When an inferior tribunal fails to pursue the provisions of a legislative grant and to keep within it, the right of this Court to review the erroneous proceedings attaches, and it is beyond the power of the Legislature to arrest the employment of the appropriate writ for that purpose. A legislative act prohibiting the writ of certiorari in such case is unlawful and void."

This case has generally been regarded as the leading authority on the subject and is cited and applied in the following cases:

- Traphagen vs. West Hoboken*, 40 N. J. L. 193 (Affirmed);
- Newark vs. Sayre*, 41 N. J. L. 158;
- Green vs. Jersey City*, 42 N. J. L. 118;
- Peckham vs. Newark*, 43 N. J. L. 548;
- Flanagan vs. Plainfield*, 44 N. J. L. 118;
- Breninger vs. Belvidere*, 44 N. J. L. 354;
- Sanderson vs. Sanderson*, 52 N. J. Eq. 532;
- Flanagan vs. Guggenheim Smelt Co.*, 63 N. J. L. 647;

People's Invest. Co. vs. Bd. of Assessors,
66 N. J. L. 175;
*Trenton Heat and Power Co. vs. Bd. of
Assessors*, 66 N. J. L. 370;
East Orange vs. Hussey, 70 N. J. L. 244;
In re Branch, 70 N. J. L. 537;
East Orange vs. Richardson, 71 N. J. L. 458;
Walsh vs. Newark, 78 N. J. L. 168;
Newark vs. Kazinski, 85 N. J. L. 59;
See also *Green vs. Heritage*, 64 N. J. L. 567,
reversing 63 N. J. L. 455.

In *Flanagan vs. Plainfield*, *supra*, the decision is by Van Syckel, J., and deals with the question of whether certiorari is the proper remedy wherewith to review a conviction in a City Court. The Supreme Court finds that the right to exercise the writ is not impaired by the legislative grant of appellate power to another court. The decision contains the following notable language:

“The distinguishing feature of the King’s Bench was the authority which it long exercised by means of the writs of certiorari, mandamus and quo warranto. That our constitution was framed to perpetuate in our Supreme Court the same ample and exclusive power is clearly shown by the opinion of the Chief Justice in *State vs. Decue*, 2 Vr. 302.

“The Supreme Court is the sole depository of these prerogative writs. * * * *

* * * * *

“The dignity of the Supreme Court will fall far below that of the King’s Bench if exclusive power in this respect is held from it.

“There can be no contraction of the sphere within which the Supreme Court may dispense

its prerogative writs except by extinguishing the tribunals to which it may be sent. The law is equally without authority whether it by express terms or by its operation and effect takes away or diminishes the inherent power of the court.

“A legislative scheme, giving to the Circuit Courts the use of any of these writs, cannot be effectuated without violation of fundamental principles.”

pp. 123-124.

The Surrogate—An Inferior Court.

The authorities cited above confirm the proposition that the writ of certiorari is to be issued by the Supreme Court to control the action of “inferior tribunals” and to inquire “whether they have exercised or exceeded the jurisdiction given to them, whether they have used the powers granted in their creation or assumed others never confided to them.” (*Ackermann vs. Taylor, supra.*) We are now to inquire whether the Surrogate’s Court is such a court as falls within the scope of review by this writ.

By “inferior” courts are not necessarily intended a court not of record, but, more exactly, a court of limited and defined jurisdiction—generally a court of statutory erection. It seems impossible to deny that the Surrogate comes within this classification.

This view is, indeed, based on the State Constitution which by direct implication includes the Surrogate’s Court in the class of “inferior courts.” Section 1 of Article VI, provides that:

“The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all

causes as heretofore; a court for the trial of impeachments; a Court of Chancery; a Prerogative Court; a Supreme Court, Circuit Courts and *such inferior courts as now exist* and as may be hereafter ordained and established by the law; which inferior courts the Legislature may alter or abolish as the public good shall require."

This classification is conclusive of the status of the Surrogate's Court for the purposes of the present discussion.

The thought may have been entertained by this Court that for some reason a *probate court* should be free from the supervision of a common law tribunal. Some basis for this conception might be found in the old English system which maintained distinct from each other ecclesiastical and lay courts. It is a mistake, however, to assume that the ecclesiastical courts of England were not subject to lay jurisdiction. As early as the reign of Henry VIII, an appeal was provided from the Prerogative Court to a "Court of Commissioners" (25 *Hen. VIII*, Ch. 19). This tribunal was a branch of the Court of Chancery by whom the commissioners were appointed. If the issue to be tried were one of common law rather than canonical law, the commission was made up of Judges of the common law and civilians. See *Harris vs. Vanderveer*, 21 N. J. Eq. 424, 447.

As a matter of fact, however, our probate courts never occupied the relation to our judicial system that the ecclesiastical courts of England held. The Orphans' Court was created by the Act of 1784 and the Surrogate, although an officer of our probate judiciary, was only raised to the dignity of a court

by the passage of this Act. By it and the legislation that followed, his powers and duties were defined, and beyond these specified powers he cannot act. Kirkpatrick, C. J., in *Bloomfield vs. Ash*, 4 N. J. L. 314 (1810) referred to the Surrogates in the following words:

“Inferior courts lately created by Act of Assembly, which now participate in that power (to grant administration), possess so much of it, and so much only, as is expressly granted to them, and the residue still remains where it originally was.”

We find that probate courts generally throughout this country have been put on the same plane as other statutory tribunals.

“Certiorari will lie to review the determination of courts, tribunals or officers empowered to proceed in a summary way or in a mode unknown to common law where no method of revision is specifically provided. So it has been held that certiorari will lie to all tribunals which are called extraordinary and special in contradistinction to the ordinary and common courts established for the trial of criminal offenses and the determination of private rights.

“*The general rule has been held applicable to Probate and Orphans’ Courts and other like tribunals upon whom special jurisdiction has been conferred by statute.*”

6 Cyc. 738.

While we find no recorded cases dealing with the issuance of certiorari to a Surrogate, we have a close analogy in a number of cases dealing with the use of the writ to review the action of the Orphans’

Court. These authorities indeed involve a more extreme case, the Orphans' Court being a tribunal of infinitely broader powers and jurisdiction than the Surrogate's Court.

In a number of the earlier cases, the Supreme Court exercised its right of review by way of certiorari over questions of law arising in the Orphans' Court.

Wood vs. Tallman, 1 N. J. L. 153 (1793);
Eldridge vs. Lippincott, *Ibid.* 397 (1795);
Burrough vs. Mickle, 3 N. J. L. 913 (1812);
Wier vs. Lum, 5 N. J. L. 823 (1820);
State vs. Mayhew, 9 N. J. L. 70 (1827);
Tenbrook vs. McColm, 10 N. J. L. 333
(1829);
Johnson vs. Eicke, 12 N. J. L. 316 (1831);
Van Pelt vs. Veghte, 14 N. J. L. 207 (1834).

The Act of 1784, under which these cases and others in the Supreme Court were decided, provided that "all final sentences or decrees of the Orphans' Court, where no appeal is given to the Prerogative Court, shall be subject to removal by certiorari into the Supreme Court." The Act specified a number of cases which should justify appeal to the Prerogative Court. In the cases just cited the writ of certiorari was used in accordance with the statute in the nature of a writ of error.

However, we find a number of other cases in which it was used in the strictly supervisory character with which it has been used in the case *sub judice*. Thus, in *Stevenson vs. Phillips*, 21 N. J. L. 70 (18), it was held that certiorari did not lie to remove an order of the Orphans' Court dividing commissions; but if the Orphans' Court had opened a final account *illegally* for the purpose of readjusting the commis-

sions, such illegal order might be reviewed and the whole subsequent proceeding set aside.

In *Admrs. of Morris vs. Morris*, 16 N. J. L. 526, (1838), the Court held that certiorari does not lie to review the decree of the Orphans' Court upon the right of administration, because the Orphans' Court had jurisdiction to try such issue. The Court proceeds, in its decision, upon the premise that a question of law arising from the record, and not a question of jurisdiction, was before it and expressly declares that if it had been confronted with a question of the lower Court's right to proceed in the matter, certiorari would have lain, and that despite the provisions for appeal.

"But then it is insisted on the other side that the Orphans' Court had no jurisdiction of the matter; that the party claiming administration adverse to Holmes and Davis, to whom administration was granted by the Surrogate, ought to have appealed to the Ordinary instead of proceeding by citation in the Orphans' Court. If this be so, a certiorari will no doubt lie to set aside such unauthorized proceeding of that Court."

p. 528.

So, in *Brush vs. Young*, 28 N. J. L. 237 (1860), the Supreme Court held that certiorari does not lie to remove proceedings of an Orphans' Court appointing a new trustee, where it appeared that such appointment was within the jurisdiction of the Court. The Court held that "If the Orphans' Court had jurisdiction of the subject-matter of the decree this Court has clearly no power of review" (p. 238); and found that the Orphans' Court had jurisdiction and that the writ had been improvidently issued.

The Supreme Court, in *Diament vs. Lore*, 31 N. J. L. 220 (1865), while dismissing the writ of certiorari, held, in like manner, that had a question of jurisdiction been involved it would have exercised its right of review.

“The order and proceedings of an Orphans’ Court made upon an application for the partition of lands, *in cases where that Court has jurisdiction*, are reviewable in the Prerogative Court only.”

The Constitution of 1844 provides in *Article VI, Sec. 4, par. 3*, that:

“All persons aggrieved by an order, sentence, or decree of the Orphans’ Court may appeal from the same, or from any part thereof, to the Prerogative Court; but such order, sentence or decree shall not be removed into the Supreme Court or Circuit Court, *if the subject-matter thereof be within the jurisdiction of the Orphans’ Court.*”

This section has remained unchanged by amendment. As regards the Orphans’ Court, it affirms, by its clear implication, the right of the Supreme Court to review the action of the Orphans’ Court when the subject-matter of review is *without* the jurisdiction of the Orphans’ Court.

To summarize the preceding discussion—We find that the writ of certiorari is designed primarily to correct the jurisdictional excesses of inferior tribunals, and that the writ is available wherever it is alleged that such a tribunal is acting without jurisdiction or exceeding the bounds of its power. We find that the Supreme Court is the inheritor of the prerogative powers of the Court of King’s Bench

of the eighteenth century; that among these powers is the right to issue the writ of certiorari and to control the proceedings of inferior statutory courts. We find that the Surrogate's Court comes within the class of tribunals subject to the Supreme Court's supervisory jurisdiction. The sole remaining objection that might be urged against the right of the Supreme Court to certiorari proceedings to a Surrogate's Court is that the acts and proceedings of a Surrogate are subject to appeal to the Orphans' Court or Prerogative Court by virtue of Sections 201-203 of the Orphans' Court Act, 3 *Comp. St.* 3888. We shall deal with this objection now.

Other Appeal Available.

We find in the encyclopedias general statements to the effect that where another remedy by appeal exists certiorari will not be allowed. 6 *Cyc.* 42. But this rule has never received recognition in New Jersey as we shall presently show. Moreover, the rule itself is subject to a well established exception to the effect that where the certiorari is directed to the review of *jurisdictional* errors it will be allowed despite the availability of other means of review. Thus, *Cyc.* says:

“The writ will not be denied, however, where such other remedy is concurrent with that of certiorari, or cumulative thereto; and for this reason the party aggrieved will not be precluded because he has a remedy by appeal. * * * *
This rule is especially applicable where the tribunal below was apparently without jurisdiction or errors of abuses going to the jurisdiction are complained of.”

6 *Cyc.* 746.

We have collected a number of decisions by our Courts which show that the Supreme Court has never been restrained from issuing certiorari by an outstanding right of review in some other tribunal. The following cases are representative and not a comprehensive collection.

It was held in *Ritter vs. Kunkle*, 39 N. J. L. 259 (1877), that

“Where the Justice has no jurisdiction, the remedies by appeal and certiorari are concurrent and the party thinking himself aggrieved may resort to either at his option.”

Other cases where certiorari was allowed to Justice's Courts despite the existence of a right to appeal are:

- Pickle vs. Covenhoven*, 4 N. J. L. 319;
- Drake vs. Berry*, 42 N. J. L. 60;
- Barclay vs. Brabston*, 49 N. J. L. 629;
- Hillman vs. Stanger*, 49 N. J. L. 191;
- ~~*Stenderm*~~ ^{*Stenderm*} *vs. Folwell*, 53 N. J. L. 136; 76
- Wheeler & Wilson Mfg. Co. vs. Carty*, 53 N. J. L. 336;
- Parker vs. Mercantile Safe Dep. Co.*, 62 N. J. L. 505;
- Furman vs. Motley*, 64 N. J. L. 174;
- Richardson vs. Smith*, 74 N. J. L. 111; 65 Atl. 163;
- Vandervoort vs. Fleming*, 68 N. J. L. 507;
- N. J. S. P. C. A. vs. Atkinson*, 76 N. J. L. 286;
- Rahway vs. Hunt*, 74 N. J. L. 116.

In *Illingsworth vs. Rich*, 58 N. J. L. 507, the judgment of the District Court of Newark, rendered in a case where the Court was without jurisdiction, was

held to be reviewable either on appeal to the Court of Common Pleas or on certiorari. Gummere, J., said:

“He had two courses open to him for getting rid of the erroneous judgment, either by an appeal to the Court of Common Pleas or by suing out a certiorari for the purpose of having the judgment reviewed in this court. That he had both of these remedies notwithstanding the provisions of the seventeenth section of the ‘Act to establish District Courts in the City of Newark,’ which forbids the removal into the Supreme Court by certiorari of any judgment in a case where the Judge had jurisdiction, is clear.”

Other cases where certiorari was directed to the District Courts are:

Prudential Ins. Co. vs. Taylor, 59 N. J. L. 353;

Maguire vs. Goldberger, 71 N. J. L. 173.

The cases of *Watson vs. Plainfield*, 69 N. J. L. 260, and *East Orange vs. Richardson*, 71 N. J. L. 458, involved similar holdings on certiorari directed to a city Judge.

In *Kingsland vs. Gould*, 6 N. J. L. 161, S. C. (1822), it was held in a case where certiorari had been directed to review the act of certain meadow commissioners that:

“There being a court of appeal does not prevent the proceedings of the inferior court from being brought before the Supreme Court by certiorari.”

Other cases involving boards of assessors which uphold the right to review by certiorari where another remedy by appeal exists are:

N. J. R. R. & Trans. Co. vs. Suydam, 17 N. J. L. 25;

Newark vs. Sayre, 41 N. J. L. 158;

People's Inv. Co. vs. Board of Assessors, 66 N. J. L. 175;

Trenton Heat and Power Co. vs. Bd. of Assessors, 73 N. J. L. 370.

Lastly the case of *State vs. Sooy Oyster Co.*, 75 Atl. 211, may be mentioned as dealing with certiorari under similar circumstances to the Riparian Commission.

The cases already cited dealing with certiorari to the Orphans' Court also involve the same principle for there there was a statutory appeal provided to the Prerogative Court.

It is evident, therefore, that the mere existence of another method of review does not bar the Supreme Court from issuing its prerogative writ. The Courts of New Jersey have consistently regarded this right of review in the Supreme Court as concurrent with any other method of appeal provided by statute.

We have shown how this principle has been recognized in the case of various inferior courts. For identical reasons it should be applied to the Surrogate's Court, which lies in importance somewhere between the quasi-judicial boards of assessors and the district courts of our cities. There seems to be nothing in the constitution and purpose of this court to exempt it from the supervisory jurisdiction of the Supreme Court.

We submit that the action of the Supreme Court in issuing its writ of certiorari directed to the Surro-

gate of Camden County was the legitimate exercise of a well established function of that tribunal.

II.

We have now to briefly consider the situation resulting, if, in the opinion of this Court, the Supreme Court had no jurisdiction to issue the certiorari. In such event we respectfully urge that expediency demands and the proper practice permits the decision of the appeal despite the fact that the lower Court acted without jurisdiction.

If we look at the situation from a technical point of view, this Court would have no more jurisdiction of the appeal than the Supreme Court had of the certiorari. There being no jurisdiction in the lower court, an appeal does not confer any jurisdiction upon the Appellate Court. 3 *Corpus Juris* 3661. The effect of this view would be to require this Court to merely dismiss the appeal as a proceeding over which it had no jurisdiction. Such a course, however, would be unfortunate and, as we shall show, unnecessary.

It would be unfortunate because the result would be to leave unsettled the meritorious question involved in the appeal, a solution now required for the future guidance of the parties to this suit. This question has been fully argued before this Court, and the considerable labor and research of counsel for both side in preparing their briefs would be lost. In addition, if the parties are to return with their dispute unsettled to the Surrogate's Court, they must go by the slow process of appeal to the Orphans' Court and to the Prerogative Court, before they can again attain the stage where they are now arrived, and this at a heavy expense in time and court costs.

The only thing that stands in the way of a decision of the question thus submitted is a technical objection. We do not feel that this technicality should prevent a decision of the meritorious question before the Court. An Appellate Court is not required to dismiss an appeal and insist on its lack of jurisdiction.

“While the contrary has been held, the general rule is that want of jurisdiction in the trial Court is not ground for dismissing an appeal. In such case the Appellate Court will hear the appeal on its merits and dismiss the action or reverse the judgment below for want of jurisdiction in the court which rendered it, unless a reversal would work an injustice, as by rendering an innocent party liable for costs, in which case the Appellate Court may dismiss the appeal.”

4 *Corpus Juris*, 580-581.

It is thus evident that an Appellate Court is not bound by any hard and fast rule of procedure in the present unparalleled situation. We submit that that action should be taken which is consistent with a just and practical determination of the real issues before the Court. This is the spirit of the Practice Act of 1912, which provides in its first section that the Act shall be liberally construed “to the end that legal controversies may be speedily and finally determined according to the substantial rights of the parties. The rule that statutes in derogation of common law must be strictly construed shall not apply to this Act.”

To use a homely figure—a merchant who orders merchandise to be delivered to him in New York from Philadelphia, via the Pennsylvania Road, will

not refuse such merchandise because it is delivered at the time set but by another road. So we feel that this Court should not require circuitry of route in order to bring up later before it the same issues that have now been argued and are awaiting decision.

There is a precedent for the action we ask which may be of value in the present emergency. In the case of *Stevens vs. Paterson and Newark R. R. Co.*, 34 N. J. L. 532, this Court, after deciding that the defendant corporation lacked the statutory power to do the act complained of by the plaintiff, went on to discuss the substantial question of the appeal, to wit, the right of the Legislature to give the corporation such power as was claimed for it. This decision, as is well known, settled the judicial dispute over the law of riparian rights and upheld the theory of the Riparian Act,—a decision needed at that time. If the Court had confined itself to the mere decision that the corporation was not the grantee of certain riparian privileges claimed, it would have accomplished nothing in the interests of the public. The Court accordingly refused to stop here and proceeded by way of dictum to discuss the merits of the right claimed by the defendant to be given in the State's charter. This dictum is the foundation for our present riparian law. So, in the present case, the decision of a Surrogate's power to review and revoke his own decrees is of value to the whole State, and it would be a distinct loss to suffer this question to pass unconsidered.

In the *Stevens* case, pages 576-577, the Court voted twice—first, on the question of whether or not the Legislature had the power to make the disputed grant to the defendants-in-error, which by a vote of nine to three it decided it had; secondly, whether

the Legislature had in point of fact granted to the plaintiffs-in-error the right claimed, which the Court decided it had not. In accordance with this plan, we respectfully suggest that this Court vote: first, on the question of whether or not the Supreme Court was correct, as a matter of law, in reversing the action of the Surrogate in attempting to entertain a petition for the revocation of his decree of probate; and, secondly, on the question whether or not the Supreme Court lacked jurisdiction to so consider the action of the Surrogate by writ of certiorari.

If the Court does not feel at liberty to declare itself upon the questions appealed, we ask that the appeal be dismissed for want of jurisdiction in the Appellate Court to hear it.

Respectfully submitted,
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