suspended by it; that the judicial proceeding can progress no further in the lower court. It is not so clear, either in reason or authority, that collateral action is erroneous or void. If an execution has been issued upon a judgment before the service of a *certiorari*, the power of the sheriff to go on under the execution is not suspended. It requires a formal *supersedeas* to suspend it. The court may even issue a *vend. ex.* to enable its completion. An execution issued after *certiorari* served is erroneous, and perhaps void, because its issue is the act of the court to which the superior writ has been sent, and of the party whose further proceeding has been stayed.

An election contest is in some respects peculiar. True it is a judicial proceeding, but so far as the court in which it is conducted is concerned, it terminates with the judgment or decree. No execution of the decree is entrusted to the court, or is under its control. When the truth of the return is contested, the duty of the court is to ascertain what should have been the true return, and declare it. Then its duty has been done. The regularity of its proceeding may be revised in the superior court, and, no doubt, a *certiorari* removes the record in such a case. It cannot, however, operate upon the inferior court as a supersedeas, for, after a decree, there is no possible action of that court to be stayed. If it stays anything it can only be the action of the Executive in issuing a new commission in view of it, rather than upon it, or action under the new commission when issued, by the substantial party to the decree in whose favor it has been made. But the issue of a commission by the executive, after the service of a *certiorari*, is not disobedience to the writ, for that goes only to the judges. It is not, therefore, a contempt, as action by the judges and the parties would be. He is no party to the contest, either in form or in substance. In reason, therefore, there is an obvious difference between the effect of a *certiorari* upon the court to which it is sent, or the parties to the judicicial proceeding removed, and the executive who has no connection with the record. Nor do the authorities show that a *certiorari* operates upon any other than the court and the parties.

We are, therefore, not prepared to hold that on the 21st day of October, 1862, after the decree declaring what was the true result of the election had been made in the court of quarter sessions, the executive had not authority to issue a commission to the defendant. Especially are we not prepared so to rule upon this motion, which is an appeal to our judicial discretion, while we are sitting only at Nisi Prius. The commission of the defendant is not necessarily invalid, because the election contest is still pending in the sense in which a cause adjudicated in an inferior court is said to be pending after its removal, by *certiorari* or writ of error, to a court which is superior. Had it issued one day before the service of the *certiorari*, but after the decree of the court of quarter sessions, and had the officer commenced his duties, no one will contend that it would have been avoided or interrupted by the mere subsequent service of the writ, any more than an execution partly executed is stayed by the service of a *certiorari* on the court which had awarded it. And yet, had the *certiorari* sued out by the complainant been four days later than it was, the election contest would be a pending proceeding just as truly as it now is. A *certiorari*, after a judgment, like a writ of error, is, in fact, a new suit. It enables him who obtained it to aver errors in the record removed, not to re-try the facts in this court. A judgment in it may, indeed, be followed by a new trial in the lower court, but there is no re-trial here. It is not on this account, not because the action may in this sense be said to be pending, that proceedings are stayed in the court where the trial was held, but it is because in contemplation of law its record is removed to another tribunal.

But while we do not hold that the *certiorari* served on the court took away from the executive the power to issue the commission to the defendant after the decree correcting the election return, a power which the decree unimpeached gave him, we do hold that the service of the writ affects the defendant. He was a party to the contest in the quarter sessions, not in name, but in substantial truth. It was his right which was in controversy, and his were the fruits of the decree. Upon him, therefore, the *certiorari* may operate. When it was served and the record was removed, he had not begun to execute the duties of the office, or to act under the decree and his commission. His position is like that of a party who has an execution in his hands not delivered to the officer, when the writ comes and stays his further proceeding. His title to his commission is not taken away, but his right to proceed under it is suspended until the final decision under the revisory writ. It may be that the decision of the supreme court on the hearing of the *certiorari* will result in setting aside the decree of the court of quarter sessions, and thus leave the original return and the commission of the complainant in full force. On the other hand, if the decree be affirmed, the right of the defendant to his commission, and to the emoluments of the office from the 21st day of October last will be established. His title will then have commenced at the date of his commission. It does not, however, give him a present right to assume the office, or interfere with its duties.

The second question is easily answered in the affirmative. The bill and affidavits show that there has been and still is a disturbance of the rights of the complainant, made by the defendant, no doubt under the belief of right, but still unlawful.

The remaining inquiry is whether the case is such an one as gives the court, in the exercise of its equity, power to grant an injunction. It is a bill preferred by an individual asserting a personal right invaded. Yet it is not to be overlooked that it affects public interests. The office of sheriff is a most important one, and the question which of two persons claiming it may lawfully perform its duties is one in which the whole community is interested. We ought not to leave the matter in doubt. Though we cannot now determine finally who has the right, we can and ought to determine who is the sheriff in fact, and prevent a conflict, until there should be an adjudication that shall terminate finally the election contest. We therefore feel constrained to award an injunction.

A speedy, final decision of the contested election is imperatively demanded by public considerations. In the light of these, individual interests and personal convenience are of minor importance, though they are by no means to be disregarded. We have no power to compel a hearing on the *certiorari* before the return day of the writ, but we have power to dissolve the injunction now raised, and we have power to impose terms upon the allowance of a common law writ of *certiorari* after judgment. It is not a writ of right, and will never be allowed for merely technical errors which do not affect the merits. Bac ab. *certiorari* A. We will use some of these powers unless the parties agree in writing to a hearing on the writ of *certiorari* before the supreme court in banc at Pittsburgh, on the 15th day of November, 1862. We cannot treat the writ as not allowed, but we can revise the allocatur and quash the writ if there do not appear to be sufficient grounds for it.

And now to wit: Nov. 1st, 1862, this motion came on for hearing before the supreme court, at nisi prius, and was argued by counsel, whereupon, after due consideration, it is ordered, adjudged and decreed that, on the complainant's giving security, according to the Act of Assembly in the sum of five thousand dollars, the said John Thompson, his agents and servants, be enjoined from interfering or intermeddling with the office of sheriff of the city and county of Philadelphia, or from disturbing or molesting the complainant in the peaceable possession and enjoyment thereof until final hearing of a certain writ of *certiorari* sued out by the supreme court to remove the record of a contested election between the complainant and defendant, or until further order.

And it is further ordered that the defendant have leave to move the court, on the 15th day of November, 1862, to quash the *certiorari* for having been issued without special cause previously shown, unless the plaintiff shall then show sufficient cause, on giving five days' notice

## GENERAL CORRESPONDENCE.

### *Notaries Public—Fees.*

To the Editors of the Law Journal.

Gentlemen,—You are aware that many persons, not of the legal profession, are appointed in Upper Canada to be Notaries Public. Especially is this the case in localities where there is no resident Lawyer.