

that he had not instructed the action to be brought. Upon this statement being read at the trial, the County Court Judge dismissed the action; and no appeal had been taken from the dismissal.

Mr. Mackenzie, who acted as solicitor for the plaintiff in the County Court, was naturally indignant at the plaintiff's statement, and moved for a certiorari to bring into the Supreme Court the obnoxious examination, in order to have it quashed; Britton, J., refused the motion; and Mr. Mackenzie now appealed, and also moved substantively for a certiorari. The two grounds alleged in the original notice of motion were, that the examination dealt with an irrelevant issue, and that the special examiner at Toronto had no jurisdiction to take the examination, as the plaintiff resided in the county of Ontario, and his solicitor had not given consent to an examination in the county of York.

Assuming that the examination was on an irrelevant issue, and that the special examiner had no authority for holding it, the application had yet been made without full consideration of the real functions of certiorari. Reference to *Rex v. Titchmarsh* (1914), 32 O.L.R. 569, 577, 578.

There were many difficulties in the applicant's way; one lay at the threshold, and was fatal. Nothing but a judicial act will be removed by certiorari—the remedy against an offender for a wrongful ministerial act is by action: *Rex v. Lediard* (1751), Sayer 6; *Rex v. Lloyd* (1783), Caldecott 309; *Rex v. Woodhouse*, [1906] 2 K.B. 501; *Leeds Corporation v. Ryder*, [1907] A.C. 420.

In the present case what was to be removed was the mere ministerial act of an officer of the Court. That he had no authority to do this act (if such were the case) was immaterial.

Assuming that the Court had power to remove the record with the judicial act of dismissal of the action, and that on such removal the obnoxious examination would be transmitted also to the Court, the applicant was not advanced; for the Court will not remove a record upon which it cannot proceed. Reference to *Dr. Sands' Case* (1699), 1 Salk. 145, disapproving the *Duke of York's Case*.

The Court could do nothing with the judgment if brought up; no appeal was taken, and the judgment was the judgment of a Court of competent jurisdiction properly seized of the case.

After judgment, there is always a judicial discretion to grant or refuse a certiorari: *In re Aaron Erb* (1908), 16 O.L.R. 597. In the present case, there would be no advantage in having the examination before the Court. Everything was in the County Court, and that Court had the same power over the proceedings now as the Supreme Court would have if they were brought into