FANNY BLOPLEH GAGE, Petitioner, *v.* J. E. D. PRATT, T. B. GAGE, and J. S. C. GAGE, Executors of the Estate of the late SAMUEL E. GAGE, and His Honor NETE-SIE BROWNELL, Judge presiding by assignment, Third Judicial Circuit, Respondents.

CERTIORARI TO THE CIRCUIT COURT, THIRD JUDICIAL CIRCUIT, SINOE COUNTY.

Argued April 5, 1938. Decided April 22, 1938.

1. Under the rule of this Court certiorari lies only in a case that is legally pending for hearing before an inferior court.
2. The Statute of Liberia governing contested wills is mandatory and should therefore be strictly followed.

Petitioner objected to the probate of the will of her alleged husband, the deceased, and the judge of the Probate Division of the Circuit Court ordered the case transferred to the Law Division for the trial of certain issues of fact by a jury. Upon motion to dismiss by the respondents, the judge of the Law Division returned the case to the Probate Division apparently without trying the issues of fact; the judge of the Probate Division thereupon dismissed petitioner's objection upon renewal of respondents' motion and ordered the will probated. Petitioner sought a writ of certiorari from this Court, and respondents moved to dismiss. Respondents' *motion denied, judgment reversed and case remanded* for trial in the Law Division.

Anthony Barclay and *Chas. B. Reeves* for petitioner. No appearance for respondents.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

This case is before this Court for review upon a writ of certiorari issued upon the petition of Fanny Blopleh Gage, now petitioner.

The records of the case show, that on the 5th day of October, 1936, Attorney T. E. Cess Pelham offered for probation the last will and testament of the late Samuel E. Gage, of Nanakroo, Sinoe County, which was objected to by counsel for the petitioner on the grounds:

"1. Because the preamble to the purported Last Will and Testament before the court has positively expressed the Testator's knowledge of the fact of his uncertainty of being in the state of sound mind, which assertions therefore invalidate and crumble the purported Will, as none but persons of sound mind and memory are capable of making a legal Will. (See Will.)

"2. And also because the objector further says, that although the purported will is subscribed to by one Samuel E. Gage as testator yet, the . . .

"3. And also because objector further says, that the testator was not of his sound mind and memory at the time of making the aforesaid purported will; in that he bequeathed objector and other native girls and his natural born children to his sister Hannah L. Pratt as goods and chattels, which no one of sound mind would do. The same being quite contrary to and repugnant with the Constitution of this Republic. (See Will.)

"4. And also because objector further says, that the testator has failed to sign his full name at the foot of the will, and that he has omitted the most essential and indispensable requisite; which is the attestation clause; as in its absence of subscription in the presence of, or in knowledgement thereto by any of the attesting witnesses makes said will absolutely illegal. (See Will.)

"5. And also because objector further says, that the

testator, an unmarried Christian, had contracted a legal marriage by native custom with the objector, the same yet undissolved prior to his death, and has made no provision as prescribed by the Constitution for her legal dower, and also the non-provision whatsoever for her two children gotten by the testator. (See Will.)

"6. And also because objector further says, that the handwriting as well as the entire signature of the testator in said purported will are by far different from his general usual mode of writing."

To these foregoing objections of the petitioner the respondents on the 2nd day of November, 1936, filed their resistance in which they prayed the trial court not to sustain the said objections but to order the will proved and probated. Which resistance reads as follows:

"1. Because the purported Fanny Blopleh Gage is not a matrimonial wife of the late Samuel E. Gage, therefore she has no right of action in this matter; and this the respondents are ready to prove.

"2. And also because that supposing the late Samuel E. Gage had paid dowry for the aforesaid objector and other native girls, that act of the late Samuel E. Gage the Testator would not constitute a marriage, which allegation is consistent with the Act of the Legislature 1935–36, pages 20–24, being an Act relating to matrimonial causes; and this the respondents are ready to prove.

"3. And also because as to count one of the objections, the contents of said count are misleading and contrary to the wording of the will referred to in said count; and this the respondents are ready to prove.

"4. And also because respondents say, that count two of the aforesaid objections is misleading; because on the date of the endorsement and acknowledgment of the aforesaid will, the late Samuel E.

Gage the Testator together with T. E. Cess Pelham and J. O. O. Broderick, the living attesting witnesses to the said will, were not out of Greenville City, Sinoe County; and this the respondents are ready to prove.

"5. And also because the native girls of the Testator, were contracted parties according to the native customs, and the testator has a right to further contract them equally in the same manner, as the native girls including the said objector respectively have a right to vacate the contract, provided that they dissent the obligation (which is a condition subsequent) in accordance with native customs; and this the respondents are ready to prove.

"6. And also because the latter clause of count four of the objections is misleading and untrue, and contrary to statutory provisions; and this the respondents are ready to prove.

"7. And also because the Will has an attestation clause signed in the presence of witnesses; and this the respondents are ready to prove.

"8. And also because the handwriting and signature in the said will are the identical handwriting and signature of the late Samuel E. Gage, the Testator; and this the respondents are ready to prove.

"9. And also because the purported objector not being a widow of the late Samuel E. Gage, Your Honor has no jurisdiction over the purported objections now in court. And this the respondents are ready to prove."

On the 7th day of December in the year aforesaid, when the case was called for hearing, the said Judge made the following ruling:

"The court says, in re the matter of the objections to the probation of the Will and Last Testament of the

late Samuel E. Gage, that the matter partakes of issues of law and facts, and in view of the fact that this will is contested and the contest contains matters of fact which under the law of the land should be tried by a jury under the direction of the court, the Clerk of this Court is hereby ordered to transmit the Will and all documents in connection with it to the law division of the Circuit Court, in order that they might be disposed of according to law."

In the month of February, 1937, the objector filed an application to the Circuit Judge resident in the Third Judicial Circuit for the hearing of the case by a special jury for reasons therein contained. (See application.) But there is nothing in the records to show what disposition was made of it by either the resident Judge of the Third Judicial Circuit or the assigned Judge of the February term, 1937, of said Court. During the regular February, 1937, term of the Circuit Court of this jurisdiction the respondents filed another motion in the Law Division of the aforesaid Court praying for the dismissal of the objections of the petitioner, based on the same grounds set out in their first motion. (See motion.)

During the hearing of this motion, it was brought to the notice of the trial judge, that the witnesses who subscribed to the will of the late Samuel E. Gage had never testified before courts as to the genuineness of said will; whereupon the trial judge made the following ruling:

"It having been agreed by both parties in this case, that no witnesses had testified to the execution and attestation of the will now before court and the Bar having conceded the irregularity, in that objections were filed contesting the Will when said Will had never been offered to be proved before any court of competent jurisdiction; the court vacates these proceedings of objections to the probation of the said Will and orders the Clerk of this court to transfer said Will to the probate division of this court from whence

it emanated in order that the first steps in the probation of a Will may be taken by all parties concerned. The parties have a right to plead over there in the probate division. Costs of this court disallowed."

On the 9th day of February, 1937, this case was called for hearing by the trial judge in the Probate Division of the court aforesaid, and witnesses were qualified and deposed *pro et con,* after which the arguments were heard. See records, minutes of February 9th, sheet 19. After this the trial judge gave his final judgment which reads *inter alia:*

"For these reasons, the court has come to the conclusion to sustain the answer of respondents generally, and in particular counts 1, 2 and 9 of said answer, and dismiss the objections to the Will and orders same to be admitted to probate. Cost against objector."

It is from this final judgment and ruling of the trial judge that the objector prayed this Court to grant unto her a writ of certiorari that the proceedings in this case may be reviewed, and in order that, should there be any errors committed by the trial judge, same may be corrected, as in her opinion there are gross errors committed.

At the call of this case for hearing in this Court, the respondents filed a motion praying this Court to dismiss the objections of the petitioner; which reads as follows:

"1. Because respondents-in-certiorari say that petitioner-in-certiorari has fatally blundered in choosing the wrong method of procedure, for that by the laws of jurisdiction, the act of the court sitting in probate allowing or disallowing a Will to probate is a decree or final judgment from which an appeal only lies and not a writ of certiorari, and this the respondents are ready to prove.

"2. And also because respondents-in-certiorari say, that according to the rules of this Honourable Court made statutory, a writ of certiorari lies for and upon proceedings which are still pending be-

fore an inferior court and not where final judgment or decree has been rendered as in the case at Bar. And this the respondents-in-certiorari are ready to prove."

The petitioner in answering the respondents' motion to dismiss for want of jurisdiction made the following resistance:

"1. Because Fanny Blopleh Gage, petitioner-in-certiorari, says the said motion of respondents-in-certiorari is not supported by an affidavit in accordance with law; she therefore prays the dismissal of said motion. And this the petitioner-in-certiorari is ready to prove.

"2. And also because petitioner-in-certiorari says that respondents-in-certiorari, having failed when cited to appear and show cause why the writ should not issue, should not be allowed at this time to raise the question, since the matter in that respect has become *res judicata.* And this the petitioner-in-certiorari is ready to prove.

"3. And also because petitioner-in-certiorari says, that according to the statute laws of Liberia which reads inter alia:

'Contested Wills shall be sent to the Court of Quarter Sessions (now Circuit Court) to be tried by a jury, upon its merits, and by them either rejected, set aside or quashed, or approved; and if rejected, the same may be removed by appeal to the Supreme Court on petition made by any person aggrieved, according to the laws which relate to appeals.'

Petitioner-in-certiorari contends that having complied with said statute in making her petition to this Honourable Court for a writ of certiorari, which was granted, and to which no exceptions taken, her appeal is properly before the Court,

and should be heard. And this the petitioner-in-certiorari is ready to prove.

"4. And also as to count two of said motion, petitioner-in-certiorari says, that His Honour Judge Brownell having illegally withdrawn said contested will from the law division of the circuit court for the third judicial circuit, and placed it back in the probate division and ordered the will probated, to which exceptions were taken nor a final disposition of said matter was made, as he then had no jurisdiction. And this the petitioner-in-certiorari is ready to prove.

"5. And also because His Honour Nete-Sie Brownell had no legal right or power to render or alter the ruling made by His Honour Judge Monger who ordered the clerk of the probate division of the court to transmit the contested Will and all documents in connection therewith to the law division of the said court, and the same had been done. What is not legally done is not done at all, and hence the ruling of His Honour Judge Brownell sitting in probate was not a final disposition of the matter. And this the petitioner-in-certiorari is ready to prove."

There are several jurisdictional issues raised by both parties in this case, but we have decided to confine ourselves to those that are in our opinion important and they are as follows: Counts 1 and 2 of the respondents' motion to the jurisdiction and counts 3, 4 and 5 of the petitioner's resistance to said motion.

It is an undeniable fact under the rules of this Court that certiorari only lies in a case that is legally pending for hearing before an inferior court for said proceedings to be removed to this Court for review. But in the case at bar, although the case was determined as the records show, yet when the trial judge had no jurisdiction over

the person and the subject matter in the division of the court where said case was tried and final judgment rendered, we are of opinion that said judgment is null and void and of no legal effect, hence the case is still pending legally before the division of said court where alone a legal judgment could have been rendered and therefore certiorari will lie.

The statute of Liberia governing contested wills is mandatory and therefore should be strictly followed. This statute provides, that contested wills shall be sent to the Court of Quarter Sessions and Common Pleas to be tried by a jury upon its merits and by them either rejected, set aside, quashed, or affirmed.

There is nothing in this statute which clothed any judge with authority to disregard its provision to try a contested will in the probate division of any court without a jury when the jurisdiction conferred for its trial is only in law and by a jury, the judgment rendered by the trial court in the Probate Division is therefore illegal and void and of no legal effect. Statutes of Liberia (Old Blue Book), p. 117, § 1; *North* v. *Dennis,* [citation omitted].

With reference to count 5 of petitioner's motion, the Court is of the opinion that in view of the statute law herein quoted, His Honor Judge Brownell the trial judge erred in his ruling by ordering the clerk of the Law Division to transmit the contested will and all documents in connection therewith to the Probate Division of said court; because all Circuit Judges have concurrent jurisdiction, therefore as a general rule no Circuit Judge has power to review, modify or rescind any decision of any of the Circuit Judges who are the same official hierarchy on any point already passed upon by a colleague of his; the only remedy being by an appeal to a superior or appellate court.

We are therefore of opinion that the petition of the petitioner should be granted and the case be reinstated

in the Law Division of the Circuit Court for the Third Judicial Circuit where it was ordered to be sent by His Honor Judge Monger to be tried by a jury upon its merits. All costs ruled against respondents and it is hereby so ordered.

Reversed.