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Certiorari as Used by the Supreme Court in the Interest of Harmony of Opinion and Uniformity of the Law

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CERTIORARI AS USED BY THE SUPREME COURT IN THE INTEREST OF HARMONY OF OPINION AND UNIFORMITY OF THE LAW.

I

GENERAL OBSERVATIONS

It is not my purpose to discuss the writ of certiorari in general, but only such writ as used by the Supreme Court and as directed to the several Courts of Appeals in the interest of harmony of the case law of the state. But whilst this is the purpose I have in mind, yet some general thoughts are not inappropriate.

In Missouri we have no general statutes covering the subject of certiorari, as we have covering prohibition, mandamus, habeas corpus and quo warranto. In most respects we use the writ as recognized at common law, and it is no doubt true that when the constitution of 1875, sec. 3 of art. VI, speaks of certiorari, it was used in the common law sense of that term. In many states, by statute the old common law writ has been curtailed, and in others enlarged. And in England Acts of Parliament have changed in some things the old common law certiorari. Even in Missouri we have some statutes providing for certiorari in given cases. Section 3031 R. S. Mo., 1919, provides for the removal by certiorari of proceedings in the courts of Justice of the Peace to the Circuit Court in cases of forcible entry and unlawful detainer. Section 7336, R. S. Mo., 1919, allows the physician whose license to practice has been revoked by the State Board of Health to proceed by certiorari to the Circuit Court. So also the Public Service Commission Act, Laws of 1913, secs. 111-113, p. 641, provides for a species of certiorari. But outside of a few statutes of the character named, this state has the common law writ of certiorari. It has no doubt been modified in a way by case made law. This writ has been defined in Bacon's Abridgment, Vol. 1, p. 559 (5th Ed.) thus:

"Certiorari is an original writ issuing out of Chancery, or the King's Bench, directed in the King's name, to the judges or officers of inferior courts commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause."

Tidd's Practice gives this definition:

"A certiorari is a writ issued from a superior court to an inferior court, tribunal or officer exercising judicial powers, whose poceedings are summary or in a course different from the common law, commanding the latter to return the records of a cause pending before it to the superior court."

Bailey in Vol. 1, p. 621, gives this idea of the writ from the American view point:

"The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court, to determine whether the former had jurisdiction or had exceeded its jurisdiction or had failed to proceed according to the essential requirements of the law."

At common law it was not a writ of right, but its issuance was within the discretion of the court to which application was made.[1] And so far as Missouri is concerned, the common law writ of certiorari may be classed as a discretionary writ, rather than a writ of right. Its purpose is not to take the place of an appeal or writ of error, but to reach those cases where there is no appeal or writ of error. At common law there was no appeal, but there was a writ of error, and as a rule the writ of certiorari would not be ganted where a writ of error could have been invoked. The writ, so far as used in this state, is not designed to bring up for consideration mere errors in the course of a trial, such as are heard upon appeal or writ of error. The purpose is to bring to the superior court the record of the inferior court to the end that it may be determined whether or not the inferior court was without jurisdiction, or if it had jurisdiction, whether or not it has proceeded according to law, and kept within that

1. Harris on Certiorari, sec. 3, p. 4.

jurisdiction.[2] At common law, in England, and even in this state the writ has been used to bring up a case to be tried upon its merits in a higher court.[3] And the case was determined there.[4] There was, however, a statute which authorized the transfer, if such statute was constitutional. The constitutionality of the statute was raised but the writ seems to have been granted upon common law rules.

In the *Dawson case, supra,* Black, J., used language which perhaps is better than ours upon this point, and I quote thus:

"But it cannot be said that the writ will be issued only in those cases where the lower court has no jurisdiction whatever over the case before it. High says: 'The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but is also extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject-matter in controversy, has exceeded its legitimate powers'."

Judge Black had before him a case in prohibition, but in *State ex rel* v. *Smith*[5] the Supreme Court applied the same doctrine in certiorari. I may add that what can be reached by prohibition before the lower tribunal acts may be reached by certiorari after the court has acted.

It is perhaps needless to say that such writ only brings up the record of the lower court or tribunal for review by the superior court[6]. And usually this is after a final disposition of the case in the lower court.

With these general observations, I shall proceed to the real subject I have in mind, i. e. the writ of certiorari, as used by the Supreme Court of Missouri in the interest of harmony of opinions and uniformity of the law.

2. *State ex rel. Dawson* v. *St. Louis Court of Appeals* (1889) 99 Mo. 1. c. 221, 12 S. W. 661; *State ex rel.* v. *Smith* (1903) 176 Mo. 1. c. 99, 75 S. W. 586.

3. *Rector* v. *Price* (1822) 1 Mo. 198.

4. *Rector's Adm'r.* v. *Price* (1823) 1 Mo. 373.

5. (1903) 176 Mo. 1. c. 99, 75 S. W. 586.

6 *State ex rel.* v. *Smith* (1903) 176 Mo. 1. c. 99, 75 S. W. 586.

II

HISTORY OF THE WRIT

The writ of certiorari as now used for the review of opinions of the several Courts of Appeals has had a somewhat checkered career. The Supreme Court first asserted this right in the case of *State ex rel. Curtis* v. *Broaddus*[7]. Prior to that time it had not asserted it, but on the other hand had denied the right. The cases will be found collected in the dissenting opinion of Bond, J., in *State ex rel.* v. *Robertson*[8]. These earlier cases were mostly mandamus or prohibition cases, but after the constitutional amendment of 1884, certiorari was specifically denied in *State ex rel.* v. *Smith et al.*[9] Shortly thereafter, however, there was a vigorous dissent to the first ruling, and Judge Sherwood, who wrote the opinion in *State ex rel.* v. *Smith, supra,* joined in this dissent. Both he and Judge Thomas concurred in the dissenting opinion of Gantt, J., in *State ex rel.* v. *Smith*[10], where the following significant language appears:

"Section 8 provides: 'The Supreme Court shall have superintending control over the courts of appeals by *mandamus,* prohibition and *certiorari!*' The history of this amendment is so recent that its object is well known. Owing to the crowded condition of the docket of this court at that time, an effort was made to relieve it by the creation of these courts of appeals. This amendment had two main purposes in view. One was to relieve the overcrowded docket of this court, and to prevent delays in the administration of justice; the other was to keep these courts of appeals in accord with each other in their decisions, and with the rulings of this court. Hence it is made the duty of either of said courts when one of the judges sitting therein shall deem one of its decisions contrary to any previous decision of any one of said courts or of this court to certify the transcript to this court.

7. (1911) 238 Mo. 189, 142 S. W. 340.
8. (1916) 264 Mo. 1. c. 681-2, 188 S. W. 101.
9. (1890) 101 Mo. 174, 14 S. W. 108.
10. (1891) 107 Mo. 1. c. 533, 16 S. W. 401.

"Previous to the adoption of this amendment an appeal would lie from the St. Louis Court of Appeals to this court. It seems clear that the legislature when it submitted this amendment and the people when they adopted it, intended and designed that every citizen and litigant should have the equal protection of the law within this state, and there should be uniformity in the administration of justice. Had it been understood that one tribunal in the eastern portion of the state could declare the law one way and another tribunal in the western portion, another way, and that no provision was made to prevent such a result, in our opinion the amendment would have been defeated. But the sixth section commended it to the bar and the people alike, because by it it was thought a simple mode was provided to insure uniformity in the decisions of all the courts; and to provide against oversight or error this court was made the final arbiter, with power of superintendence over all inferior courts, and courts of appeal especially, with power to issue writs of *mandamus,* prohibition and *certiorari.*"

It is true that this case was a mandamus case against a court of appeals, but the reasoning of the matter is pertinent here. These three members of the court as then constituted, Sherwood, C. J., Gantt and Thomas, JJ., were of the opinion that one of the purposes of the amendment of the constitution in 1884 was to secure harmony in the law and in the judicial opinions of the state. They went so far as to say that such amendment would not have been adopted, but for this understanding. The significant portion of Judge Gantt's opinion is in the words: "and to provide against oversight or error this court was made the final arbiter, with power of supervision over all inferior courts, and courts of appeals especially, with power to issue writs of *mandamus,* prohibition and *certiorari.*"

It must be borne in mind that he was discussing a case wherein there was an alleged conflict of opinions between the Supreme Court and one of the Courts of Appeals. So that it will be seen that the rule announced, which precluded the Supreme Court from reaching the Courts of Appeals when there was con-

flict of opinions was not one established in unanimity of thought among the judges. Suffice it to say that it was established and remained until the *Curtis* case mentioned before. The writer had the pleasure of being admitted to the bar by Judge Gantt whilst he was a circuit judge and lived within the same circuit in adjoining counties. I served upon the supreme bench with him later, and know that he never gave sanction to the first rule, but followed it because it had been announced by the majority. No judge of the Supreme Court would have been more gratified at the rule now prevailing and first announced in the *Curtis* case, than Judge Gantt, had he served long enough to have participated in the *Curtis* case. I feel that I can authoritatively say that he never departed from the views expressed in his dissent. He only yielded to the majority view in later opinions. While the first rule was not one born in unanimity of thought, the same can be said of the rule having its origin in the *Curtis* case. There has been, and there is now, diversity of thought upon the propriety of our present writ of certiorari among the judges of the Supreme Court. This appears from the opinion of Woodson, C. J., in *State ex rel.* v. *Robertson*[11], where he announces for the first time his submission to the present rule, rather than his acquiescence therein. From the announcement of the principles to the effect that the Supreme Court could and would, under its writ of certiorari, bring before it the opinion of a court of appeals, and quash said opinion and the judgment founded thereon, as expressed first in the *Curtis* case, there was a long drawn out fight for the maintenance of the rule. Every time a new face appeared upon the Supreme Court, interested lawyers renewed this fight, but it finally culminated in the case of *State ex rel.* v. *Robertson, supra,* wherein Woodson, C. J. yielded his personal views to those of the majority, and wherein by four concurrences, the separate concurring opinion of the writer once for all, again announced the fact that under the superintending control given the Supreme Court by the Constitution, such court could by its writ of certiorari bring before it the record (which

11. (1915) 264 Mo. 1. c. 668, 188 S. W. 101.

under the constitution, sec. 15, art. 6 includes the opinion) of a court of appeals, and quash such record, including both the opinion and judgment entered thereon. Since this case there has been substantial unamimity of opinion in the Supreme Court. I say substantial, because it should be noted that our lamented Judge Bond to the day of his death opposed this assertion of power of the Supreme Court. The reasons for the rule I shall discuss but slightly, because I exhausted my thought upon that question in *State ex rel* v. *Robertson*[12], and those interested can read for themselves.

Before passing to the reasons for the present rule it will not be improper, I trust, for me to say that I came to the Supreme Court thoroughly convinced that the Supreme Court not only had the constitutional power and right to review the opinions of the courts of appeals, to determine the question of conflict, but that it was its constitutional duty so to do, notwithstanding the increase of work that would be imposed. I found, however, that there were different views existing among the members. There were those who denied that the right existed. There was at least one, whom I have mentioned, who in innermost thought was opposed to the old rule, as indicated by the dissent from which I have quoted, and there were others who opposed a change of the then existing rule, without assigning further reason than its long existence. But smouldering fires need but a slight gust of wind to produce the flame. *Curtis'*[13] case was the gust of wind.

Curtis had sued Sexton in the Jackson County Circuit Court, and being forced to a nonsuit, *nisi,* he appealed to the Supreme Court[14]. Judge Valliant wrote the opinion and ruled that Curtis had adduced sufficient evidence to take his case to the jury, and reversed and remanded the cause. Upon a retrial Curtis obtaintained a judgment but in the meantime the jurisdictional amounts

12. (1916) 264 Mo. 1. c. 671, 188 S. W. 101.

13. *State ex rel. Curtis* v. *Broaddus* (1911) 238 Mo. 189, 142 S. W. 340.

14. *Curtis* v. *Sexton* (1907) 201 Mo. 217, 100 S. W. 17.

had been changed, and the next appeal went to the proper court of appeals. Although the evidence was substantially the same, that court reversed the case on the ground that a demurrer to the evidence should have been given, and also refused to certify to the Supreme Court, although asked so to do upon the ground that their ruling conflicted with the ruling of the Supreme Court. This was the straw which broke the camel's back.

Councel in later cases undertook to argue that we meant, by the ruling in *State ex rel.* v. *Broaddus*[15], to say that the Supreme Court would only issue its writ of certiorari to courts of appeals in cases where the Supreme Court had once heard the particular case. These arguments fell upon deaf ears, and the rule was adhered to just as we have it now.

There is an able, exhaustive, and instructive *resume* of all the Supreme Court cases from the above case up to August, 1916, in 13 Law Series, Missouri Bulletin, pages 30 to 75 inclusive. Its author is the Hon. J. P. McBaine, now Dean of the Law Department of the Missouri State University. One will read this article with much pleasure and profit.

III.

REASONS FOR THE PRESENT RULE

Having been a part and parcel of the majority in the Supreme Court which first established the present rule as to certiorari to the courts of appeals, I hope to be able to assign to you satisfactory reasons for this present day rule. As stated, I shall be brief upon this point, because I have pointed to the case where I have fully discussed the reasons—not as ably as it might have been, but with such power as I possessed. My time, then, as it has been in the preparation of these notes, was limited. But to the reasons for the present rule. By the original constitution of 1875, sec. 3 art. VI, the Supreme Court was given the power and right of "a general superintending control over all inferior courts". By the same section the Supreme Court was

15. (1911) 238 Mo. 189, 142 S. W. 340.

granted the power "to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same." By section 12 of art. VI of this original constitution the St. Louis Court of Appeals was created, but it should be noted that there was no provision *requiring* that court to follow the last controlling opinion of the Supreme Court. This is no doubt accounted for, in part, by the fact that in the more important cases to be disposed of by that court an appeal or writ of error would lie to the Supreme Court. But in 1884, when by amendment to the constitution, a system of courts of appeals was provided for, the framers of the amendment had looked into the future and bethought themselves of what might happen. By this amendment the field of action of the St. Louis Court of Appeals was broadened, the Kansas City Court of Appeals created, and provision made for the establishment of a third court of the same class[16]. Section 6 of the amendment of 1884, provides:

"When any one of said courts of appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the same term and not afterward, certify and transfer said cause or proceeding and the original transcript therein to the Supreme Court, and thereupon the Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals."

Then, for fear that the original constitution had not made the right and power of the Supreme Court clear this amendment of 1884, by section 8 thereof provided: "The Supreme Court shall have superintending control over the courts of appeals by mandamus, prohibition and *certiorari*."

16. Secs. 1, 2 and 3 of the amendment of 1884.

By referring to section 6, it will be seen that the last clause thereof reads: "and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals." It was those provisions that Judge Gantt had before him in *State ex rel.* v. *Smith*[17], when he said: "It seems clear that the legislature when it submitted this amendment, and the people when they adopted it, intended and designed that every citizen and litigant should have the equal protection of the law within this state, and there should be uniformity in the administration of justice. Had it been understood that one tribunal in the eastern portion of the state could declare the law one way and another tribunal in the western portion another way, and that no provision was made to prevent such a result, in our opinion the amendment would have been defeated. But the sixth section commended it to the bar and the people alike, because by it it was thought a simple mode was provided to insure uniformity in the decision of all the courts." He meant by "all the courts" not only the courts of appeals, but the Supreme Court as well, for he closes the paragraph with these enlightening words: "and to provide against over-sight or error this court (the Supreme Court) was made the final arbiter, with power of superintendence over all inferior courts, and courts of appeal especially, with power to issue writs of *mandamus,* prohibition, and *certiorari.*"

The idea is that by the amended constitution we were adopting a system of appellate courts, with the Supreme Court at the head thereof, and with a superintending control of those courts by the Supreme Court. Throughout the whole thread of this amended constitution runs the thought of uniformity in the case law of the state as announced by the several appellate courts. The courts of appeals were to be guided in their opinions by the last previous rulings of the Supreme Court. This was provided because there could be no harmony in the base law without it. To reach this end two methods were provided: (1) a judge of the court of appeals could say that the majority opinion of that

17. (1891) 107 Mo. 1. c. 533, 16 S. W. 401.

court conflicted with certain opinions of the Supreme Court, or of another court of appeals, and ask that cause be certified to the Supreme Court for final determination; or, (2) in the event, using the language of Judge Gantt, by "oversight or error" the courts of appeals failed to follow the last rulings of the Supreme Court, then by *certiorari* that court could correct the conflict, and preserve the harmony of the law. Judge Gantt uses the term, "oversight or error" but may we be permitted to suppose a flagrant case? Suppose a court of appeals passed upon a case, otherwise within its jurisdiction, and openly said that their opinion did not accord with the last rulings of the Supreme Court, but failed to certify such case to the Supreme Court, what would become of harmony in the case law, if the Supreme Court could not bring before it, by certiorari, the record in that case, and upon a hearing quash such record?

Judge Bond, with great diligence, has collected all the cases supporting the old rule in his dissenting opinion in *State ex rel.* v. *Robertson*[18]. Those cases will be searched in vain for any serious discussion of that portion of section 6 of the amendment of 1884, which reads: "And the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals." Those cases proceed upon the erroneous theory, that simply because the particular case fell within the appellate jurisdiction of a court of appeals, such court could in the face of the last quoted clause of the constitution, decide the case by announcing rulings of law or equity contrary to the last previous rulings of the Supreme Court upon the same questions. In other words those cases gave no effect whatever to the last clause of section 6 of the amendment of 1884. According to those cases there was left to the courts of appeals alone the power of determining whether or not there was conflict of opinion between them and the Supreme Court. As a practicing lawyer the rule of those cases grated upon my better judgment, and I never could bring to my

18. (1916) 264 Mo. 1. c. 681-2, 188 S. W. 101.

legal conscience an acquiescence in the law announced in those cases.

It was a useless act for the framers of the amendment of 1884 to make the last previous rulings of the Supreme Court controlling upon the courts of appeals, if other portions of the instrument did not give to the Supreme Court power to enforce this constitutional provision as against the courts of appeals. Our view is that this power was specifically granted by section 8 of the amendment of 1884, wherein it is said: "The Supreme Court shall have superintending control over the courts of appeals by *mandamus,* prohibition and *certiorari.*" In other words, if such a court refuses to hear and determine a case which it should hear and determine, the Supreme Court by mandamus can compel it to act. If such court assumes jurisdiction and threatens to determine a case contrary to the constitution and law, the Supreme Court can prohibit such threatened action. And, if such court has determined a case in violation of the constitution and law, the Supreme Court by its writ of certiorari can bring before it the record and upon a hearing quash such record.

In what I have just written I have had in view the purpose of the writ of certiorari as announced by the authorities, i. e. "The purpose of the writ is to have the entire record of the inferior tribunal brought before the Supreme Court, to determine whether the former had jurisdiction or had exceeded its jurisdiction or *had failed to proceed according to the essential requirements of the law.*" I must add that the constitution is a vital part of the law.

Both the old rule and the present rule of the Supreme Court are in accord on the question that the record and judgment of a court of appeals, upon certiorari, can be quashed by the Supreme Court, if the court of appeals was without jurisdiction in the first instance. The difference between the two rules lies within the latter portion of the quotation given in the preceding paragraph. The present rule proceeds upon the theory that a court of appeals may have jurisdiction in the first instance, but in the

course of its proceedings it may violate the constitution, and thereby act in excess of its lawful jurisdiction. Such is the case when such a court, in deciding a case, otherwise within its lawful power, acts beyond its jurisdiction when it either fails or refuses to recognize the last previous ruling of the Supreme Court as controlling. The constitution says that such last previous ruling of the Supreme Court shall be controlling, and when a court of appeals violates this provision, it gets beyond its lawful jurisdiction and authority in the particular case.

To be plain, the constitution has fixed an orbit in which these courts must travel in the disposition of the cases properly before them. Following the last previous ruling of the Supreme Court is a constitutional provision which must be obeyed, if the courts of appeals would travel in the orbit fixed for them by the amendment of 1884. They are acting in excess of their lawful powers when they ignore this provision of the constitution, and their record should be quashed upon certiorari. In conclusion it will suffice to say that the Supreme Court has the constitutional power to determine an alleged conflict of opinions, and to quash the opinion of a court of appeals, if such opinion conflicts with previous rulings of the Supreme Court. Harmony in the case law cannot otherwise be attained.

IV.

THE PRACTICE

To the beginner in the law, the practice is a thing of first importance. The Supreme Court has clearly indicated to the bar that the granting of the writ of certiorari is purely discretionary[19]. It was such at the common law and our rule comports with that of the common law.

Limiting our discussion to the writ of certiorari as used by the Supreme Court against the courts of appeals in the interest of uniformity of the law, it must be said that the practice is gov-

19. *State ex rel. Gardner* v. *Hall* (1920) 282 Mo. 425, 221 S. W. 708; *State ex rel.* v. *Ellison* (1921) 230 S. W. 970.

erned, (1) by the rules of the Supreme Court, and (2) by the case-made law since the case of *State ex rel.* v. *Broaddus*[20].

The applicable rules are Nos. 32, 33 and 34 of the present revised rules of the Supreme Court, which rules are printed at the end of each volume of the reports. The first two rules (32 and 33) have but general application. Thus rule 32 provides that no remedial writ will be granted when the party has adequate relief by appeal or writ of error. By rule 33 it is indicated that oral arguments will not be heard on applications for remedial writs, and this applies to applications or petitions for the writ of certiorari. This rule also provides that if a remedial writ is granted, then upon final hearing "printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in ordinary cases". This rule should be noted, because lawyers of long experience have, a few times, overlooked the fact that a printed abstract was required in a certain case. This rule applies to certiorari and must be observed.

Rule 34 is one which applies specifically to applications for the writ of certiorari, which we have under discussion. The rule requires, (1) a notice of five days to the opposite party, or parties adversely affected, (2) that the petition or application shall not exceed five pages, in which counsel shall "concisely set out the issue presented to the court of appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found "and (3) such petition shall be accompanied by, (a) copy of the court of appeal's opinion complained of in the petition, (b) copy of motion for rehearing, or to transfer to the Supreme Court, with copy of the rulings upon such motion or motions by the court of appeals, (c) suggestions in support of the petition or application, which shall not exceed six typewritten or printed pages. The notice which the rule requires to be given to the party adversely interested must be accompanied by a true copy of the petition and all the exhibits and suggestions. The adverse party may file suggestions in op-

20. (1911) 238 Mo. 189, 142 S. W. 340.

position to the granting of the writ at any time prior to the date fixed by the notice as the time for the presentation of the application or petition for the writ. These suggestions must be limited to five pages. The purpose of this rule is obvious. If there is a real conflict of opinion, it does not require a volume of matter to state it. Some lawyers imagine, or seem to imagine, that verbosity is an evidence of erudition, but quite the contrary is true. The real legal mind is full of thought and substance with the power to express it in precise and brief terms.

One suggestion may not be out of the way here. An application for the writ should concisely show the issues, *nisi,* and the issues in the court of appeals. Further, it should be shown in the fewest apt words the ruling or rulings of that court which conflict with those of the Supreme Court, pointing to the case or cases by book and page. One should not endeavor to find a great number of conflicts, but find the real conflicts, if such there be. Too many lawyers proceed upon the drag-net theory. If one has a case of real conflict he should state it and quit. It requires the time of the court to winnow the grain from the chaff in these drag-net applications. A lawyer should not drift into the habit of preparing such applications. Nor should he be disappointed if the court is unable to discern conflict even in what he considers a real conflict. Great minds often differ. It is safe to say that there is about one application granted to where there are seven to nine refused.

Another matter of interest is that if the court has in mind a case decided by the Supreme Court, which does in fact conflict with that of the court of appeals, the court will make use of its own knowledge, and in the disposition of the certiorari case, will use the case of which it has knowledge, although not called to the court's attention in the briefs. This is done on the theory that real harmony of the law is the chief purpose of the writ now under consideration.

The practice of the Supreme Court under its rules and the law is to be found in cases since the *Curtis* case. The rules of court indicate no limit of time within which petitions or appli-

cations for the writ may be filed. There is no statute upon the subject in Missouri. So, a rule of law had to be established upon that question. This was to have been expected in the earlier cases, but it did not come forth, because the question was not raised by counsel until the recent case of *State ex rel. Berkshire* v. *Ellison*[21]. In that case the writ of certiorari was quashed because of laches. In other words, the court ruled that the application upon which the writ was issued was not timely made. The further ruling was that a period of thirty days from the time the motion for rehearing was overruled by the court of appeals, was, to say the least, a reasonable time within which to make application for the writ, and that due diligence would require notice of an intended application even earlier. The reasons for this rule may be gathered from the opinion in *Berkshire's* case.

The most important question in the matter of practice (and not mentioned in the rules of court) is just what will be considered by the court in the final disposition of the case. There were, and are now, members of the court entertaining the view that we should consider the whole record before the court of appeals, including the evidence preserved in the bill of exceptions. This view has some sustaining authority in the common law practice. The court has finally settled the matter by holding that it will look solely to the opinion of the court of appeals for the evidentiary facts, indulging the presumption that such court has stated the facts in its opinion[22]. It was not long before division arose as to whether a written document if mentioned in the opinion could be considered as a part of the opinion of the court of appeals. Prior to *Wahl's* case it had been ruled that such documents would be considered[23]. The peculiar language of *Wahl's* case became a disturbing factor. The lamented

21. (1921) 230 S. W. 970.

22. *State ex rel. Wahl* v. *Reynolds* (1917) 272 Mo. 588, 199 S. W. 978.

23. *State ex rel.* v. *Ellison* (1915) 176 S. W. 1. c. 12; *State ex rel.* v. *Robertson* (1916) 264 Mo. 661, 188 S. W. 1. c. 102; *State ex rel.* v. *Ellison* (1916) 191 S. W. 1. c. 53.

Judge Bond, with an eye singly directed to the curbing of the power of the Supreme Court in these certiorari cases, used this language: "Nor does it (the court's rule of review) embrace any consideration of the record of the case in the court of appeals further than the same is *set forth* in the opinion under review." "Set forth" in the record might have a very restricted meaning, and I have no doubt (knowing as I do the views of Judge Bond) that he used the words in the most restrictive sense. He meant, (leaving out of consideration what construction those who agreed with him gave to the words) that if the opinion mentioned an instruction, but did not set it out in the opinion in substance or in *haec verba,* the Supreme Court could not look at that instruction. These unfortunate words "set forth" occasioned another review of the cases in *State ex rel. Kansas City* v. *Ellison*[24]. There the applicable case law was collated, and the rule was finally announced that the Supreme Court would take the facts from the court of appeals opinion for the evidentiary facts of the case, but would also examine any written document mentioned in the opinion, although not "set forth" in the opinion. This is for the sound reason that the mention of such written instruments (which includes instructions) made such written instruments just as much a part of the opinion, as if they were fully written out therein. This is a sensible rule, and it works toward the ends of exact justice. A court of appeals cannot well write an opinion without making some reference to the pleadings and the several contested instructions. Under the present rule the real question of conflict can be determined with certainty.

Finally, upon the determination of the case upon certiorari, the Supreme Court either quashes the record of the court of appeals, or quashes its own writ. The latter action leaves the action of the court of appeals undisturbed. If the record of the court of appeals is quashed, the original case is left pending there as if it had never been determined, but in the future deter-

24. (1920) 220 S. W. 498.

mination of the cause, such court would be bound by the opinion of the Supreme Court in the certiorari proceedings. The Supreme Court renders no judgment in the particular case, which has been the occasion of the certiorari proceeding.

W. W. GRAVES

Jefferson City, Missouri.