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In a previous number of the Law Series the writer published an article on the subject "The Writ of Certiorari in Missouri," which treated generally of the use of that writ in this state.[1] This article was published largely because the Supreme Court of Missouri in several cases then recently decided had overruled a long list of earlier decisions and had held that under the constitution it had authority by writ of certiorari to quash the judgment of a court of appeals that had not followed "the last previous ruling of the Supreme Court on any question of law or equity."[2] No attempt was made to discuss fully the extent of the constitutional authority of the Supreme Court where it is claimed that its last previous ruling has not been followed by a court of appeals or what may be considered by the Supreme Court upon issuance of a preliminary writ of certiorari. The decisions at that time seemed to contain too little material for a discussion of these topics; but the decisions during the last two years have involved more extended consideration of them, and it is thought that a discussion of all the cases would now be of interest to the profession in Missouri. As the questions involved are new and as there may be difference of opinion even as to just what has been decided a somewhat detailed statement of the cases will be necessary.

Probably it is desirable first to look at the case that overruled the earlier decisions and established the rule that seems now to be firmly settled to the effect that the Supreme Court

1. 6 Law Series, Missouri Bulletin, p. 3.
2. Constitution of 1875, Amendment of 1884., § 6.

possesses constitutional power to issue these writs to the courts of appeals of Missouri to bring about harmony of judicial decisions in this state. The title of that case is *State ex rel. Curtis* v. *Broaddus*,[3] in which the judgment of the Kansas City Court of Appeals was quashed. A suit was brought by Curtis against Sexton for breach of a contract to purchase land; upon the first trial the circuit court held that the plaintiff had not made a case and directed a verdict for the defendant; the plaintiff thereupon appealed to the Supreme Court which held that the ruling of the trial court was erroneous and reversed the judgment.[4] Upon a retrial the plaintiff received a verdict and the defendant appealed to the Supreme Court which transferred the case to the Kansas City Court of Appeals, where the judgment of the circuit court was reversed because it was thought the plaintiff had not adduced proof tending to prove his cause of action.[5] The plaintiff thereupon filed motions in the court of appeals for a rehearing and to transfer the case to the Supreme Court. These motions were overruled and thereupon he filed in the Supreme Court an application for a writ of certiorari claiming that the decision of the court of appeals was in conflict with the former decision of the Supreme Court in the same case, wherein it had been held that his proof did tend to establish a cause of action and did entitle him to have the case submitted to a jury. A preliminary writ was issued. The case was argued in the Supreme Court *in banc* and an opinion was written by FERRISS, J., which failed of adoption by the majority of the court. The case was reassigned to BROWN, J., who wrote an opinion which received the approval of a majority of the court. At the outset of the opinion Judge BROWN considered the argument that was made for the respondents that the decision of the Kansas City Court of Appeals was not in conflict with the decision of the Supreme Court "because the evidence in the second trial was wholly different from the evidence before the court upon the first appeal." He stated that a com-

3. (1911) 238 Mo. 189.
4. *Curtis* v. *Sexton* (1907) 201 Mo. 217.
5. *Curtis* v. *Sexton* (1910) 142 Mo. App. 179.

parison of the opinion in the former decision of the Supreme Court and of the opinion of the court of appeals tends to show "that the decision of the court of appeals is not in conflict with our decision." He did not end the matter at this point, but stated that an examination of the evidence in the case as first decided by the Supreme Court, when it was held plaintiff was entitled to go to the jury, showed that it was the same evidence as was held by the court of appeals to be not sufficient to entitle the plaintiff to go to the jury. As to this he says: "We have carefully examined the record upon which the decision of the Kansas City Court of Appeals is based, and compared it with the record which was before us on the former appeal, and find that the evidence on the part of the plaintiff in both trials was substantially the same, so far as such evidence tends to make out a case against the defendant Sexton." He then stated that under the constitution the Supreme Court had the power to quash a decision and judgment of a court of appeals that had not followed the previous ruling of the Supreme Court and held that it had such power where the ruling of the Supreme Court, not followed, has been made in the same case. VALLIANT, C. J., GRAVES and KENNISH, JJ., concurred.

In a separate opinion in which LAMM, J., concurred, FERRISS, J., expressed the opinion that the Supreme Court had authority under the constitution upon writ of certiorari to quash the judgment of the court of appeals because the matter in controversy was *res adjudicata,* in as much as there was no way by writ of error or appeal to get the case again into the Supreme Court. He expressly limited the right to issue the writ to cases where a court of appeals has failed to follow the ruling of the Supreme Court in the *same* case; and as to such action of the court of appeals he says: "If that court attempts to disregard the decision of this court, upon such point it exceeds its jurisdiction. When a court acts without jurisdiction, or in excess of its jurisdiction, it is in error, and the error may be reached by certiorari." Tho it seems that the learned judge took too narrow a view of the constitutional power of the Supreme Court, and that the majority view that the power exists

to quash a judgment of a court of appeals in any case where the previous ruling of the Supreme Court has not been followed is the better view, yet an attempt will later be made to show that his statement, that a court of appeals that fails to follow the ruling of the Supreme Court in the same case exceeds its jurisdiction, is sound, and that the same statement is equally sound when applied to a decision and judgment of a court of appeals which fails to follow the controlling decisions of the Supreme Court tho the ruling be made in another case. Judge FERRISS concluded his opinion by stating that the decision of the court of appeals was not in conflict with the decision of the Supreme Court, taking the facts as stated in the opinion of the Supreme Court; but that the facts were erroneously stated in the opinion of the Supreme Court and that the court of appeals was not bound, as had been held by a majority of the court, to compare the abstracts presented upon each appeal to determine actually whether the evidence was the same, "because even if that court had examined the record, and had seen that the facts in the two records were alike it still could properly have said that the judgment of the Supreme Court must be applied to the facts as stated in the opinion, and not to the facts as stated in the record." He concluded therefore the preliminary writ should be quashed.

WOODSON, J., in a dissenting opinion expressed the view that the constitution did not empower the Supreme Court to issue the writ of certiorari to review a decision and judgment of a court of appeals; that under the constitution the judges of the courts of appeals have sole authority to determine whether their decisions are in conflict with the controlling decisions of the Supreme Court; that the Supreme Court has no power to review a court of appeals decision by certiorari or any other writ in any case where the court of appeals has appellate jurisdiction tho its decision be "in conflict with the opinions of this court." He was of the opinion consequently that the preliminary writ should be quashed.

In the first case decided, therefore, the majority of the judges of the Supreme Court were of the opinion that the ab-

stract of the record as filed in the court of appeals might be examined upon certiorari, where an examination thereof was necessary to determine whether the controlling decision of the Supreme Court had in fact been followed by the court of appeals. Since this decision the question as to what will be brought up and examined upon certiorari has frequently been raised in and discussed by the Supreme Court, but as will be seen from an examination of the later cases the law on this phase of certiorari from the Supreme Court to a court of appeals is not yet free from doubt.

The next case was *State ex rel. Evans* v. *Broaddus*,[6] where again the decision and judgment of a court of appeals was quashed. The opinion of the Supreme Court was written by LAMM, J., and the entire court concurred. The Kansas City Court of Appeals had held that it had authority to issue a writ of mandamus to a sheriff to compel him to execute a committment warrant to put in jail a witness who had been committed by a notary public for contempt for refusing to answer questions when his deposition was being taken. Previously the witness had filed in the circuit court a petition for a writ of *habeas corpus* and that petition was then pending. The Supreme Court held that the court of appeals had no such power because of the pendency of *habeas corpus* proceedings and that in issuing the writ of mandamus it had not followed the controlling decisions of the Supreme Court. Judge LAMM pointed out that certiorari is issued by a higher to a lower court "in order that profert of the challenged record be made to be searched for jurisdictional defects—that is, orders, judgments and parts of judgments without (or in excess of) the jurisdiction of the subordinate court making or rendering them." He also pointed out that it does not issue to compel the lower tribunal to make a record and that it is not to be employed to bring about a review of the rulings of the lower court upon the merits of the case. This latter statement doubtless was made in answer to an argument that the evidence in the mandamus proceeding in the court of appeals could not be examined. As to that he says: "But that contention avails naught here; for the

6. (1912) 245 Mo. 123.

facts as set forth appear on the face of the record itself. Hence, we disallow the point to respondents."

It would seem then that this decision does not hold that the abstract of the record as filed in a court of appeals, including the evidence therein, will never be examined to determine whether a court of appeals has in fact followed the controlling decisions of the Supreme Court. While it is true that upon certiorari the merits of a case will not be reviewed and that evidence adduced in the lower tribunal will not be reconsidered to determine what should have been found to be the facts in the controversy, yet it by no means follows that the evidence upon which the lower tribunal acted and which appears in the record will not be looked at in determining whether such action was in excess of the jurisdiction of the court, and whether upon the facts as found by the verdict of the jury or the court, the court of appeals has followed the last previous ruling of the Supreme Court in deciding the case. Of this matter more will be said later on.

In *State ex rel. Iba* v. *Ellison*,[7] also referred to in the previous article, the decision and judgment of the Kansas City Court of Appeals was quashed under these circumstances. The opinion of the Supreme Court was written by FARIS, J., and received the approval of LAMM, C. J., GRAVES, BROWN and WALKER, JJ. WOODSON, J., dissented in a separate opinion in which BOND, J., concurred. The Kansas City Court of Appeals, according to the holding of a majority of the Supreme Court, did not follow controlling decisions of the Supreme Court in deciding whether a circuit judge had acted upon a correct view of the law as to the duty of a trial judge to set aside a verdict of a jury on the ground that it is against the weight of the evidence.[8] What the trial judge said in passing upon the motion for a new trial was stated in the opinion of

7. (1914) 256 Mo. 645.
8. *Iba* v. *C. B. & Q. Ry. Co.* (1913) 172 Mo. App. 141.
Pursuant to the mandate of the Supreme Court the court of appeals after a reargument rendered a decision affirming the judgment below for $5000. (1915) 186 Mo. App. 718. Again, the case came before the Kansas City Court of Appeals, (1916) 182 S. W. 135, on appeal

the court of appeals thus the facts to which the rule of law was to be applied were found by the Supreme Court without further investigation of the record. The Supreme Court held that the court of appeals had reached a conclusion on these undisputed facts that was not warranted, that the court of appeals was in error in holding that it was the duty of the trial judge to consider certain affidavits that had been filed some forty-five days later than the rule governing the time of filing the motion for a new trial required, and his duty not to consider the result of a criminal prosecution for perjury against one of the witnesses which occurred some fifty-seven days after the expiration of the time lawfully to file a motion for a new trial on the ground of perjury and newly discovered evidence. Judge FARIS, however, considered what might have been held had the court of appeals not discussed what was said by the trial judge, and stated that if the opinion of the court of appeals had disclosed that it had made a mistake as to the facts and "had shown, in other words, that the court found that Judge Rusk was of the view even before the affidavits charging perjury were filed and before the verdict of acquittal came in, that the preponderance of the evidence was so greatly in favor of the defendants as to warrant him in setting the verdict aside," a different question would have been presented. Judge Rusk had said when the verdict of the jury was returned that he felt that he would have decided the case the other way had it been submitted to him, but that he did not feel that the weight

from an order of the circuit court overruling defendant's motion to quash the execution. The contention was made that neither the trial court nor the court of appeals had jurisdiction as the writ of certiorari was issued by the Supreme Court to the court of appeals after the term had expired (March Term, 1913), at which the court of appeals reversed the judgment of the trial court, and that the latter judgment was a finality notwithstanding the mandate of the Supreme Court upon certiorari. The court of appeals affirmed the action of the trial court holding that (a) its first judgment was in excess of its jurisdiction and therefore void and not a final judgment; and (b) that at all events the Supreme Court had quashed that judgment and it was incumbent upon the circuit court and the court of appeals, inferior courts, to obey the mandate of the Supreme Court whatever either might think as to the writ of certiorari being issued improperly because issued after the expiration of the term of the court of appeals at which the cause was decided.

of the evidence was so greatly with the defendant as to warrant him in setting the verdict aside; that later when he considered the affidavits which were filed forty-five days too late, which tended to show perjury upon the part of the principal witness, he changed his views and concluded that it was his duty to set the verdict aside; and that still later when he learned the witness in question had been tried and acquitted of a criminal charge of giving perjured testimony he concluded that he should "respect the verdict of that jury" and that his own views as to the perjury should not prevail and that he would not act upon his own views and would not set the verdict aside out of regard for the result of the trial in the criminal court. Judge FARIS concluded that it was not the duty of the trial judge, according to decisions of the Supreme Court to consider these affidavits and the acquittal in the criminal case, and that the court of appeals was in error in holding that Judge Rusk took an improper view as to the effect of the finding in the criminal case; that in truth Judge Rusk had no legal right to consider either the affidavits or the acquittal of the witness, and that his views which were changed by the affidavits and by the acquittal were legally of no importance. In the course of his opinion Judge FARIS made the following statements as to the scope of the inquiry upon certiorari and as to the effect of a determination of the facts by a court of appeals: "We repeat, that if the learned judge who wrote the opinion in the Court of Appeals had found that Judge Rusk was at the end of the trial in the Iba case of the opinion that the verdict therein should be set aside because it was against the weight of the evidence, then no valid objection to his views could be urged, and while opinions might differ as to the correctness of such view of the facts upon this record, yet, no ground for jurisdiction in us by certiorari would have existed; because the error, or difference in view, would then have arisen upon a question of fact. On such a question, in cases wherein they have jurisdiction, the several courts of appeals have the same right to decide, even erroneously, as we have, and we may not interfere in any wise, whether in our judgment, their opinion be right or wrong. Upon a point of law arising from undis-

puted facts, they are required to follow the last previous ruling of this court. [Section 6, Amendment of 1884, Constitution of Missouri] If they do not we have held that a judgment rendered by them in contravention of the constitutional mandate above referred to may be quashed by us upon certiorari." These statements seem to be unnecessary to the decision as he had held upon the facts as stated by the court of appeals that its judgment was wrong, and the statements are therefore entitled only to the weight to be given to the *dicta* of a learned judge.

Judge WOODSON based his dissent in the case upon the reasons he expressed in *State ex rel. Curtis* v. *Broaddus*,[9] and enlarged upon them by observing that there was no more than an erroneous ruling in the case and that if the court of appeals had erroneously ruled they had not exceeded their jurisdiction but had committed merely an error in deciding a case over which their appellate jurisdiction was complete and that the Supreme Court had no authority to correct an error of this nature.

In *State ex rel. United Railways Company* v. *Reynolds*,[10] also mentioned in the previous article, the question of the scope of the inquiry upon certiorari was touched upon in the court's opinion. Here, however, the preliminary writ of certiorari issued to the St. Louis Court of Appeals was quashed. The St. Louis Court of Appeals in affirming a judgment in a personal injury suit for negligence had held that no error was committed by the trial court in giving an instruction authorizing the jury to assess damages for loss of time by an unskilled laborer, tho there was no evidence as to the wages he was receiving. Before passing upon the question whether the ruling of the court of appeals was in harmony with the law as determined by the Supreme Court, Judge BROWN who wrote the majority opinion, raised the question whether the Supreme Court should ascertain the facts from the statement prepared by or contained in the opinion of the court of appeals, or whether the court should look at the evidence in the case to

9. (1911) 238 Mo. 189.
10. (1914) 257 Mo. 19.

determine whether the statement so made by the court of appeals was correct. He concluded that the statement as made by the court of appeals should be taken as final. He distinguished *State ex rel. Curtis* v. *Broaddus*[11] where the evidence was reexamined, on the ground that it had "once been before us on the sufficiency of the evidence and a ruling made that such evidence for plaintiff made out a *prima facie* case for the jury." He then stated that in cases where the facts have not previously been before the Supreme Court, it should consider "only the pleadings, evidence and facts as recited by the Court of Appeals whose judgment is sought to be quashed," and that tho it may be argued that a court of appeals may fail to state correctly the facts and pleadings and that this might result in an individual case being decided improperly and in conflict with the law as determined by the Supreme Court, yet this result would not be contrary to the "primary object sought by Section 6, Article 6, supra, i. e., the uniformity of judicial construction on issues of law and equity in this state."

It was conceded by both parties in this case that the evidence showed that the plaintiff was a laborer engaged in hauling ice cream cabinets for a manufacturing company from the factory to a railroad station for shipment and that he was unable to work for some time as a result of his injury. Judge BROWN held that the instruction which authorized recovery for loss of time was at least supported by sufficient proof to entitle the plaintiff to recover nominal damages tho there was no proof of what he had received for his time as laborer, and that it was the duty of the defendant at the trial, if it desired to have the jury more specifically advised, to prepare an instruction upon the question of damages limiting the right of plaintiff's recovery for loss of time to nominal damages. Whether there was or was not evidence of the amount of wages received was not important, therefore, according to the actual decision of the Supreme Court. And again it seems that the statement of Judge BROWN as to whether the evidence produced at the trial should be examined upon certiorari was be-

11. (1911) 238 Mo. 189.

side the question and not actually before the court for decision. He expressly stated that "whether a jury will be presumed to know what the services of such common laborer are worth at a given time and place is a matter not necessary to a decision of this case, and upon which we express no opinion." Had Judge BROWN concluded that it was necessary to know whether there was evidence as to the amount of wages the plaintiff was earning, his statement as to the scope of the inquiry upon certiorari would have been necessary to a decision and would be regarded as a direct ruling on a question involved in the case; but inasmuch as it was unnecessary to determine what the evidence showed as to the amount of the wages his statements are only *dicta.* LAMM, C. J., concurred in the opinion, while WALKER and BOND, JJ., concurred except in that part of the opinion which held that the Supreme Court had jurisdiction. WOODSON, GRAVES and FARIS, J. J., concurred as to jurisdiction in opinions filed by GRAVES and WOODSON, JJ., respectively, and dissented from the result reached. Judge GRAVES stated in his dissenting opinion that the ruling of the court of appeals was in conflict with several decisions of the Supreme Court. He did not discuss the facts in the case. Judge FARIS concurred with Judge GRAVES. Judge WOODSON stated that he thought it unwise to dissent further, as to the jurisdiction of the Supreme Court in these cases as a majority of the judges of the court had held otherwise and said that he agreed with Judge GRAVES that the decision of the court of appeals was not in harmony with the controlling decisions of the Supreme Court. He did not discuss the facts in the case.

The cases that will be discussed from this point were not cited in the previous article as the opinions were not available at that time. In *State ex rel. Zehnder* v. *Robertson,*[12] the Springfield Court of Appeals had affirmed the conviction of two persons charged with violating the local option law of Phelps County. It was claimed that the convictions were improper as the information did not state that the local option law had been adopted in that county. The information stated

12. (1914) 262 Mo. 613.

that at the time of the alleged violation "the Local Option Law was in full force and effect in the aforesaid county of Phelps." The Supreme Court held that the information did sufficiently allege the adoption of the local option law, according to the rule of pleading in misdemeanor cases as determined by prior decisions of the court, and that this being true, the preliminary writ that had been issued should be quashed. Speaking thru GRAVES, J., the court held that it would not consider upon certiorari whether the prior decisions of the Supreme Court were correct. "It would hardly be expected in this kind of a case that we would quash the Court of Appeals judgment, if it was made clear that they had followed our latest ruling upon the identical question, although our ruling might be wrong. The Constitution requires these courts to follow our latest ruling, and we cannot convict them of error if they so do, whether we were right or wrong." This view of the question seems undoubtedly sound. A court of appeals in deciding a case according to the last controlling decisions of the Supreme Court does that which it is required to do under the constitution and that which it is required to do is neither error of judgment nor an improper exercise of jurisdiction. In this opinion all the court concurred except BOND, J., who concurred in the result only.

In the next case, *State ex rel. Jones* v. *Robertson*,[13] the Supreme Court refused to quash the decision and judgment of the Springfield Court of Appeals where that court had held that certain sewer tax bills were valid. It was argued by the relators that the statute granting the power to cities of the third class to build sewers required the city to first pass an ordinance fixing the dimensions and prescribing the materials for the sewer and that an ordinance which accepted the best bid and also fixed the dimensions of and prescribed the material for the sewer was not sufficient. The opinion of the court was written by BROWN, J., who stated that upon certiorari the action of the trial court will not be reviewed as upon appeal but that the Supreme Court had been urged by relator to consider the case as if it were on appeal and that relator had raised issues in the

13. (1914) 262 Mo. 535.

case that were not even discussed by the court of appeals in its opinion and had requested a review of evidence that had not been set forth in the opinion. He stated that "practically all of these things are outside of the issues in this case," and that on certiorari the Supreme Court is not concerned with the question whether all of the issues were considered by the court of appeals or whether the court of appeals had failed to follow the decisions of the several courts of appeals. He then held that as this statute had not been construed by the Supreme Court the meaning given to it by the court of appeals would not be held erroneous. He stated: "It is neither appropriate nor necessary for us to decide whether respondents in their opinion complained of have placed a correct construction upon section 5848, Revised Statutes 1899, and we do not decide that point. A judgment of a Court of Appeals can not be quashed by this court by certiorari because it is merely erroneous or places a wrong construction upon a statute or other law."

Judge BROWN intimated in his opinion, however, that the Supreme Court agreed with the Springfield Court of Appeals in holding that the ordinance need not be first passed. In this opinion the entire court concurred, except BOND, J., who concurred in the result. This case seems, therefore, to merely establish the self-evident proposition that under the constitution the power of the Supreme Court exists to quash a decision and judgment of a court of appeals only where it has failed to follow a controlling decision of the Supreme Court, and conversely does not exist where there is no previous controlling decision. Under the constitution the several courts of appeals doubtless have the power to finally dispose of cases of which they have appellate jurisdiction, where there are no previous controlling decisions of the Supreme Court, as they shall deem proper .

The next case upon the subject is *State ex rel. C. R. I. & P. Ry. Co.* v. *Ellison.*[14] Here the opinion was delivered by BOND, J., who it will be remembered had consistently been of the opinion that the Supreme Court has no constitutional power to issue these

14. (1915) 263 Mo. 509.

writs. His opinion was originally delivered in division one and later was adopted by the court *in banc*. The decision and judgment of the Kansas City Court of Appeals was held not in conflict with prior controlling decisions of the Supreme Court. The question involved in the case was whether the plaintiff in a personal injury suit was, as a matter of law, guilty of contributory negligence. The plaintiff while standing upon a platform of a railroad station, where he had gone to meet his father who was expected to arrive on an incoming train, leaned against a truck which fell because it did not have proper support at one end. The holding of the court of appeals, that the plaintiff who was ignorant of the insufficiency of the supports of the truck was not guilty of contributory negligence as a matter of law, was held not in conflict with the previous controlling decisions of the Supreme Court and particularly with *Kelley* v. *Lawrence*.[15] The court was also divided in this decision, BROWN and WALKER, JJ., concurred, BLAIR, J., concurred in the result, while GRAVES and FARIS, JJ., dissented. WOODSON, C. J., did not sit. In determining the law as to certiorari this case seems relatively unimportant as neither the power of the court nor the scope of the inquiry was discussed.

The next case decided is *State ex rel. Gilman* v. *Robertson*.[16] Here the Springfield Court of Appeals had affirmed a judgment where the appellant had neither filed a transcript of the judgment and order granting the appeal nor paid the docket fee. The facts in the case were not disputed. The opinion of the court was delivered by WOODSON, C. J., who at the outset asked this question: "Has this court the constitutional power or authority to review the errors (not the jurisdiction) of the various Courts of Appeals of the State, upon writs of certiorari?" He then stated that while he had not changed his own opinion as to the power of the Supreme Court in these cases, yet he said he deemed it unwise to have the question of jurisdiction frequently agitated and that therefore in recognition of previously decided cases and out of regard for stability of the law he

15. (1906) 195 Mo. 75.
16. (1915) 264 Mo. 661.

considered the question of the power of the Supreme Court to be finally settled in the affirmative. He then held that the court of appeals in affirming the conviction had followed repeated rulings of the Supreme Court. BROWN, J., concurred in the result, GRAVES, WALKER, FARIS and BLAIR, JJ., concurred in the result in a separate opinion by GRAVES, J. BOND, J., dissented. While as stated by one of the judges of the Supreme Court in a later case the case reviewed upon certiorari was of rather slight importance, yet the case in the Supreme Court is of the first importance in determining the law of certiorari as to the power of the court to issue these writs. An elaborate argument in favor of the power was made by Judge GRAVES, and an elaborate argument against it was made by Judge BOND. It seems that counsel who had other cases of the same nature pending before the Supreme Court also filed briefs in this case thereby causing the court to attach to the decision the greatest importance. Judge GRAVES said that he did not concur in Judge WOODSON'S opinion to the effect that because the court had previously decided that it had the power to issue these writs the question should be considered settled, but stated that he concurred because he had no doubt about the power of the court under the constitution to issue the writ. He then pointed out that in 1884, when the constitution was amended, creating the Kansas City Court of Appeals and changing the jurisdiction of the St. Louis Court of Appeals and changing a court of appeals from a court of intermediate appellate jurisdiction to a court of final appellate jurisdiction in all cases where an appeal was provided for to a court of appeals, the people determined to leave no doubt upon the question of the power of the Supreme Court and for that reason adopted Section 8, of the amendment of 1884, which provided specifically that "the Supreme Court shall have superintending control over the Courts of Appeals by mandamus, prohibition and certiorari."

Judge GRAVES then argued that specific authority for the use of the writ appears in the constitution in direct connection with the subject of the jurisdiction of these courts, that the language quoted above is susceptible of but one meaning, and that not only

was superintending control given the Supreme Court over courts of appeals, but that the very writs by which the power may be exercised were specified in the constitution. He stated in discussing certiorari, as provided in the constitution, that it can be used to bring up the record in a court of appeals, and that by Section 15 of Article 6 of the constitution the courts of appeals are required to file written opinions in cases decided by them, and that such written opinions "become parts of their record," and that in all events where the opinion of a court of appeals shows that it has gone beyond its authority the Supreme Court may quash the decision because it is rendered without authority and therefore beyond the jurisdiction of a court of appeals. He then pointed out that a court of appeals may commit error in holding that it has jurisdiction when it has not jurisdiction under the constitution and that it may commit an error of judgment where it has jurisdiction; and that in the first class of cases the Supreme Court is the "final arbiter," but in the second class of cases the Supreme Court has no concern. He then stated that if a court of appeals fails to follow controlling decisions of the Supreme Court it exceeds its jurisdiction. His views may probably be best expressed by two brief quotations from his opinion. "If a Court of Appeals in deciding a case fails to follow the last previous ruling of this court upon the doctrine of law or equity involved in the case, the moment such act occurs such court has overstepped its jurisdiction, and is then as much under the superintending control of this court by proper writ as if it had never possessed jurisdiction. The Constitution has created the lines within which such courts must travel in deciding a case, and when such court oversteps these fixed lines, it is exceeding the jurisdiction granted by the Constitution creating the court. Its act is in excess of constitutional and legal authority, and therefore beyond its power or jurisdiction to do."

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"The constitution fixes a pathway of decision for these courts. If they get out of that pathway, they are without constitutional power or jurisdiction."

Judge GRAVES' opinion in this case as to the scope of the inquiry upon certiorari, however, is not as important as it is upon the power of the court for, as has been stated, the question involved appeared in the written opinion filed by the court of appeals, and no question, therefore, was before the court as to any part of the record in the court of appeals other than the written opinion. In considering, however what may be reviewed upon certiorari Judge GRAVES' argument as to the nature of the power of the Supreme Court is of first importance as he reviewed the entire judicial system of Missouri as provided for in the constitution. He pointed out that thruout the constitution "runs the idea of harmony in the law" and that it is specifically provided that the Supreme Court has the power to enforce harmony of decision by the courts of Missouri. He stated that it was highly proper that the power should have been given to one of the courts by the constitution because if there had been no such power harmony of decision would have been "but an iridescent dream." Judge GRAVES' argument is also important as to the scope of the inquiry in these cases, because surely it was not intended by the framers of the constitution that whether there should be harmony of decision should depend upon mere form or the language of the written opinion of a court of appeals; but on the contrary, no doubt, substance was intended by the constitutional provisions, that is, actual harmony of decision by the courts of this State.

In his dissenting opinion, Judge BOND concluded that certiorari will not lie where a court of appeals has merely failed to follow the last controlling decision of the Supreme Court, as the framers of the constitution intended courts of appeals to be courts of final appellate jurisdiction, and that by section 8, *supra*, it was intended that the writ should only be issued where under the constitution courts of appeals are prohibited altogether from exercising jurisdiction. He stated that the provision of the constitution to the effect that the last previous ruling of the Supreme Court shall be binding upon the courts of appeals was only intended "to furnish a body of legal doctrine for the use of the courts of appeals, in the decision of causes of which they have final appellate jurisdiction." This view seems to

overlook the fact that Section 6, of the amendment of 1884, after providing that cases should be certified to the Supreme Court by a court of appeals upon its own motion, where any one of the judges shall deem the decision contrary to the previous decision of the Supreme Court or to any one of the courts of appeals, again specifically reiterated the duty of following the decisions of the Supreme Court and stated definitely, "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."[17] This view seems also not to give sufficient importance to the fact, as pointed out in the opinion of Judge GRAVES, that Section 8, of the amendment of 1884, specifically provided the means of making the last previous rulings of the Supreme Court controlling authority in the courts of appeals.[18] As to the latter statements, however, Judge BOND'S argument is that the writ of certiorari provided for in Section 8, can only be used to review errors of jurisdiction and there is no error of jurisdiction when a court of appeals fails to follow a controlling decision of the Supreme Court. But as we have said the better view of the constitution seems to be that the courts of appeals have not unlimited power in deciding cases even where they have appellate jurisdiction, but are at all events to decide cases, whatever may be their views as to the rules of law to be applied, according to the last previous ruling of the Supreme Court.

The next case decided involved a decision and judgment of the St. Louis Court of Appeals. It is *State ex rel. Kirkwood* v. *Reynolds*.[19] The St. Louis Court of Appeals had decided that a suit upon a special tax bill is not a suit concerning land, "or whereby the title thereto may be affected," within the meaning of the statute[20] and that service of process upon the defendant in such a suit in the City of St. Louis did not give the circuit court of St. Louis county jurisdiction. The defendant claimed, as he did not live in St. Louis county and was not

17. Section 6, of the Amendment of 1884, Constitution of Missouri.
18. Section 8, of the Amendment of 1884, Constitution of Missouri.
19. (1915) 265 Mo. 88.
20. Revised Statutes 1909, § 1753.

served there, that the circuit court of St. Louis county had no jurisdiction and that the statute[21] providing that in certain cases suit shall be brought where the land lies was not applicable. The court *in banc,* in an opinion written by Judge GRAVES, held that the decision and judgment of the St. Louis Court of Appeals was erroneous and should be quashed; that tho the Supreme Court had not previously decided as Judge GRAVES put it "a grey mule" case, i. e., a case involving the question of venue in a suit upon a special tax bill, yet, it had held suits to enjoin a sale of land under execution and suits to enforce liens against lands to be suits in which the title to the land may be affected, and that a suit to enforce the lien of a special tax bill is of the same nature, and that therefore the principle or rule of law applicable to the situation was not applied by the St. Louis Court of Appeals. All concurred but BOND, J., who dissented as to the jurisdiction of the Supreme Court to issue the writ.

This case seems to hold, what has been previously stated to be the sound holding, that the courts of appeals are bound to follow and apply the principles announced by the Supreme Court, and the mere fact that a particular class of cases has not been decided by the Supreme Court does not leave a court of appeals free to decide such cases in conflict with cases previously decided by the Supreme Court involving the same principle. Under the common-law precedent system we of course determine rules of law, or the principle on which cases should be decided, from cases previously decided and to secure actual harmony of decision in this state the holding in this case was not only proper but necessary.

The next case decided is *State ex rel. National Newspaper Association* v. *Ellison,*[22] in which the decision and judgment of the Kansas City Court of Appeals was quashed. The court of appeals had held in a negligence case that the trial court erred in granting the defendant a new trial where an instruction had been given to the jury which broadened the issues as found

21. Revised Statutes 1909, § 1753.
22. (1915) 176 S. W. 11.

in the petition. The Supreme Court held that the issues could not be broader than those made by the pleadings and that the court of appeals in reversing the ruling of the circuit court in awarding a new trial had failed to follow several previous decisions of the Supreme Court to the effect that the pleadings determine the issues to be submitted to the jury. Judge GRAVES for the court *in banc* held that tho the opinion of the court of appeals set forth the substance of the petition, yet the petition would be looked at "as the petition is just as much a part of the record as is the opinion of the court, and must speak for itself." He also stated that for the facts in this case the Supreme Court would look to the opinion of the court of appeals. Here we find a case to the effect that the record in the court of appeals is the record in the Supreme Court, for the purpose of determining whether a court of appeals has decided the case according to the controlling decisions of the Supreme Court, and it would seem that the Supreme Court had in so holding taken a more liberal view as to what would be examined upon certiorari than was indicated by the language of the writer of the opinion in *State ex rel. Jones* v. *Robertson*[23] and in *State ex rel. United Railways Company* v. *Reynolds*.[24] In this respect the decision seems thoroly sound as the whole purpose of issuing the writ is to establish actual harmony of judicial decision and to bring about actual uniformity of the law in this state. All concurred in this opinion except BROWN and BOND, JJ., who dissented, and BLAIR, J., who did not sit. BOND, J., dissented upon the question of jurisdiction only. It does not appear upon what ground BROWN, J., dissented, tho it will be remembered that he had previously said the opinion of the court of appeals would be taken by the Supreme Court as to what are the pleadings in the case. Whether it was actually necessary for the Supreme Court to know the language of the petition we are unable to say because, as Judge GRAVES states, the substance of the petition is set forth in the opinion of the court of appeals.

23. (1914) 262 Mo. 535.
24. (1914) 257 Mo. 19.

The next case decided by the Supreme Court is *State ex rel. Delano* v. *Ellison*.[25] This was a personal injury case in which a court of appeals had affirmed a judgment for the plaintiff who was injured by a collision with a railroad engine while driving over a public crossing. It was contended by the relator that the plaintiff in the personal injury case was as a matter of law guilty of contributory negligence as the physical facts showed he could have seen the train in time to have avoided the collision, and that his evidence to the contrary was of that character which the Supreme Court had previously held had no probative value and did not raise an issue of fact; and further that the trial court committed error in giving two instructions on behalf of plaintiff, one of which it was claimed wholly excluded the defense of contributory negligence and the other, it was claimed, left the case to the jury without limitation as to the acts of negligence they might consider in determining whether defendant was negligent. The Supreme Court in an opinion by REVELLE, J., held that the Kansas City Court of Appeals had followed the decisions of the Supreme Court on all three questions; first, that there was a conflict in the evidence having probative value as to whether plaintiff could have seen the train; second, that the error complained of in the instructions was cured by other instructions in the case which made it plain to the jury that contributory negligence was a defense; third, that the jury were limited in their consideration to a single charge of negligence, viz., failure upon the part of the defendant, who was operating a railroad, to give the statutory signals for the crossing. Judge REVELLE stated that upon certiorari the record in the court of appeals will be examined to determine whether the evidence showed that plaintiff was guilty of contributory negligence as a matter of law, that is, to determine whether there was legal evidence upon which the case should have been submitted to the jury by the trial court; and also that the abstract of the record in the court of appeals should be examined to determine whether the instructions contained the errors alleged by relator upon certiorari. The opinion of the court of appeals in

25. (1915) 181 S. W. 78.

the case contained a part of the evidence but it did not set forth the instructions complained of or the substance thereof. At the outset of the opinion Judge REVELLE asked this question: "At what can we look, and by what must we be governed in determining whether the Courts of Appeals have acted within the bounds of their jurisdiction, or in contravention of the decisions of this court?" He answered it by stating that the Supreme Court could only have recourse to the record of a court of appeals. He then cited authorities sustaining the proposition that according to common law principles certiorari brought up the record of the lower tribunal in order that the higher tribunal may "determine whether the inferior court has acted legally and within its jurisdiction," and that whatever constituted the record in the case is brought up. He then applied that general principle to the case where the writ is issued by the Supreme Court to a court of appeals and concluded that the whole record should be examined to determine two questions, viz., whether the court of appeals had decided a case of which the Supreme Court had exclusive jurisdiction and whether the court of appeals had followed controlling decisions of the Supreme Court. He also stated that there is no distinction, so far as the scope of the inquiry goes, as to the record proper and the record in the court of appeals, that by statute the bill of exceptions becomes part of the record and that the matter contained in the bill of exceptions constitutes a part of the record in the court of appeals. He also stated that to merely look at the written opinion of the court of appeals would frequently be of no effect in determining whether actually the decisions of the Supreme Court had been followed, and that the Supreme Court could not tell whether its rulings had in fact been followed, "when we cannot know the facts and subjects upon which the other courts have passed, cannot see or understand the matters to which they had either applied or failed to apply the law as declared by this court." He then stated what he understood the rule should be in this language: "My position is that, for the sole purpose of ascertaining and determining whether they have done either of these two forbidden things, we are not only authorized, but

required, by both the written law and the necessities of the case, to examine and consider their whole records,—the records to which they have applied the law and upon which they have decided. We will not examine the record for the purpose of determining the credibility of witnesses, or the weight to be given to conflicting testimony in cases of either law or equity, nor for determining whether the Court of Appeals has committed any error, save and except the two matters herein mentioned."

WOODSON, C. J., and BLAIR, J., concurred in the views of REVELLE, J., as to the scope of the inquiry, but dissented as to the result reached. GRAVES, J., dissented but expressed no opinion as to the views expressed. BOND, J., concurred for the reasons stated in *State ex rel.* v. *Robertson*.[26] FARIS, J., concurred in a separate opinion. WALKER, J., concurred in the result. It is to be seen, therefore, that Judge Revelle's statements as to the scope of the inquiry represented the views of three members of the court, two of whom disagreed with him as to the result reached. Judge GRAVES evidently was of the opinion that even under a narrower view as to the scope of the writ the decision and judgment of the court of appeals should have been quashed. The opinion of FARIS, J., is devoted to a discussion of the scope of the inquiry upon certiorari. He disagreed with Judges REVELLE, WOODSON and BLAIR, as to the use of certiorari in these cases. He stated that in his opinion under the constitution the Supreme Court has nothing to do with the correctness or incorrectness of the decisions of courts of appeals, that under the constitution the Supreme Court is required not to interfere "so long as the abstract rules of law which they announce in their opinions run with, and not contrary to, our own antecedent pronouncements." He then concluded that the rules as to the use or scope of the common law writ of certiorari are of no particular importance, as under the constitution there is no right of appeal from a court of appeals to the Supreme Court, and that it was the intention of the framers of the constitution, "to cut off at the root the right of ap-

26. (1915) 264 Mo. 661.

peal from a Court of Appeals to this Court." He did state, however, as has been indicated, that the writ should issue to compel uniformity of decision where lack of it shall "appear upon the face of an opinion of a Court of Appeals," and that the use of the writ under the constitution was warranted in such cases. He concluded that this is the only purpose for which the writ may be issued by the Supreme Court; "even though a rank miscarriage of justice may have occurred, the law is yet the same in one county that it is in another, and the mandate of the Constitution and the intent thereof are fulfilled."

This view seems untenable. Surely the extraordinary remedy of certiorari was not given in the constitution to enforce mere apparent uniformity of decision. The constitution states that Supreme Court decisions "shall be controlling authority in said courts of appeals," and the writ of certiorari specifically was provided in the same connection and was not restricted or limited by any language in the constitution. The views of this learned judge seem further to fail to recognize that the Supreme Court is doing a different thing when it is determining whether a court of appeals has followed the last controlling decision of the Supreme Court than it is doing when it is reviewing the action of a trial court upon writ of error or statutory appeal. It may well be as we have already seen in *State ex rel. Jones* v. *Robertson*[27] that a court of appeals may decide erroneously and yet not fail to follow a controlling decision of the Supreme Court. If there be no controlling decision of the Supreme Court and if the action be one of which the Supreme Court has not exclusive appellate jurisdiction a court of appeals has power to decide incorrectly, and if it were contended that the Supreme Court had the power to quash an erroneous decision of this character Judge FARIS' observations would be true, that there is a failure to recognize that the constitution cut off the right of appeal from a court of appeals to the Supreme Court

The next case decided is *State ex rel. Pedigo* v. *Robertson*.[28] In this case the writ was issued to the Springfield Court

27. (1914) 262 Mo. 535.
28. (1915) 181 S. W. 987.

of Appeals but was quashed upon final hearing by the court *in banc* in an opinion by FARIS, J. The Springfield Court of Appeals had affirmed a conviction of a trial court in the criminal case of *State* v. *Pedigo*.[29] In response to a preliminary writ of certiorari the court of appeals returned the printed abstract of the record filed in the court of appeals containing all of the proceedings of the trial court, and stated in the return that a copy of the opinion had been filed in the Supreme Court at the time of the application for the preliminary writ. Upon final hearing of the case in the Supreme Court the relator filed nothing but a brief which contained a printed argument only. Judge FARIS held that the writ should not issue as the relator had not complied with Rule 35, adopted April 2, 1914, requiring in cases begun in the Supreme Court by extraordinary writs that the parties suing out the writ shall file "printed abstracts and briefs" as is required in appeals and writs of error in other civil suits. He stated that "not a word of record" had been printed and that the rule (Rule 13) requires in civil cases that as much of the record should be printed "as is necessary to a full and complete understanding of all the questions presented to this court for decision." Judge FARIS then discussed elaborately, first, what constitutes the record in a court of appeals and, second, the necessity for bringing up the matter contained in the bill of exceptions in cases decided by a court of appeals. He concluded that under the practice in certiorari at common law the evidence and matter contained in a bill of exceptions may be brought up and should be included in the return and that it is part of the record in the cause. As to this he stated "the rule is that a Bill of Exceptions timely made and filed in a case becomes thereupon and thereafter a part of the record in the case." He stated, however, that this disposition of the "academic question" as to what constitutes the record in a case does not determine the broader question of the power and authority of the Supreme Court. And to determine that question he pertinently asked: "Can we use the evidence after it gets here? Have we power to go over it and weigh it? If we

29. (1915) 176 S. W. 556.

have not—if our own holdings and well-settled rules admonish us we have not—why do the vain and futile thing of requiring the bill of exceptions to come up?" He then stated, for the reasons assigned by him in his opinion in *State ex rel. Gilman* v. *Robertson*,[30] that he concluded the Supreme Court has only power to quash the decision and judgment of a court of appeals where the face of the opinion or decision contains a rule of law in conflict with the controlling decisions of the Supreme Court, consequently the Supreme Court has no use whatever for the evidence or other matter contained in the bill of exceptions. He also raised the question whether to comply with Rule 35 of the Supreme Court, it is necessary to again print an abstract of the proceedings in the trial court or whether the relator may use the abstract of the record filed in a court of appeals. He concluded by saying that the question need not be decided, as the case under consideration was a criminal case, and that in criminal cases the statutes of this state require the clerk of the court below to send up to the appellate court a complete transcript of the proceedings below including the bill of exceptions. Finally Judge FARIS concluded that as none of the record was printed and filed in the Supreme Court, not even the opinion and judgment of the court of appeals, the writ should be dismissed for failure to comply with the rules of the Supreme Court. WALKER, J., concurred. GRAVES and BOND, JJ., concurred in the result and BLAIR, J., concurred in the result, and in those paragraphs which held that the Supreme Court upon its own motion had the power to dismiss the writ for failure to comply with the rules of the court, and that the rule had in fact not been complied with. REVELLE, J., wrote a separate opinion, in which WOODSON, C. J., concurred, in which he concurred in the same paragraphs, but not in the statements in the paragraph which dealt with the power of the court and the scope of its inquiry upon certiorari to a court of appeals. He pointed out, first, that upon certiorari, as in any other case before the Supreme Court, the court should only review such matters as are necessary to a correct determination of the question before the

30. (1915) 264 Mo. 661.

court; and second, that the evidence upon which the lower court acted will be treated as a part of the record, if it is necessary to know upon what the lower court acted, to determine whether the court, whose decision is under review, proceeded legally and within its authority; and, third, that the constitutional provision requiring courts of appeals to follow the controlling decisions of the Supreme Court do not mean merely that "the written opinions of the Courts of Appeals shall be so framed and prepared as to avoid the open appearances of a conflict with our previous decisions," but on the contrary they mean that the actual decision in the case decided by the court of apeals shall be according to the controlling decisions of the Supreme Court.

Judge REVELLE then stated that there seems to be no necessity of printing and filing in civil cases brought to the Supreme Court on certiorari another abstract of the proceedings in the trial court, that the bill of exceptions, filed below, being a part of the record when printed and filed in an appellate court, should be considered the record for all purposes and should be so used. As to the latter question Judge REVELLE s opinion especially commends itself. Assuming that the Supreme Court will look at the matters and things contained in a bill of exceptions there seems to be no reason whatever for requiring litigants to incur double expense and again print the bill of exceptions and proceedings upon which the court of appeals decided the case. The rule of the Supreme Court requiring printed abstracts in these cases should receive that interpretation

So all that can be said as to the actual decision in this case is that the relator in certiorari cases must comply with the rules of the Supreme Court as to printing abstracts, etc., or the court may dismiss the case of its own volition. The opinions, however, are interesting as they shed light upon the difference of opinion that existed as to the power of the Supreme Court upon certiorari to compel harmonious decision by courts of appeals in administering the rules of law and equity. At this juncture it may be remarked that it seems from reading these opinions that too much has been made of the argument that courts of general jurisdiction have the power to decide incorrectly—to commit error in deciding cases. It is true no doubt

that a court of general jurisdiction, limited in no way, has the power to err in its decision and that by committing error it does not exceed its jurisdiction; but under the constitution of Missouri the power of courts of appeals is not unlimited, but on the contrary is expressly limited by a mandate to follow the last previous decisions of the Supreme Court on the rule of law on the question, and if a court of appeals fails to follow and apply such last controlling decision it exceeds its power and authority and therefore commits an error of jurisdiction. A court of appeals has no power or authority to decide that the last decision of the Supreme Court is not binding and controlling and therefore it would seem it has not the power or authority to decide a given case in conflict with the last controlling decision of the Supreme Court. The important question, therefore, under the constitutional provision, as to the controlling decisions of the Supreme Court, is whether a court of appeals or a single judge thereof shall determine whether there is a conflict, or whether something more was meant—whether the Supreme Court was given the authority by the extraordinary writs of certiorari and mandamus to compel courts of appeals to follow the last controlling decisions of the Supreme Court. Once having determined that the makers of the constitution intended to give the Supreme Court authority to compel the courts of appeals by the extraordinary writ of certiorari, to follow controlling decisions of the Supreme Court, the sound conclusion seems to be that the writ is being used to determine whether a court of appeals has exceeded its power or jurisdiction, and is not being used to revise and review the decision of a tribunal that has unlimited and final appellate jurisdiction; and is not being used to secure a second appellate review in the Supreme Court, of cases decided by the courts of appeals, as if upon writ of error or appeal. If the constitution requires courts of appeals to follow the last controlling decisions of the Supreme Court, and if it gives the Supreme Court the right to issue the writ of certiorari to a court of appeals to bring the case into the Supreme Court, that court in quashing a decision and judgment of a court of appeals is not correcting mere error of decision of a court of appeals, but

on the contrary, is annulling a decision and judgment which a court of appeals has no power under the constitution to make. We conclude, therefore, that a decision of a court of appeals contrary to the last controlling decision of the Supreme Court is beyond the jurisdiction of a court of appeals, and that the power to determine whether it is in conflict with prior Supreme Court decisions and beyond the jurisdiction of a court of appeals is not exclusively vested in the courts of appeals but is vested finally in the Supreme Court as the head of the judicial system of the State.

The next case decided is *State ex rel. St. Louis, etc., Ry. Co.* v. *Nortoni*.[31] In this case too the preliminary writ of certiorari issued to the St. Louis Court of Appeals was quashed by the court *in banc* in an opinion by WALKER, J. The St. Louis Court of Appeals had held that the St. Louis & Hannibal Railway Company was not liable as an interstate carrier of live stock under the Carmack Amendment to the Interstate Commerce Law of the United States, and that it could not successfully defend upon the ground that no notice of loss or injury had been given to it by the shipper as was provided in the bill of lading. The requirement for this notice was not binding if the shipment was not an interstate shipment. The facts in the case as stated by the court of appeals disclose "that the shippers consigned the hogs at Perry, Mo., to the relator to be shipped to Gilmore, thence to be delivered to the Wabash Railroad as a connecting carrier for transportation to East St. Louis." The answer of the defendant in the case stood admitted, wherein it was alleged that there was "a special contract with the plaintiffs to the effect that the relator undertook to transport the hogs only to the terminus of its own line at Gilmore, Mo." Judge WALKER, after considering several previous decisions of the Supreme Court as to interstate shipments, held that the decision of the St. Louis Court of Appeals was not in conflict with the decisions of the Supreme Court on the matter under review. In these views GRAVES and BLAIR, JJ., concurred. BOND and FARIS, JJ., concurred in the result.

31. (1915) 181 S. W. 995.

WOODSON, C. J., dissented upon the ground that the shipment was an interstate shipment, but did not point out the controlling decisions of the Supreme Court to that effect. REVELLE, J., concurred in the opinion of WOODSON, C. J.

The next case decided is the case of *State ex rel. Southwestern National Bank, etc.*, v. *Ellison*.[32] In this case the opinion and decision of the Kansas City Court of Appeals was quashed upon final order of the Supreme Court *in banc* in an opinion by REVELLE, J. The court of appeals in a mechanic's lien suit had held that it could not review the ruling of the trial court upon a motion to strike out a petition where the motion contained three grounds; first, that the record showed on its face that plaintiff's right to a lien had expired by lapse of time; second, that plaintiff had not sued the persons who contracted the debt upon which the lien was based; third, that the members of a certain partnership had not been made parties defendant. The trial court heard evidence upon the motion but put its ruling upon the first ground. The court of appeals declined to review the action of the lower court because neither a motion for a new trial nor a bill of exceptions had been filed. The Supreme Court held that where a motion to strike out is made on several grounds, but is sustained only on the ground that the record shows on its face that the plaintiff's right to recover had expired by lapse of time, the motion is in effect a demurrer; and that the view taken by the court of appeals was contrary to several decisions of the Supreme Court to that effect and consequently that the ruling of the trial court should have been reviewed by the court of appeals though no motion for a new trial nor bill of exceptions had been filed. In the course of the opinion Judge REVELLE distinctly stated that it was not the province of the Supreme Court in these cases "to determine how the court of appeals shall decide the various questions involved in this record," but only to determine whether previous controlling decisions of the Supreme Court have been followed. WOODSON, C. J., BLAIR, FARIS and GRAVES, JJ., concurred. WALKER, J., concurred in the result. BOND, J., dis-

32. (1915) 181 S. W. 998.

sented. In this opinion, which was concurred in by all of the judges but two, the distinction is made between issuing the writ of certiorari to determine whether a court of appeals has followed previous controlling decisions of the Supreme Court, and reviewing, as by error or appeal, the decision of a court of appeals to determine whether it has held correctly as to the proceedings in a trial court from which an appeal has been taken.

The next case to be considered is *State ex rel. O'Malley* v. *Reynolds*.[33] Here the writ was issued to the St. Louis Court of Appeals but the preliminary writ was quashed upon final hearing. The Supreme Court held that the court of appeals followed controlling decisions of the Supreme Court in a mechanic's lien suit. BLAIR, J., writing the opinion for the court said: "Not being asked to go beyond the opinion of that court for the facts the question whether we can do so is not involved." All concurred except BOND, J., who concurred in the result only. The decision of the Supreme Court seems not particularly significant, yet, from the above statement by Judge BLAIR, we infer that the question, as to whether the facts upon which the court of appeals acted may be examined, has not been finally settled.

The next case that we desire to call attention to is *State ex rel. Schmoll* v. *Ellison*,[34] which was decided the same day the last case discussed was decided. Here the writ was issued to the Kansas City Court of Appeals and the decision and judgment of that court quashed. The opinion of the Supreme Court is by GRAVES, J., and all the court concurred but BOND, J., who dissented. The court of appeals in a suit upon an accident policy issued to the plaintiff held that there was no liability where the plaintiff's mother was killed by accidentally falling from the platform of a moving passenger coach. There was issued to the plaintiff a policy naming the plaintiff's mother as beneficiary which insured against plaintiff's death from injury sustained "while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the

33. (1915) 182 S. W. 743.
34. (1915) 182 S. W. 740.

platform, steps or running board of railway or street railway car)"; and there was also issued at the same time and covered by the same premium a supplemental policy on a separate document, separately signed, covering the life of the plaintiff's mother naming the plaintiff as beneficiary and insuring against accidents to her "while riding as a passenger in a railway passenger car." The court of appeals held this to be one contract and that reading the main and supplemental parts thereof together the insurance company was not liable, that there was only to be liability upon the insurance company where the mother was inside the passenger coach; that this was true because there was specific language in the policy imposing liability in the event of death or injury to plaintiff, while riding on a platform, and an absence of such specific language in describing the liability which should exist in a case of the death of the plaintiff's mother, and that the entire contract therefore showed that the parties intended that there should be liability only in the instances covered by the very words of the policy. The court of appeals concluded that if the instruments were not one contract a fair interpretation of the supplemental contract imposed liability for the death of the mother while on the platform of the passenger coach. The Supreme Court held that the rule of law applied in the case by the court of appeals, to the effect that the documents were legally one contract, was inconsistent with previous decisions of the Supreme Court in two cases where the same principle was involved, and therefore that the decision and judgment of the court of appeals should be quashed. Judge GRAVES in delivering the opinion of the court said: "If they entrench upon the decisions of this court in holding the two instruments to be one contract, as we hold, it necessarily follows that their judgment should be quashed; and it is so ordered." Nothing more is meant by this language, we think, than had been previously stated by the same judge in the opinion in *State ex rel. Kirkwood* v. *Reynolds*,[35] which he wrote for the court, wherein it was held that it is not necessary that the conflict exist with a prior decision of the Su-

35. (1915) 265 Mo. 88.

preme Court where the facts are the same as in the case under review, but that the important question is, has the rule of law applicable to the situation been previously settled by the Supreme Court *contra* to the decision of the court of appeals.

State ex rel. Grear v. *Ellison*,[36] was also decided at the same time that the two preceding cases were decided. In this case the preliminary writ issued to the Kansas City Court of Appeals was quashed on final hearing. The question before the court of appeals arose in a personal injury suit where the plaintiff had been struck by a street car. The action was founded upon negligence of the agents of the street car company in not reversing the power of the car and upon the humanitarian doctrine. The court of appeals had held that there was no negligence of the motorman in not reversing the power, and that the case on its facts was not one for the application of the humanitarian doctrine; that the motorman of the car had the right to assume that the injured man would not thrust himself in a situation of visible danger, and that he did in this case recklessly thrust himself in a situation of obvious danger and that no act of the motorman could have prevented the collision. In stating the humanitarian doctrine the court of appeals used the phrase "reasonable care" in describing defendant's duty, and the plaintiff claimed that the Supreme Court in *Lyons* v. *Metropolitan Railway*[37] had held it was the defendant's duty "to use all reasonable efforts" consistent with the safety of the passengers to avoid a collision. The Supreme Court held that in a great majority of the cases the term "ordinary care" had been used to define the defendant's duty, and that in some cases "reasonable care" had been used, that the two expressions meant the same thing, and that such was the meaning of the above language in *Lyons* v. *Metropolitan Railway*. The court held that the principle of the so-called humanitarian doctrine cases had not been incorrectly applied by the Kansas City Court of Appeals. FARIS, J., delivered the opinion of the Supreme Court and in the course of a discussion of the opinion of the Kansas City Court of

36. (1915) 182 S. W. 961.
37. (1913) 253 Mo. 143.

Appeals he said, "The Constitution does not make us arbiters of their rhetoric and diction." He further held that the court of appeals had followed the previous rulings of the Supreme Court, in holding it was negligence on the part of plaintiff to drive a smoothly shod horse, on a dark morning, over a sleet covered street, on a down grade, at a slow trot, to a point within thirty-five feet of a street car track, and that this holding did not violate the rule previously established by decisions of the Supreme Court that ordinarily one is not required to look out for danger, but pointed out that the rule is not applicable to one approaching a place of danger such as a railroad track. The court also held that the fact that the brakes of the street car were out of order didn't change the situation, that a plaintiff claiming the benefit of the humanitarian rule had no right to demand that perfectly equipped cars be run, but could only complain of the failure of the motorman to exercise ordinary care in handling the particular car, to avoid injuring him after seeing him in a position of danger, or after he might have seen him by the exercise of ordinary care. GRAVES and WALKER, JJ., concurred. BOND, J., concurred in the result. BLAIR and REVELLE, JJ., dissented. WOODSON, C. J., dissented in a separate opinion. WOODSON, C. J., dissented upon the ground that the evidence tended to show that the motorman was negligent in not reversing the power; that the evidence tended to show the brakes were out of repair, and that the plaintiff had the right to assume that they were in good order when approaching the track and that the car could be stopped; and that under proper instructions the case should have been submitted to a jury to determine whether the plaintiff was guilty of contributory negligence and whether the motorman was guilty of negligence in not reversing the power. The case contains no discussion of the power of the court to issue certiorari to a court of appeals or the scope of the inquiry upon the issuance of the preliminary writ of certiorari.

The next case passed upon by the Supreme Court is *State ex rel. Tiffany* v. *Ellison*.[38] In this case the judgment of the

38. (1916) 182 S. W. 996.

Kansas City Court of Appeals was quashed which had affirmed a judgment of the trial court in a suit by Mary Coffey against Tiffany and Howard. The plaintiff had recovered a judgment for $10,000, which was reduced to $7500 by remittitur, for injury to her eyes caused by the alleged negligence of the defendant, Howard, an oculist. It was urged that the court of appeals in affirming the judgment failed to follow controlling decisions of the Supreme Court upon several questions involved. At the outset of the opinion of the Supreme Court delivered by GRAVES, J., in which WOODSON, C. J., FARIS and BLAIR, JJ., concurred, he stated that tho counsel for respondent had vigorously attacked the right of the Supreme Court to issue a writ of certiorari to a court of appeals, in a case wherein the judgment of the court of appeals is at variance with previous controlling decisions of the Supreme Court, yet the Supreme Court was satisfied with the decision it reached in *State ex rel. Curtis* v.*Broaddus*,[39] wherein it was first decided that under the constitution the Supreme Court has power to issue a writ of certiorari in such a case, and with the decision in *State ex rel. Gilman* v. *Robertson*,[40] wherein the same result was reached after hearing arguments by various counsel attacking the power of the Supreme Court to issue these writs. Judge GRAVES concluded that the constitutional authority of the Supreme Court to quash a judgment of a court of appeals in these cases is undoubted, and that while the members of the court may differ as to what will be considered in determining whether a court of appeals has failed to follow the last previous ruling of the Supreme Court, the members of the court "are firmly fixed upon the question of our constitutional authority to act." Judge GRAVES then stated that in disposing of the case the court confined itself to the facts found by the court of appeals in its opinion and that therefore, "it will not be necessary to tread upon any disputed ground." He pointed out that there is a presumption that a court of appeals correctly states all the necessary facts and remarked that such a pre-

39. (1911) 238 Mo. 189.
40. (1915) 264 Mo. 661.

sumption may not represent the true situation in a particular case; and later stated in the course of his opinion that the court of appeals did not state all the important facts in their written opinion in the very case under consideration.

It seems from the opinion of the Supreme Court, in which is quoted an extract from the opinion of the court of appeals, that the plaintiff was a patient of Dr. Tiffany, an oculist, but that she had been treated in Dr. Tiffany's absence by defendant Dr. Howard for Dr. Tiffany. The principal contention in the case was that, over objection at the trial, incompetent testimony of a process server was admitted of statements made by an office girl employed by Dr. Tiffany. These oculists occupied offices in the same building, Dr. Howard having an office down stairs and Dr. Tiffany up stairs. Dr. Tiffany was not in at the time the papers were served on Dr. Howard and the process server testified that after the papers were served Dr. Howard called up stairs (so the opinion of the court of appeals states) to Dr. Tiffany's office girl and asked "if she had a record of the Mary Coffey case" and that the office girl answered that she had and stated that Mary Coffey "was the school teacher that he dropped iodine in her eye and put it out," and that Dr. Howard who was standing by the process server said nothing. The court of appeals held that this evidence was properly admitted by the trial court. The majority of the Supreme Court held that in so holding the court of appeals had failed to follow many controlling decisions of the Supreme Court announced in cases involving the same principle relating to the admission of such testimony and that the failure to deny the statement of the office girl was not an admission of negligence because: "(1) The physical situation of the parties did not demand a denial; (2) the relationship of the girl to the co-defendant, who might have adverse interests, did not demand a denial; (3) the statement, if made (a matter we seriously doubt), was one not called for by the question, and was therefore purely voluntary, and in the highest degree an impertinence; (4) Dr. Howard, even if in a physical situation where a protest might seem to be expected, still had the right to consider his own interests in the controversy, and for

that reason alone decline to reply." Judge GRAVES however pointed out, by quoting at length from the abstract of the record filed in the court of appeals, that the process server was not sure whether the alleged conversation was had by Dr. Howard talking to the girl up the stairway, or thru a speaking tube, and stated that in a very close case it might be very important to know whether the conversation was had thru a speaking tube or whether it was had by one person talking to another who was at the top of a stairway. He stated that he recited the record of the court of appeals for the purpose of demonstrating that the legal presumption that the court states all the necessary facts may not at all times represent the true situation and that he quoted from the record for no other reason.

It was also urged upon the Supreme Court that the facts in the case failed to show that the injury to plaintiff's eyes was due to any act of either of the defendants. As to that matter Judge GRAVES said there was "much substance in the contention," and that he would discuss it "if we had in the court of appeals opinion all of the facts upon the issue," notwithstanding that the majority of the court had concluded that the judgment of the court of appeals would have to be quashed because of the erroneous ruling as to the admission of the testimony of the process server. He stated, that as the case would have to be sent back for a new trial, it was not desirable to express an opinion upon the sufficiency of the evidence in the first trial. He concluded his opinion with the statement that tho the court had confined itself to the facts stated in the opinion of the court of appeals yet it had read the entire record and had its own impression as to the facts therein. BOND, J., dissented because he thought the Supreme Court was without jurisdiction; REVELLE, J., did not sit. WALKER, J., dissented in an opinion in which he concluded that upon certiorari issued to the court of appeals the Supreme Court would limit its review to an examination of the court of appeals' opinion. He stated that the writ is much more limited than the common law writ of certiorari, that the power to issue the writ would

not exist were it not for the constitutional provision, and that the constitutional provision authorizes a review only under limited conditions. He stated that the conditions are limited because a court of appeals is a court of complete appellate jurisdiction in cases where it has jurisdiction and that to hold otherwise would be "to question the integrity of the judgment of the court of appeals." It is difficult to find any limitation in the constitution upon the writ as authorized to be issued to a court of appeals, either expressly or by implication, and to say that a court of appeals is a court of complete or final appellate jurisdiction seems to assume the very point under discussion; and to say that the writ should not be issued because to do so would question the integrity of the judgment of the court of appeals seems neither very exact nor decisive of the question. Failure on the part of a court of appeals to correctly state the facts in a given case may occur from the same reasons which cause a court of appeals to fail to correctly state and apply the rule of law previously announced by the Supreme Court; and if it is necessary to know what the facts actually are in order to determine whether the case has been decided according to the controlling decisions of the Supreme Court no valid reason is seen why the Supreme Court may not determine whether the facts have been correctly stated by a court of appeals. Judge WALKER was of the opinion that the testimony of the process server was admissible according to the controlling decisions of the Supreme Court.

In *State ex rel. Majestic Mfg. Co.* v. *Reynolds*,[41] where the writ was issued to the St. Louis Court of Appeals, the writ was quashed upon full hearing because it was held that there was no previous controlling decision of the Supreme Court construing the statute which provides for guarding and fencing machinery.[42] The court in an opinion by FARIS, J., declared that under the settled decisions of the Supreme Court a court of appeals has jurisdiction in the first instance "to construe authoritatively" any statute, and that the Supreme Court

41. (1916) 186 S. W. 1072.
42. Revised Statutes 1909, § 7828.

has no constitutional authority to interfere even tho in its opinion the construction given the statute by the court of appeals is erroneous. He further pointed out that the Supreme Court does not render judgment in the case brought up upon certiorari but sustains or quashes, as the case may be, what has been done by the court of appeals. He made a distinction between cases so brought up to the Supreme Court and cases transferred to the Supreme Court by a court of appeals and pointed out that the latter cases are dealt with in the Supreme Court as tho they had been taken there by appeal or error.

At the same time the last case was decided the Supreme Court also decided *State ex rel. Thompson* v. *Reynolds.*[43] The St. Louis Court of Appeals had held defendant liable upon an agreement to take stock in a land corporation where he had not signed the articles of association but had authorized an agent to act for him in forming the corporation. The relator upon certiorari claimed that in so holding the court of appeals had not followed a controlling decision of the Supreme Court, viz., *Sedalia, Warsaw & Southern Railway Co.* v. *Wilkerson,*[44] in which the Supreme Court had held defendant who had not signed the articles of association of a railroad corporation was not liable and that a contract attempting to bind him before the company was organized was not obligatory. Judge Blair said no attempt would be made to distinguish the statute construed in the Wilkerson case from the statute under which the land company was organized, but, said he, "we are to determine whether it is the law that one bound by a contract whereby he subscribes a named amount of stock in a business corporation he assists in originating and which he authorizes his agents and attorneys in fact to bring into existence, can after such attorneys in fact and agents have organized the corporation, pursuant to his written authorization so to do, repudiate his contract, abandon his associates, take the benefit of the common enterprise, and escape liability." He concluded that

43. (1916) 186 S. W. 1057.
44. (1884) 83 Mo. 235. On the subject of preliminary stock subscription agreements, see Hudson, *Preliminary Stock Subscription Agreements In Missouri*, 9 Law Series, Missouri Bulletin, p. 3.

according to the sound rule one is bound who, before the corporation is organized, authorizes another to take stock for him in a corporation to be organized. He cited in support of this conclusion a court of appeals decision and an encyclopedia of law, and said as to the *Wilkerson* case: "The authorities referred to lead to the conclusion that, at all events, the decision in the Wilkerson case, in so far as its conflicts with this holding, should be overruled. At least its application should be restricted to the particular facts in judgment in that case."

If the Wilkerson case was in point it would seem that the court of appeals was bound under the constitution to follow it. It is of course not for a court of appeals to decide that the last controlling decision of the Supreme Court is unsound, but if for any reason the last controlling decision of the Supreme Court has not been followed by a court of appeals, and a preliminary writ of certiorari has been issued by the Supreme Court, the Supreme Court should, if it concludes that its controlling decision not followed is unsound, decline to use the power given it by the constitution to quash the judgment of the court of appeals because the judgment of the court of appeals is held correct. To hold that the judgment of a court of appeals should be quashed tho conceded to be sound would be folly. Nothing in the constitution requires the Supreme Court to quash a judgment of a court of appeals which the Supreme Court considers correct. The right to quash is given, but no obligation is put upon the court to use the writ to do injustice. In *State ex rel. Zehnder* v. *Robertson*,[45] supra, Judge Graves, it will be recalled, said upon certiorari that the Supreme Court would not quash a judgment of a court of appeals that had followed the controlling Supreme Court decision and would not re-examine the Supreme Court decision to determine whether it is sound. In that case the court was asked to hold its previous decision wrong and to quash the judgment of a court of appeals that had followed it. It declined to consider whether its last previous ruling was sound. In *State ex rel. Thompson* v. *Reynolds*,[46] supra, the court was in effect asked to determine be-

45. (1914) 262 Mo. 613.
46. Professor Hudson has discussed the effect of this decision in this number of the Law Series, p. 76.

fore quashing the judgment of a court of appeals whether the last controlling decision claimed not to have been applied was correct. It did consider whether the controlling decision was correct and having concluded it was incorrect declined to quash the judgment. In the one case a court of appeals had followed a controlling decision of the Supreme Court, so its decision and judgment was not interfered with, in the other, it had not done so, we may grant, and had thereby violated the constitutional mandate, yet the Supreme Court declined to quash it as it concluded the decision not followed was unsound. In the former case it probably had no power under the constitution to interfere with the judgment of the court of appeals as it had obeyed the constitutional mandate. In the latter case it merely declined to exercise its power where injustice would result. The cases therefore are distinguishable and each is sound and in accord with settled principles governing the use of the extraordinary legal remedies.

At the same time the last case was decided, the Supreme Court also decided *State ex rel. Atchison T. & S. F. Ry. Co.* v. *Ellison*,[47] and quashed the decision and judgment of the Kansas City Court of Appeals because it had not followed previous controlling decisions of the Supreme Court, relating to the power of a circuit court to grant a new trial upon the ground that a verdict for punitive damages is against the weight of the evidence. In a suit for wrongfully ejecting a passenger the jury had returned a verdict for $5 actual damages and $500 punitive damages. The trial court ruled that it would award a new trial unless the plaintiff remitted $400 from the verdict for punitive damages. The court of appeals held the circuit court committed error and that a verdict for punitive damages should not be disturbed as to the amount by the trial court, "except it be so disproportionate to the wrong committed by the defendant as to strike all reasonable men that the jury, in fixing upon the sum found, have acted corruptly, or from passion and prejudice." The Supreme Court held that the court of

47. (1916) 186 S. W. 1075.

appeals applied an improper test as to the power of the circuit court; that there is no difference "between a verdict which is not supported by the evidence as to the amount thereof, and one which is not supported by the evidence at all", and that the action of the trial court will not be disturbed where it sets aside a verdict as excessive, if there is any substantial evidence to support its action, and that in this case there was substantial evidence to support the action of the trial court. The Supreme Court was urged by relator to enter judgment in the case but it held that it had no power to enter judgment, but only authority to quash the judgment and decision of the court of appeals.

And in *State ex rel. Detroit, etc., Ins. Co.* v. *Ellison*,[48] the Supreme Court, upon certiorari, quashed the decision and judgment of the Kansas City Court of Appeals where that court had affirmed a judgment for the plaintiff in an action on a fire insurance policy.[49] The Supreme Court held that the court of appeals failed to follow previous controlling decisions of the Supreme Court in approving two instructions given by the trial court defining the burden of proof as to the defense of willful burning by the insured. No question of certiorari was decided. All concurred, except BOND, J., who dissented.

And in *State ex rel. Scullin* v. *Robertson*,[50] the writ issued to the Springfield Court of Appeals was quashed upon final hearing in an opinion by BLAIR, J., in which all concurred but BOND, J., who concurred in the result only. The question arose in this way: the plaintiff in the circuit court recovered a judgment against a railroad company for injury received at a public crossing. His petition was in three counts; the first alleged failure to give crossing signals of the train's approach, the second was based upon the humanitarian rule, while the third alleged a failure to provide a proper public crossing. All counts were submitted to the jury who returned a verdict for plaintiff on the first count and made no express finding as to the

48. (1916) 187 S. W. 23.
49. *Rice v. Detroit Fire & Marine Ins. Co.* (1915) 176 S. W. 1113.
50. (1916) 187 S. W. 34.

second and third counts. The court of appeals held the evidence showed as to the first count that the plaintiff should not recover as he was, as a matter of law, guilty of contributory negligence.

The court of appeals then reversed the judgment on the first count and remanded the case to the circuit court for retrial. In remanding the case the court said that defendant had induced the trial court to give an erroneous instruction upon the humanitarian rule. Relator upon certiorari contended that the court of appeals should have reversed the judgment and not reversed and remanded the case and that the latter course was the only proper course under repeated rulings of the Supreme Court. It was contended that, according to previous decisions of the Supreme Court, the verdict on the first count was a final bar to further action on the other counts, which were submitted to the jury, upon which no verdict was returned, and that the court of appeals should not have considered whether the instruction was prejudicial to plaintiff as plaintiff had not appealed. The Supreme Court held, first, that the verdict on the first count, according to its previous decisions, was not a bar to further action on the second and third counts and, second, that if the court of appeals concluded that there was evidence as to either count which indicated that a case might be made upon either count on a retrial, it had the power to remand the case to the circuit court for another trial tho the plaintiff, who did not appeal, could not complain of the erroneous instruction as to the second count. Judge BLAIR, for the court, said that a presumption exists that the court of appeals came to the correct conclusion as to whether the record before it showed that the evidence on the second and third counts indicated that the plaintiff might on a retrial adduce sufficient proof to go to the jury. He said the Supreme Court had before it only the facts the court of appeals stated in its opinion as to the first count, but that even if that was all the evidence in the case the court of appeals might have concluded from the whole record that the plaintiff on a retrial would probably be able to adduce additional proof sufficient to entitle

him to go to the jury on the second or third count, and that the settled practice in the Supreme Court is to remand the case for retrial under such circumstances.

This decision seems sound and not contrary to the power of the Supreme Court to examine the record in a court of appeals, if necessary, to determine whether the rule of law as previously announced by the Supreme Court has been applied; tho the written opinion of the court of appeals seems to be not as specific as it might have been on the question whether they remanded the case solely because of the erroneous humanitarian instruction or because they concluded from the whole record evidence might be adduced on a retrial sufficient to take the case to the jury. There is of course a presumption that a court of appeals correctly states and interprets facts and nothing was shown to the Supreme Court, it seems, to the contrary. As to this Judge BLAIR said that, "the fact that the whole evidence is not before *us* does not affect the matter save that it justifies us in presuming the record before the Court of Appeals justified whatever action it took in so far as evidence, rulings on instructions, etc., could justify it."

These are all the cases that have been found reported in the official reports and the Southwestern Reporter up to this time.[51] They have been stated in detail in order that the reader may be better able to draw his own conclusions as this branch of the law is new and somewhat unsettled; however, frequent comments have been made in connection with the statement of the cases and in conclusion the following summary of the law has been attempted:

First, it is now finally settled that under the constitution, by writ of certiorari issued to a court of appeals from the Supreme Court, the Supreme Court has the power to quash a decision and judgment of a court of appeals which fails to follow previous controlling decisions of the Supreme Court.

Second, a previous controlling decision of the Supreme Court exists where the rule of law has been announced by that court, tho the facts to which the rule was applied by the Supreme

51. August 23rd, 1916.

Court may be different from the facts in the case before the court of appeals for decision.

Third, where there is no previous decision of the Supreme Court as to a particular rule of law, courts of appeals, in cases of which they have appellate jurisdiction, have the power to apply the rule of law they conclude is the sound rule and the Supreme Court will not by certiorari decide whether the rule applied is the sound rule.

Fourth, if a court of appeals has failed to follow the last previous ruling of the Supreme Court and the Supreme Court is of the opinion that the last previous ruling not followed is wrong and that the court of appeals has applied the sound rule a Supreme Court may and should decline to quash the judgment and decision of the court of appeals.

Fifth, judgment in the case reviewed upon certiorari will not be rendered by the Supreme Court as the purpose of the writ is to correct excess of jurisdiction; but the decision of the court of appeals may be quashed, if contrary to a previous controlling decision of the Supreme Court, as it is void; or the writ of certiorari will be quashed, if the decision of the court of appeals is not in conflict with a previous decision of the Supreme Court.

Sixth, tho the state of the law is somewhat uncertain, the Supreme Court upon certiorari, in determining whether the rule of its previous decision has been followed, should examine not only the written opinion of a court of appeals but should examine the record upon which the court of appeals decided the case, if necessary, to determine whether the court of appeals in the very case decided applied the rule of law previously announced by the Supreme Court.

Seventh, unless the Supreme Court has authority to examine the record upon which the court of appeals acted actual harmony of the law may not be attained; under the constitution the power given the Supreme Court was not merely power to enforce harmony of the written opinions of the courts but power to force courts of appeals in deciding cases to actually apply the rule of law previously announced by the Supreme Court.

Eighth, the writ of certiorari, as known to the common law, is an adequate remedy to bring up for inspection the record upon which the court of appeals acted, and to enforce actual harmony of decision; and its common law functions have not been in any way restricted by the constitution so as to leave the Supreme Court without an adequate remedy to enforce actual harmony of decision.

Ninth, there are no procedural difficulties as to bringing up the record of a court of appeals to the Supreme Court, as the statutes provide for a printed abstract of the record to be filed in the court of appeals, which also may be used by the Supreme Court, in determining upon what facts the action of the court of appeals is based.

J. P. McBaine