"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

ABOLITION OF WRITS OF ERROR

At common law, a writ of error was an original writ issuing out of the Chancery and would lie, as a matter of right, where a party was aggrieved by a judgment of a common law court of record.1 It was in the nature of a commission to the judges of the superior court to examine the record upon which the judgment was rendered and to affirm or reverse the same, according to law.2 While

1. 2 TIDD, PRACTICE (2d Am. ed. 1828) 1188.
2. Ibid.
appeals have been frequently declared to be of a statutory nature, they were not statutory in origin under the English law. They were employed without statutory authority to review Chancery cases by the House of Lords, and later to review decrees of admiralty and ecclesiastical courts. Appeals were deemed to be a continuation of the case, while writs of error were in the nature of a new action.

Under the present statutory procedure in Missouri, either appeals or writs of error may be used to review cases of either equitable and legal nature. Both are a matter of right under the statutes. The bill of exception procedure has been extended to appeals. The writ of error issues out of the appellate court while the appeal is allowed by the trial court. Though the distinction is not vital for most practical purposes, the appeal is still regarded as a continuation of the suit while the writ of error is a new action. For these reasons appeal is the manner employed in the great majority of cases. The only substantial advantage a writ of error has is that it may be taken out within one year, while the ordinary appeal must be allowed within the term.

The new Civil Code of Missouri, which becomes effective January 1, 1945, simplifies appellate practice as well as other phases of civil procedure. Section 125(a) of the Civil Code provides as follows:

"Writs of error are abolished in civil cases. Review shall be by appeal, which shall constitute a continuation of the proceedings in the trial court and be deemed to present all issues which heretofore have been presented by writ of error and appeal."

This unification of the methods of review has met with general approval by the bar. However, in an unpublished memorandum one member of the bar has asserted that the writ of error can not be abolished under the constitution. The matter is of sufficient interest and importance to warrant a thorough examination.

The principal provision of the Missouri Constitution thought to give rise to doubt as to the constitutionality of the proposal to abolish writs of error is Section 3 of Article VI:

"The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same."

4. Williams, Appellate Practice (1942) 7 Mo. L. Rev. 158, 164-165.
5. Id. at 159.
Practically identical provisions were contained in the constitutions of 1820 and 1865. Other sections deal with matters of appellate review, but, with one exception, they have only incidental bearing on the matter in hand. Writs of error are mentioned in several places in the constitution but not in such a way as to require their continuance as a method of appellate review.

On its face, the above quoted constitutional provision does not seem to preserve any right of appellate review by writ of error or any other manner. It deals only with the powers of the supreme court. The writ of error was an original writ at common law and hence literally comes within the phrase "other original remedial writs," though if that were intended it is strange indeed that the most usual common law writ employed to review decisions of trial courts is not given a place in the specific enumeration of writs. The superintending control of inferior courts mentioned in the first sentence of the Section does not sound like a grant of power to review all actions at law by writ of error, and all suits in equity by appeal. It may or may not authorize judicial rule-making, which power the supreme court has never exercised; but as concerns the issuance of writs it does not seem to have been intended to do any more than authorize the court to hold inferior courts within bounds of their jurisdiction by means of such extraordinary writs as those expressly mentioned in the second sentence.

Turning to the case authorities on the subject, the first decision is contained in the first volume of the Missouri reports. It is Blunt v. Sheppard, which was writ of error to review a judgment at law for $84.00. The question was whether writ of error would lie in view of an act of the first General Assembly which allowed appeals and writs of error only in cases where the amount in dispute was equal to $100.00. The court declared that the constitution gave the right to all people to have their causes reviewed by the supreme court without regard to amount, and therefore the writ of error would lie notwithstanding the limitation of the act. The court seems only concerned with the limitation of the right of review and not with the procedural method. It is fairly implied that any form of review which is a matter of right would have satisfied the court.

At the same term the same result was reached in Graves & Ravenscroft v. Black, which was writ of error to review a judgment for defendant in an action

10. Except that in the earlier constitutions the words "of law" were included at the end of the first sentence.
11. Art. VI, §§ 2, 12, 19, 20, 27; Am. 1884, §§ 3, 5, 6, 7, 8; Am. 1890, § 1; Schedule, § 7.
12. See infra note 18 and text following.
13. Art. VI, §§ 12, 20, 27; Am. 1884, § 5; Schedule, § 7. Provisions dividing appellate jurisdiction between the supreme court and the courts of appeals refer to appeals and writs of error but only in such way as to grant or withhold jurisdiction over these proceedings, if they are otherwise permitted by law.
14. 2 Tidd, PRACTICE (2d Am. ed. 1828) 1188.
15. Consider in this connection MO. CONST. ART. VI, § 12.
16. 1 Mo. 219 (1822).
17. Mo. Laws 1820, c. xxxviii, § 5.
18. 1 Mo. 221 (1822).
at law to recover a $25.00 debt. The opinion in that case showed that the court relied not only on the superintending control Section of the judiciary article, but also, and perhaps principally, upon the Section which provided:

"The supreme court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, under the restrictions and limitations in this constitution provided."

This section, which has an identical counterpart in Section 2 of the judiciary article of the present constitution, seems on its face only to prohibit the supreme court from entertaining original jurisdiction except as directed by the constitution. However, from the standpoint of authority, it must be conceded that the foregoing cases hold to the contrary.

A third early case is that of English v. Mullanphy, 10 which was a writ of error to review a judgment of nonsuit and the refusal to set aside the same in an action of covenant. The court referred to the superintending control Section of the judiciary article and stated that the statute regarding appeals and writs of error neither intended to, nor could, abridge the appellate power of the court. This language follows:

"If no mode in any case has been prescribed, this court would be bound to exert its power, under the Constitution, of controlling the proceedings of inferior courts, in such mode or by such writs, as would have been most convenient and proper; and it doth seem to this court that the writ of error is the most convenient process that could be used."

This was said, of course, before there could be review by appeal in the action at law. The implication seems clear, however, that if review by appeal were provided there would be no objection to an act which prohibited the writ of error.

St. Louis v. Marchel 20 was an appeal by the city from a judgment of acquittal upon the charge of violation of a city ordinance. There being no statutory provision for appeal in such cases, the court dismissed the appeal, saying:

"While the legislature may not properly deprive litigants of their right to have such causes reviewed by this court, as fall within its constitutional jurisdiction (Blunt v. Sheppard, 1 Mo. 219), yet the mode to be pursued in obtaining such review is (speaking generally) a proper subject of legislative regulation. Where, as here, a convenient and efficient one, by a writ of error, is available, no constitutional right of plaintiff is infringed by the omission of the legislature to provide for an appeal."

This is an even stronger intimation that had the statute provided that writ of error would not lie but had allowed an appeal the statute would be valid. The court in this case as in the previous cases is insisting on the substance of the right of review and not the historical and common law distinction as to the method of review. This position is reiterated in the dissenting opinion in the later case of State v. Thayer. 21

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19. 1 Mo. 780 (1827).
20. 99 Mo. 475, 12 S. W. 1050 (1889).
21. 158 Mo. 36, 55, 58 S. W. 12, 15 (1900).
It will be noted that the controverted Section of the new Civil Code fully preserves by appeal the right of review heretofore presented by writ of error and appeal. Furthermore, the very next Section of the bill provides:

"Any party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the Constitution, nor clearly limited in special statutory proceedings, may take his appeal to a court having appellate jurisdiction . . ."

The substantial right of review in ordinary cases at law and in equity is preserved by these two Sections as completely as it is in the existing law. If statutes regarding special proceedings prohibits review thereof, their provisions rather than the provisions of the Civil Code are the ones which deny the right of review. If the right of review exists under the constitution, the contrary special provisions are void, leaving the matter to be governed by the Code, which gives a general right of review.

Surely marked changes have been made in the writ of error since the adoption of the first constitution, and the contention has never been made that the common law procedure of the writ cannot be altered. Does our fundamental law preserve the form of ancient remedies when simpler, better ones continue all the substance attached to former? Assume that our constitution expressly declared that parties should be entitled to review by writ of error, what party could complain of the substitution of the appeal, which gives a simpler, easier and more complete remedy? Viewed in the aspect of the appellate court’s power, what court would insist on its power to issue a writ to acquire appellate jurisdiction, when the statute gave parties the full right of review without obtaining any writ? Bearing in mind that the writ has always been a matter of right, is the power to issue a formal paper emblazoned with the court’s seal necessary either to uphold the court’s constitutional power or its essential dignity?

From the standpoint of reason and good sense these questions call for neither answer nor argument. Our fundamental law should be deemed to deal with substance and not with mere form. The authorities show this. In the celebrated case of State v. Campbell22 the information concluded “against the peace and dignity of State” while the constitution required informations to conclude “against the peace and dignity of the State.” The court held that this constitutional provision was mandatory and on account of omission of “the” reversed the conviction. This decision was subject not only to criticism but to ridicule as well, and thirteen years later the rule was expressly overruled in State v. Adkins23 upon the grounds that the constitution must be construed in the light of its purpose and that an appellant may not complain when he is not prejudiced. It is a well recognized principle that one who is not injured by a statutory provision may not question its constitution-

23. 284 Mo. 680, 225 S. W. 981 (1920) noted in (1921) 22 LAW SERIES, Mo. BULL. 50.
COMMENTS

Surely a person who is given a better method of review has no basis of complaint that another traditional method is taken away.

Thus it seems clear that the legislature may abolish the writ of error provided it retains the appeal, and no one could complain of the change even if our constitution had expressly preserved the writ of error, which it does not. It is interesting to consider further whether the principle enunciated in the early Missouri decisions that the legislature cannot abolish the right of review may be said to be still the law of the state. These cases have not been cited on this point by our appellate courts for many years. Due process does not require any method of review. In more recent decisions, insisting on the observation of the statutory requirements for review, there is possibly the implication that statutes might withhold review altogether, although most of the holdings do not go that far. However, at least one case upholds a statute which forbids appeal from a judgment dissolving a corporation and furthermore interprets the statute as denying writ of error as well. Of course the judgment dissolving a corporation was not one known to the common law and the case may be distinguishable on that ground, but the opinion does not so restrict the ruling and seems to indicate an entire change of viewpoint upon the question of a constitutional right to review.

Five conclusions follow from the foregoing discussion.

1. The constitution does not prevent abolition of writs of error, at least if review by way of appeal is preserved.
2. Even if the constitution did preserve the writ of error, no one could complain of the provision of the new Civil Code which abolishes the writ of error but allows appeal wherever writ of error would lie formerly.
3. Though the early Missouri cases held that there was a constitutional right of review in cases at law and suits in equity, the more recent decisions seem to indicate that the legislature may curtail or entirely abolish all judicial review.
4. Even if the right of review cannot be abolished under the constitution it is effectively preserved by the Civil Code in all cases at law and suits in equity.
5. In the only cases where the Civil Code contemplates absence of the right of review—special statutory proceedings where the right has been clearly limited by the legislature—there is clearly no constitutional right of review.

Thus no constitutional problems are presented by the provisions of the new Civil Code which abolish writs of error.

T. E. A.

24. 11 Am. Jur. 748.
25. See St. Louis v. Marchel, supra note 20; Kansas City v. Bacon, 147 Mo. 259, 311, 48 S. W. 860, 875 (1898); State v. Thayer, supra note 21.