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The Proposed Judicial Article: an Escape from Anachronism

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CONCLUSION

In deciding whether or not a corporate veil should be pierced, it would be well for the courts to pay heed to Ballantine's caveat:

> The problems involved, however, are to be solved not by "disregarding" the corporate personality, but by a study of the just and reasonable limitations upon the exercise of the privilege of separate corporate capacity under particular circumstances in view of its proper use and functions. If the separate corporate capacity is perverted to dishonest uses, as to evade obligations or statutory restrictions, the courts will interpose to avoid the abuse.[30]

Mechanical application of a formula in determining whether or not the corporate veil should be pierced is inherently dangerous. For there is no general formula to fit all cases, such as "alter-ego" or instrumentality. Each situation must be considered by the court on its merits.

As Mr. Justice Cardozo observed in a case involving substantially the same considerations:

> The problem is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it. We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an "alias" or a "dummy." All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation. . . . The logical consistency of a juridicial conception will indeed be sacrificed at times, when the sacrifice is essential to the end that some accepted public-policy may be defended or upheld. This is so, for illustration, though agency in any proper sense is lacking, where the attempted separation between parent and subsidiary will work a fraud upon the law. . . . At such times unity is ascribed to parts which, at least for many purposes, retain an independent life, for the reason that only thus can we overcome a perversion of the privilege to do business in a corporate form.[31]

It may thus be concluded that the use of the entity privilege of separate capacities in Illinois is at all time subject to limitations of an equitable nature to prevent the privilege from being exercised or asserted for illegal, fraudulent, or unfair purposes by those claiming under it; and the courts of law or equity will step in to prevent its abuse as the situation, and justice, may require.

[30] Ballantine, Corporations § 122 (2d Ed., 1946).

[31] Berkey v. Third Avenue Railway Co., 244 N.Y. 84, 155 N.E. 58, 61 (1926).

THE PROPOSED JUDICIAL ARTICLE: AN ESCAPE FROM ANACHRONISM

Much has been written about the proposed judicial amendment to the Illinois Constitution in regard to the election of judges, but only a paucity of writing has been devoted to the ever-increasing need to change the

mandatory appellate jurisdiction of the Supreme court which is included in the proposed amendment.

Presently, between eighty-four and ninety per cent of the cases argued before the Supreme court are heard involuntarily, that is, as a matter of right to the appellant.[1] As a direct consequence of this fact, the power of the Supreme court to use its discretion in selecting cases for review is vastly curtailed.

The proposed judicial amendment, if adopted, will remedy the present situation, because it will only require the Supreme court to hear two classes of cases on appeal—namely, capital cases and constitutional questions. As to all other cases, the Supreme court will determine on its own, whether leave to appeal will be granted.[2] Therefore, if the present amendment is adopted, the high court will obtain the flexibility that it is so patently lacking.

EFFORTS TO AMEND

There has been discussion of the need for a new judicial article since 1905 and several efforts have been made to amend the article.[3] In 1922, for example, the constitutional convention included in its draft of a proposed constitution a completely new judicial article. Although that constitution failed of adoption by the people, it is interesting to note that it failed *not* because of any wide disagreement over the need for a revised judicial article but because the only choice was to accept or reject the proposed constitution *in toto*.

The current effort to amend the Judicial Article started in 1951. The 1951 General Assembly created an interim legislative commission to report to the 1953 session. This commission, working in conjunction with a joint committee appointed by the Illinois State Bar Association and the

[1] Cedarquist, The Continuing Need for Judicial Reform in Illinois, 4 De Paul L. Rev. 153, 154 (1955).

[2] Proposed Judicial Article of the Constitution of the State of Illinois. The power to review decisions of the circuit courts will be vested in an Appellate court and a Supreme court. Most appeals will be taken to the Appellate court, but in any case involving a question arising under the Federal or State Constitution and any capital case resulting in the imposition of a sentence upon the accused, appeal will be taken from the circuit court directly to the Supreme court. The Supreme court will have exclusive authority to permit direct appeals in other types of cases. In general, litigants will be entitled to only one appeal. The Supreme court will have power, however, to review decisions of the Appellate court, and when a constitutional question arises for the first time in and as a result of the action of the Appellate court, appeal may be taken to the Supreme court as a matter of right. The same will be true whenever the Appellate court certifies that its decision involves a question of such importance that it ought to be decided by the Supreme court. In all other cases decided by the Appellate court, it will be up to the Supreme court to decide whether a second appeal should be allowed.

[3] Cedarquist, The Continuing Need for Judicial Reform in Illinois, 4 De Paul L. Rev. 153, 165 (1955).

Chicago Bar Association, produced a Judicial Article which was proposed to the 1953 General Assembly. Although the proposal was defeated on the floor of the House, it met with popular approval among the people of Illinois. The joint committee was reappointed and submitted a new draft of the proposal to the 1955 General Assembly. This proposal, too, was defeated.

This year, again, a revised Judicial Article to supersede present Article VI of the state constitution will be proposed and, if approved by the legislature, will be submitted to the voters of the state at the general election in November, 1958. If then adopted, it will become effective January 1, 1961.

The purpose of this comment is to underscore the dire need for that portion of the Proposed Judicial Article dealing with the appellate jurisdiction of the Supreme court in cases where direct appeal lies as a matter of right.

BASES FOR MANDATORY DIRECT APPEALS

The appellate as well as the original jurisdiction of the Supreme court is defined by the Illinois Constitution.[4] Original jurisdiction is conferred in cases relating to the revenue, mandamus, and habeas corpus. Appellate jurisdiction is given in all other cases.

The legislature has the power to enlarge, diminish or abolish the appellate jurisdiction of the Supreme court[5] except that by the constitution, litigants are guaranteed the right of *ultimate* appeal to the Supreme court in all criminal cases and cases in which a franchise, freehold, or the validity of a statute is involved.[6]

It is not by express provision of the constitution but by an enactment of the legislature that any appeal goes *directly* from the trial court to the Supreme court. At present, the right of direct appeal has been given litigants by the legislature in the following cases:

(1) Where a franchise, or freehold, or the validity of a statute, or a construction of the constitution is involved, in all cases relating to revenue, or in which the state is interested as a party or otherwise, and cases in which the validity of a municipal ordinance or county zoning ordinance or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires.[7]

[4] Ill. Const. Art. 6, § 2.

[5] Young v. Stearns, 91 Ill. 221 (1878).

[6] Ill. Const. Art. 6, § 11. In such cases appeals and writs of error must go to the Supreme court. L.S. & M.S. Ry. Co. v. Richards, 152 Ill 59, 38 N.E. 773 (1894). In all other cases the appellate jurisdiction of the Supreme court is entirely dependent upon statute. Northern Trust Co. v. Chicago Rys. Co., 318 Ill. 402, 149 N.E. 422 (1925).

[7] Ill. Rev. Stat. (1955) c. 110, § 75.

(2) Numerous miscellaneous cases covered by specific statutory provisions.[8]

Direct appeal in criminal cases is provided for in the Criminal Code and includes all cases above the grade of misdemeanors.[9]

CASE LAW REQUIREMENTS FOR STANDING ON DIRECT APPEAL

It will be advantageous at this point to examine the case law requirements imposed by the Supreme court to give a litigant standing on direct appeal in four representative types of cases. These cases comprise the great bulk of those heard by the Supreme court on direct appeal, namely, freehold, franchise, revenue, and criminal cases.

A. FREEHOLDS

When the framers of the Illinois Constitution provided for an appeal as a matter of right whenever a freehold is involved, they neglected to define a freehold. Perhaps it was believed that the term was self-explanatory or, as is usually the case, it was decided to let the courts prescribe the standard. Whatever the reason may have been, the result is that the Supreme court has been burdened with the problem of determining when a freehold is involved and, as a consequence, has set up certain arbitrary standards which, through judicial precedent, have become the law.

As respects the appellate jurisdiction of the Supreme court, a freehold is defined as an estate in real property of inheritance, or of life, or the term by which it is held.[10] Having decided at an early date that such a definition of a freehold was not specific enough to be used as a determinant upon which the Supreme court should invoke its appellate jurisdiction, a subsequent line of cases enunciated a set of rules that have been tenaciously adhered to in determining when a freehold is involved. The rules are:

(1) The title to realty must be put in issue by the pleadings and also in the questions to be determined upon review by the Supreme court.[11]

(2) The freehold must be directly, and not incidentally, contingently and collaterally involved.[12]

(3) The necessary result of the judgment must be that one party gains or the other party loses a freehold estate.[13]

[8] Consult Fitzpatrick, The Reviewing Courts of Illinois, 1952 Ill. L. Forum 1, 7, at note 46 for a collection of such statutory provisions.

[9] Ill. Rev. Stat. (1955) c. 38, § 780½.

[10] Gage v. Scales, 100 Ill. 218 (1881).

[11] Liberty Nat. Bank v. McCreary, 8 Ill. 2d 250, 133 N.E. 2d 14 (1956); Leverich v. Roy, 402 Ill. 71, 83 N.E .2d 335 (1949).

[12] McCarthy v. McCarthy, 6 Ill. 2d 52, 126 N.E. 2d 633 (1955); Petru v. Petru, 2 Ill. 2d 148, 116 N.E. 2d 878 (1954).

[13] Nelson v. McCabe Development Co., 408 Ill. 263, 96 N.E. 2d 576 (1951); Peters v. Peters, 405 Ill. 507, 91 N.E. 2d 438 (1950).

The preceding rules have the virtue of being definite, but notwithstanding such standards, any attempt to *justify* the continuance of direct appeal as a matter of right merely because a freehold is involved is unwarranted. In the first place, when the constitution was adopted, Illinois was substantially an agrarian state in which the common denominator of economic activity was land, and hence the legal rights to land required a determination by the Supreme court. Today, however, the economic make-up of Illinois is such that a leasehold interest, for example, is as important as a freehold. The same can be said with regard to ownership of securities. It follows, therefore, that the right to appeal a freehold question to the exclusion of other commercial interests is anachronistic.

Secondly, the procedural law has been adversely affected by virtue of the right to direct appeal. To illustrate this proposition: Where there is a joinder of causes of action or merely a two-count complaint, if one of the issues is reviewable on direct appeal to the Supreme court and the other issue is reviewable on appeal to the Appellate court only, the proper procedure in such instances requires that the trial court preserve the identity of each so that each will, on appeal, be taken to the court having jurisdiction thereof.[14] Such a rule has only led to duplicity. Two reviewing courts must hear the different aspects of one case. Printers' fees are doubled. Manpower is wasted. It is true that the Civil Practice Act was intended to expedite the business of the court.[15] But by allowing joinder of causes of action the Civil Practice Act has actually created an additional problem with regard to direct appeal and thereby sacrificed the expediency intended.

One of the strongest arguments in favor of curtailing the right of direct review is that mandatory review has had the effect of forcing the court to unduly concern itself with writing negative opinions.[16] Even a cursory glance at recent volumes of the Illinois Reports will reveal the disproportionate amount of time consumed in stating why the court has no jurisdiction under a particular set of facts.[17] Such an absurdity becomes apparent upon consideration of the fact that only ten to fifteen per cent of the cases handled by the Supreme court are on leave to appeal, whereas seventy-five to eighty-five per cent of the cases decided are mandatory.[18] It follows that since the function of a supreme court is to act as an overseer

[14] Borman v. Oetzell, 382 Ill. 110, 115, 46 N.E. 2d 914, 918 (1943).

[15] Myers v. Myers, 341 Ill. App. 406, 409 (1950).

[16] Liberty Nat. Bank v. McCreary, 8 Ill. 2d 250, 133 N.E. 2d 14 (1956); Romain v. Lambros, 7 Ill. 2d 206, 129 N.E. 2d 739 (1955).

[17] Central Standard Life Ins. Co. v. Davis, 7 Ill. 2d 266, 130 N.E. 2d 169 (1955); McCarthy v. McCarthy, 6 Ill. 2d 52, 126 N.E. 2d 633 (1955).

[18] A Study of the Illinois Supreme Court, 15 Univ. Chi. L. Rev. 107, 170 (1947).

and solve the problems in the unsettled areas of the law,[19] this task is consistently being frustrated by the continuation of direct appeal.

B. FRANCHISES

The term "franchise" as employed in section seventy-five of the Civil Practice Act authorizing direct appeals to the Supreme court refers to a special privilege conferred upon an individual or a corporation by the government, which does not belong to citizens generally, by common right.[20] The contemporary usage of franchise as herein expressed is merely a reiteration of the definition given by Blackstone, ". . . a royal privilege or branch of the King's prerogative subsisting in the hands of the subject, and being derived from the crown must arise from the King's grant."[21]

In *Morgan v. Louisiana*,[22] the court aptly remarked that much confusion of thought has arisen from attaching a vague and undefined meaning to the term "franchise." Once again, as a result of a "vague and undefined meaning," the Illinois high court proclaimed that certain standards must be complied with in order to invoke its appellate jurisdiction.[23]

It appears that the criterion generally required in order for a franchise to be involved is that the suit must be brought directly to determine right or title to franchise, and appeal is not authorized if issues involve only the construction, but not the existence, of the franchise.[24] In other words, there must be a question as to the validity or existence of a corporation or franchise or right to exercise privileges of a franchise.[25] In conclusion, one must assail the existence and not merely the construction of a franchise, in order to warrant direct appeal.[26]

C. REVENUE

In order to give the Supreme court jurisdiction of a direct appeal on the ground that the revenue is involved, the revenue must be involved *directly*, and not *incidentally* or *remotely*. The question of revenue can be at issue only when some recognized authority of the state or some of its political subdivisions authorized by law to assess or collect taxes are attempting to

19 Interview with Justice Walter Schaffer of the Illinois Supreme Court.

20 Trico School Dist. v. School Trustees, 6 Ill. 2d 323, 324, 129 N.E. 2d 158, 159 (1955); Community School Dist. v. Trustees, 6 Ill. 2d 320, 322, 128 N.E. 2d 898, 900 (1955).

21 2 Blackstone's Com. 37 (1767).

22 3 Otto (U.S.) 217 (1876).

23 Board of Trade v. The People, 91 Ill. 80 (1878).

24 Chicago Bar Ass'n. v. Kellogg, 401 Ill. 275, 281, 82 N.E. 2d 639, 643 (1948).

25 People v. Union Trust Bank, 406 Ill. 208, 210, 92 N.E. 2d 663, 665 (1950); People v. Meyers, 276 Ill. 260, 261, 114 N.E. 584, 585 (1916).

26 Rostad v. Chicago Suburban Water & Light Co., 211 Ill. 248, 249, 71 N.E. 978, 979 (1904).

proceed under the law and questions arise between them and those from whom the taxes are demanded.[27] In cases involving the revenue, the Supreme court limits its decision to the objections made.[28]

Among the recent cases where direct appeal was allowed on the ground that they involved the revenue are: a taxpayer's appeal of a personal property tax judgment,[29] an appeal by a dairy from a decree restraining the state revenue department and its directors from assessing a retailer's occupation tax against it,[30] and a suit brought by taxpayers to enjoin the Secretary of State and the State Treasurer from transferring truck license fees paid to them to a state road fund and for return of the fees.[31]

On the other hand, direct appeal has been held *not* to lie where the controversy is merely over the question of *what* municipality shall have the money derived from the revenue and there is no question as to whether the money *is* revenue or not.[32]

Early cases construed the word "revenue" to embrace all taxes and assessments imposed by any public authority, that it was not confined to State taxes or public revenue, but embraced *all* revenue, whether it may be State, county or city taxes, and that it includes special assessments made by a city for any public improvement.[33] That proposition is still considered good law today.[34]

Although none of the cases or other authorities examined stated the *specific* justification for the right of direct appeal where revenue is involved, it is submitted that the legislature in creating the provision deemed it a necessity that the sovereign power remain financially sound. This, in turn, seemed to require the practice of adjudicating all cases involving the revenue forthwith.

D. CRIMINAL APPEALS

The Criminal Code provides that "[a]ppeals . . . in all criminal cases . . . above the grade of misdemeanors shall be taken directly to the Supreme Court."[35]

The provision is obviously too clear to create serious problems of judicial interpretation or construction. A "felony" is an offense punishable by

[27] People v. Smith, 413 Ill. 382, 109 N.E. 2d 196 (1952).

[28] People v. Cairo & T.R. Co., 319 Ill. 118, 149 N.E. 824 (1925).

[29] People v. Jennings, 3 Ill. 2d 125, 119 N.E. 2d 781 (1954).

[30] Bowman Dairy Co. v. Lyons, 2 Ill. 2d 625, 120 N.E. 2d 1 (1954).

[31] Agricultural Transp. Ass'n v. Carpentier, 2 Ill. 2d 19, 116 N.E. 2d 863 (1953).

[32] People v. Holten, 259 Ill. 219, 102 N.E. 171 (1913).

[33] People ex. rel. Johnson v. Springer, 106 Ill. 542 (1883); Potwin v. Johnson, 106 Ill. 532 (1883).

[34] Lackey v. Pulaski Drainage Dist., 4 Ill. 2d 72, 122 N.E. 2d 257 (1954).

[35] Ill. Rev. Stat. (1955) c. 38, § 780½.

death or imprisonment in the penitentiary and every other offense is a "misdemeanor."[36]

The apparent justification for this provision is a desire, on the part of the legislature, to provide for prompt and competent final adjudication where one's rights to life and freedom are at stake.

CONCLUSION

The need for action is clear. The Supreme Court of Illinois must be relieved of its burden of compulsory appeal cases. Only then can it begin to function in a manner commensurate with its status as the highest tribunal of one of the country's leading commercial states. Given more discretion in the selection of cases it will review, the court will be free to take those cases that involve significant issues of law and matters of great public interest. It will be free to bypass cases involving settled propositions of law which fit into classifications deemed worthy of privileged consideration by the framers of a constitution now largely outmoded by intervening decades of economic, social and political change. The proposed Judicial Article, if adopted, will afford the Supreme court a much-needed increase of discretionary power.

[36] People v. O'Connor, 414 Ill. 51, 110 N.E. 2d 209 (1953).

IMPEACHMENT BY PRIOR CONVICTION PENDING APPEAL

That evidence of a prior criminal conviction is admissible to impeach a witness would seem to be a well-settled proposition of law. Yet an aspect of this proposition has arisen four times, all quite recently, in the federal system, and the decisions have demonstrated a need to go further into the matter. Specifically, the problem situation arises in this way: W, a witness, is questioned by the opposition about a previous criminal conviction, in an attempted impeachment. Objection is made, on the ground that the conviction is being appealed. Query: has W been convicted within the meaning of the proposition stated above?

Reference to the standard texts discloses no discussion of this problem although it has arisen many times in various states. That the problem is closely circumscribed and limited in its application must be admitted. Its implications, however, could become of prime importance in any number of ways.

To take but one example, suppose a situation in which a candidate for public office has been convicted of a crime, which conviction carries with it the penalty of forfeiture of civil rights. Suppose further that the conviction is being appealed at the time of the election. Query: has the conviction, i.e. the forfeiture of civil rights, taken place, or will it be held in