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# The Illinois appellate system procedure and practice

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ILLINOIS WESLEYAN UNIVERSITY

THE ILLINOIS APPELLATE SYSTEM

PROCEDURE AND PRACTICE

SPECIAL COLLECTIONS

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POLITICAL SCIENCE 402  
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## PREFACE

The appellate procedure and practice which characterize the Illinois judicial system comprise an awesome body of factual material which is, I am certain, impossible to present in one volume no matter how bulky it may be. This volume does not attempt to describe the whole of that procedure. It also is not a guide suitable for legal reference. It is, however, a *How to* general description of the superficial workings of the Illinois appellate system. In most cases, procedure is the only topic of discussion. What substantive information there is contained in the discussion exists to shed light on how the practice and procedure is utilized to effect justice.

One qualification needs to be made in regard to the references and court<sup>case</sup> citations. In the endnotes, abbreviations have been employed when statute compilations and commentaries have been used very often. Thus, the following abbreviations have been employed: I.R.S. for Illinois Revised Statutes, 1971; I.L.P. for Illinois Law and Practice; and S.H.A. for Smith-Hurd Annotated Statutes. For the court cases, these abbreviations are used: Ill. for Illinois Reports; Ill.App. for Illinois Appellate Reports; and N.E. for the Northeastern Reporter.

Finally, it should be understood that this investigation is concerned with appellate procedure at all levels. The fact that the vast majority of this work involves procedure at the first appellate level should not imply that the supreme court has been slighted. The section dealing with the second level of review is short because much of the procedure outlined there is identical to that at the first level. Thus, a duplication of effort has been avoided.

## CHAPTER I

### INTRODUCTION

In the analysis of any social process, it is first necessary to identify certain factors which delineate and define the scope of the examination. In this case, the civil, procedural, and appellate aspects of the law must be differentiated from the criminal, substantive, and original components. Then, the context of the subject in terms of origin, development, and contemporary status can be discussed. Finally, the bulk of this investigation can deal with the actual procedural structure of the procedural process.

The concept of civil law can be distinguished from criminal law insofar as the former concerns itself with disputes arising between persons acting in their private capacity, while the latter determines the existence of a public wrong.<sup>1</sup> Lawsuits are derived in both areas, although civil lawsuits comprise the vast majority of all litigious matters. A further limiting factor in this inquiry relates to an emphasis on procedural civil law rather than its substantive element. Beginning with the basic concept of justice that rights exist, wrongs occur which violate those rights, and that such wrongs should be remedied,<sup>2</sup> substantive law can be defined according to the content of those rights, wrongs, and remedies; procedural law emphasizes the method or process of using the substan-



tive law to effect justice. Put simply, procedural civil law attunes itself to the problem of how disputes between persons acting in their private capacity are adjudicated.

Appellate actions may be distinguished from original actions in ~~that~~ the former acts upon a judicial determination already made by the latter. The scope of such proceedings might include review of the findings of fact, of the applicable law, of the application of that law by the courts, and the application of common law rules.<sup>3</sup> The appellate proceeding deals, then, with errors in the determination of fact and law.

Within these limits, therefore, the origins, development, and present status of appellate procedure as it has been institutionalized in Illinois can be examined. A detailed inquiry into the specific procedures and practice connected with the appeal can then be pursued. Finally, an evaluation of the Illinois appellate procedure shall be attempted in order to identify the advances that have been made and the changes that are necessary for the future.

ENDNOTES

1. George G. Coughlin, Your Introduction to Law (New York: Barnes & Noble, Inc., 1972), p. 15.
2. Ibid., p. 22.
3. Roscoe Pound, Appellate Procedure in Civil Cases (Boston: Little, Brown and Company, 1941), p. 3.

PART I

THE ORIGIN AND DEVELOPMENT OF THE APPEAL

## CHAPTER II

### JUSTICE AND THE ANCIENTS: INSTITUTIONALIZING THE APPEAL

Justice, sir, is the great interest of man on earth.  
--Daniel Webster

To declare that justice is the principal pursuit of man on this earth is, at once, to say something terribly significant about the nature of justice and to beg the question. Webster's statement is a capsule description not only of the world of the nineteenth century, but of virtually every major civilization whose ideas have been preserved for us in the pages of history. Unfortunately, this identification of man's "great interest" fails to confront the basic issue of the composition of justice or, even more importantly, the structural framework requisite to infuse this metaphysical monstrosity with the breath of life.

The nature of justice does not really present an indefinable obstacle. Historically, there has been a striking unanimity of opinion about what justice is; culture after culture, empire after empire, men have echoed Cicero and Plato that justice is giving everyman his due.<sup>1</sup> It is the other variable in the equation of man's all-consuming quest--the structural, institutional, applicatory "how" of the matter--that has resulted in such a multiplicity of judicial systems.

That is, the process of moving from general to specific or from concept to code has been a painful but progressive one, dependent upon environmental conditions, contemporary events, and prevailing philosophical and religious attitudes. Our judicial system with its peculiar institutions--particularly, in this instance, the appellate process--is, therefore, the evolutionary result of various schemes to satisfy "the great interest of man" in fact as well as in theory.

In Two Treatises of Government, John Locke described the basic conflict between men that resulted in the development of institutions to insure that justice be made real. Without the benefit of the institutions of civil society, each individual bore the burden of enforcing the law and obtaining justice. This "state of nature" degenerated into a "state of war" wherein force could act without regard to justice.<sup>2</sup> Locke, therefore, theorized that the civil instrument of the third-party judge was formulated out of necessity:

To avoid the state of war (wherein there is no appeal but to heaven, wherein every the least difference is apt to end, where there is no authority to decide between contenders) is one great reason of men's putting themselves into civil society, and quitting the state of nature.<sup>3</sup>

Justice, then, demanded the formation of an appropriate civil institution.

A similar evolutionary trend was manifested by the ancient Hebrews. In the Israelite's pre-tribal state of nature, Sarah could demand of Abraham that their dispute be offered up to Yahweh, saying "The Lord judge between thee and me."<sup>4</sup>

By the time of the division into twelve tribes, however, the Hebrews had instituted a third-party judge<sup>5</sup> (not to be confused with their political leaders of the time, also called Judges).

Throughout such an evolution of judicial institutions, it was obvious that the mere interposition of a third party to adjudicate disputes would not necessarily guarantee that the tenets of justice would be satisfied. This intuition or knowledge of human nature led the Roman emperor Justinian to declare in the Digests that "'appeals are necessary to correct the unfairness or unskillfulness of those who judge.'"<sup>6</sup> Historically, others have concurred, though they may have passed a less harsh judgment on the integrity or competence of judicial man:

Culture requires only that a legal certainty shall arise, not that it shall be achieved at the first attempt. At this point, the institution of the appeal developed. . .<sup>7</sup>

Functionally, the appeal has been viewed not only as a necessary corrective device, but as a preventive measure. Opportunity for review "moves tribunals to keep to the best of their ability in the straight path."<sup>8</sup> Regardless of the motivations that might be ascribed to their actions, it is obvious that ancient civilizations recognized the need for some form of appellate process.

The actual innovation of detailed appellate procedure has traditionally been attributed to the Romans, yet it certainly was known and practiced in classical Greek society.

Plato outlined a three-tiered judicial system for his theoretical state of Magnesia.<sup>9</sup> In The Politics, Aristotle critiqued the plan of Hippodanus to set up a final court of appeal for all cases shown prima facie to have been badly judged.<sup>10</sup> Bits and pieces of these hypothetical constructions were actually incorporated into the Athenian polity under the Solonian constitution. A two-level arrangement existed wherein "elected magistrates had the power to render judgments, but their verdicts could be appealed to a popular court, the Heliaea."<sup>11</sup> Thus, a viable, functioning appellate court system existed in classical Greek civilization.

If the Romans might not claim full credit for the institutional innovation of the appeal, they certainly must be recognized for providing its skeletal structure with form and substance of a remarkably "modern" quality. Though the right of appeal did not exist in the republic, under the empire it soon "became a regular institution under which the higher court not only quashed the decision of the lower, but substituted its own."<sup>12</sup> The Roman mode of appeal, then, presented the cause for a trial de novo,<sup>13</sup> i.e., a complete rejudication of the issues in which points or facts not considered at the first trial could be raised on appeal.<sup>14</sup> The main contribution of Roman law to appellate procedure, however, concerned the four specific methods of reviewing a case: the record could be inspected for error; the entire cause could be heard by a higher tribunal; the essential point of

law could be referred to the highest court; or the cause could be reheard in the original court.<sup>15</sup> Regardless of the method employed, notice of appeal had to be given within a few days of the entry of the original judgment.

Thus, the pursuit of justice drove man into civil society. As civilization reached new plateaus, new methods of attaining this great interest of man were realized. One dimension of this progression was the institutionalization of the appeal as a necessary component of any system claiming to satisfy man's desire for justice.



## ENDNOTES

1. Plato, The Republic, trans. by Francis MacDonald Cornford (New York: Oxford University Press, 1971), p. 9.
2. William Ebenstein, ed., Great Political Thinkers: Plato to the Present (4th ed.; New York: Holt, Rinehart and Winston, Inc., 1969), p. 405.
3. Ibid., p. 406.
4. Genesis 16:5.
5. Martin Noth, The History of Israel (New York: Harper & Brothers, 1960), p. 101.
6. Roscoe Pound, Appellate Procedure in Civil Cases (Boston: Little, Brown and Company, 1941), p. 3.
7. Josef Kohler, Philosophy of Law (New York: Rothman Reprints, Inc., 1969), p. 246.
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10. Aristotle, The Politics, trans. by T. A. Sinclair (Baltimore: Penguin Books, Inc., 1971), p. 78.
11. Robert J. Bonner, Aspects of Athenian Democracy (Berkeley: University of California Press, 1933), p. 30.
12. H. F. Jolowicz, Historical Introduction to the Study of Roman Law (Cambridge: University Press, 1967), p. 410.
13. Roscoe Pound, Jurisprudence (5 vols.; St. Paul: West Publishing Company, 1959), V, 606.
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15. Pound, Appellate Procedure in Civil Cases, op. cit., p., 9.

## CHAPTER III

### THE DIFFUSION AND DIFFERENTIATION OF THE APPELLATE PROCESS

The demise of the Roman empire did not destroy the institution of the appeal although it did contribute to the fragmentation of its form. While the Roman definition continued to function through the Church, the nature of the secular application of the appeal underwent a significant transformation. In its early feudal, ecclesiastical, and later Anglo-Norman forms, the formerly monolithic appeal became an instrument with many variations.

During the middle ages, secular methods of adjudication such as combat often precluded any reference to a higher tribunal. Those cases, however, which were disposed of by a judge or group of men familiar with the facts (a quasi-jury of inquest or inquisitio<sup>1</sup>) were appealable, usually to a royal court. In such instances, recourse consisted of "suing the judge" or the jury for deliberate false judgment or "attaint."<sup>2</sup> Under the laws of the Carolingian empire, however, no redress was available at all for "errors committed in good faith."<sup>3</sup>

It must not be supposed that the Roman mode of appeal simply disappeared. Rather, it survived through an elaborate system of ecclesiastical courts and canon law. The Church possessed what might today be termed a unified court system

with a graduated hierarchy of ecclesiastical courts beginning with the local archdeacons, proceeding through the courts of the bishops and the archbishops, and ending in the court of last resort--that of the papacy.<sup>4</sup> Appellate hearings were after the nature of a trial de novo.<sup>5</sup> This judicial network functioned effectively despite the dispersion of its courts over the entire European continent.

Two distinct procedural appellate strains, therefore, flourished during the early middle ages. Both the proper Romano-canonical form and its haphazard, secular bastard offspring influenced the development of the appellate system which has most influenced our own--that of England. Of the two forms, it would seem that the secular version held the greatest initial sway over the English system:

Nothing that was, or could properly be, called an appeal from court to court was known to our common law. This was so until the 'fusion' of common law with equity in the year 1875.<sup>6</sup>

That is, the early secular and later English institutions associated with the concept of the appeal were scarcely deserving of that appellation. This was due, in part, to the connotation of the modern sense of the "appeal". In its native Anglo-Norman sense, an appellare was an original action of bringing a felon to justice;<sup>7</sup> in such a criminal action, an appeal was made to the king to invoke his peace or a public accusation was made which would ultimately be settled by battle,<sup>8</sup>

Though it is difficult to say when the meaning of the word "appeal" changed, it is known that several processes of an appellate nature were available to Anglo-Norman litigants in

civil actions. Generally, all such processes were perfected through the instrument of a writ, i.e., "a letter addressed by the king to a sheriff or other officer commanding steps to be taken to determine a controversy or secure a right."<sup>9</sup> In the thirteenth century there were two principal types of civil appellate writs. A writ of attain<sup>10</sup> (also known as a writ odio et atia) could be purchased to inquire whether the verdict had been rendered prejudicially; this was particularly applicable in jury trials wherein the original twelve jurors were "accused" before a jury of twenty-four which could reverse the verdict and substitute their own.<sup>11</sup> In such an instance, the twelve jurors might be severely punished. The writ of deceit enabled the investigation of fraud or collusion in judgments concerning land tenancy.<sup>12</sup> That type of action was, of course, very important in the land-oriented economy of the late middle ages.

In the thirteenth century, such writs could be prosecuted in local courts when the king sent out his itinerant justices. More often, however, these causes were heard at one of three central courts: the Court of Exchequer, the Court of Common Pleas, and the Court of King's Bench. The suggested jurisdictional differentiations were financial, civil, and criminal, respectively. In practice, these distinctions rarely held, and the courts competed for business. The Court of Common Pleas could call up cases to review on their own by a quasi-certiorari instrument, the writ of pone.<sup>13</sup> Yet, the King's Bench could also hear such appeals, and it also decided

questions of points of law for the Common Pleas.<sup>14</sup> Beyond this, the king and parliament often acted as final courts of appeal.

Such a description demonstrates the utterly confused and unstructured nature of the appellate process in late medieval England. The court system could hardly be called unified, and procedure emphasized technique rather than justice. Strangely, this jurisprudential nightmare did not noticeably improve during the next few centuries. The three central courts continued to handle and compete for the bulk of the appeals. The grounds for appeal from local courts remained few and, whatever the case, limited to points of law.<sup>15</sup> However, there was no shortage of routes of review. Pound describes eight separate procedures involving no less than six different courts.<sup>16</sup> Also, new instruments were devised to facilitate these processes. The writ of error allowed review for "some supposed mistake in the proceedings of a court of record."<sup>17</sup> Unfortunately, the seemingly general nature of the writ did not afford an appellant any advantage over the older thirteenth century methods. Indeed, the formal and technical nature of this legal process had, if anything, the opposite effect:

Review of proceedings and judgments at law by writ of error in ~~the~~ eighteenth century England was cumbersome, dilatory, expensive, extremely technical, and tied to the formal record so as often to review anything but the case itself as it could be gathered from the pleadings.<sup>18</sup>

Thus, only in equity proceedings could the term "appeal" be applied in its purest sense. In such suits, litigants were not required to place an exception in the record during the

trial in order to raise a point for review as they were in actions at law utilizing the writ of error. Additionally, such equity actions reviewed the cause in its entirety.

This was, essentially, the "entailed inheritance" which, without sufficient "probate", was left to an heir only barely of age--America. Indeed, the gift originally was not bestowed but imposed, quite naturally, on the land in its colonial infancy. Thus, the technicalities of the writ of error; the separate appellate procedures at law and in equity; and the unsolvable jumble of English courts met head to head with the new American mind's preference for neo-classical structure, form, and order. The final result was an American interpretation of how to best satisfy "the great interest of man on earth."

## ENDNOTES

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2. Marc Bloch, Feudal Society (Chicago: University of Chicago Press, 1961), p. 373.
3. Ibid.
4. Sir Frederick Pollock and Frederic William Maitland, The History of English Law Before the Time of Edward I (2nd ed.; 2 Vols.; Cambridge: University Press, 1968), II, 664.
5. Roscoe Pound, Appellate Procedure in Civil Cases (Boston: Little, Brown and Company, 1941), p. 10.
6. Pollock and Maitland, op. cit., p. 664.
7. Ibid., p. 587.
8. Max Radin, Anglo-American Legal History (St. Paul: West Publishing Company, 1936), p. 226.
9. Ibid., p. 179.
10. Sir William Blackstone, Commentaries on the Laws of England (18th London ed.; 2 Vols.; 4 Books; Philadelphia: Collins and Hannay; Collins and Co.; N. and J. White; and Griggs and Elliot, 1832), II, III, 311.
11. Ibid.
12. Ibid.
13. Radin, op. cit., p. 94.
14. Colin Rhys Lovell, English Constitutional and Legal History (New York: Oxford University Press, 1962), p. 145.
15. Ibid., p. 213.
16. Pound, Appellate Procedure in Civil Cases, op. cit., pp. 44-67.
17. Blackstone, op. cit., p. 311.

18. Roscoe Pound, Jurisprudence (5 vols.; St. Paul: West Publishing Company, 1959), V, 625.



## CHAPTER IV

### AN AMERICAN ANALOG:

#### THE INSTITUTION OF THE APPEAL IN ILLINOIS

In the colonial confrontation between the English and Romano-canonical appellate systems, it was a foregone conclusion that the former would predominate despite any intellectual affinity that the latter might create. After all, transplanted Englishmen brought an English judicial system with them. By the time of the revolution, the new institution-builders balked at the thought of a judicial reformation. If the "Founding Fathers" could be described as being unified in any one area, it was in their judicially aristocratic, conservative notions.

Generally, then, civil appellate procedure in the colonies-turned-states followed the English example of allowing a writ of error for actions at law and an "appeal" (or trial de novo) for suits in equity. The older states had these instruments imbedded in their judicial fabric already; new states, like Illinois in 1818, adopted them as a matter of course. The problem inherent in this type of follow-the-leader institutionalizing process was that the end product did not achieve the desired goal of justice. The writ of error was particularly to blame for this:

In essence, writs of error corrected only some kinds of errors, those that appeared on the face

of the formal record. These were pleading errors mostly, except insofar as a party, in a bill of exceptions, preserved complaints that the judge had let in illegitimate evidence. These errors rarely went to the heart of the matter.<sup>1</sup>

A mistake in the spelling of the name of an opposing party in the pleading could cause the reversal of a judgment. On the other hand, the failure of counsel to take formal exception to a ruling of the court prevented him from urging it as a ground for reversal. The advantage of equity proceedings became manifest in such circumstances; "assignment of error was sometimes dispensed with in equity cases although required in actions at law."<sup>2</sup> Yet, a judicial system that functioned principally on the basis of equity could hardly be characterized as enforcing a body of common or statutory law. This was not, in Illinois or in any other state, the great interest of man. It might well be thought that appellate procedure-- particularly as exemplified by the use of the writ of error-- "existed as a system of preventing the disposition of cases themselves upon their merits."<sup>3</sup>

The institution-builders adopted a reforming mentality in the early twentieth century when they recognized the shortcomings of this form of judicial "record worship."<sup>4</sup> The reform of appellate procedure and practice was painfully slow in Illinois.<sup>5</sup> Many of the states had revamped their appellate systems and procedure around the turn of the century, substituting a codified form of pleading for common law types and abolishing the distinction between actions at law and suits in equity.<sup>6</sup> This was not accomplished in Illinois until the

Civil Practice Act of 1933 was adopted:

Writs of error coram nobis and coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review are abolished . . . There shall be no distinction among actions at law, suits in equity, and other proceedings . . .<sup>7</sup>

Appealing parties no longer had to choose between the cumbersome common law writ of error and the "appeal" in equity, and the result was a simplified appellate process whose standards of adjudication more accurately rested upon the tenets of justice than on the technical form of the record. Formal exceptions no longer were required in order to preserve an issue for review.<sup>8</sup> Such a pattern of change lends credence to this observation by Roscoe Pound: "Reform of appellate procedure in America has largely been a getting away from the fundamental ideas with which we started."<sup>9</sup> That such changes came late in the institutionalizing process cannot deprecate the vital importance of such reform.

Beyond these procedural alterations, the nature and concept of the Illinois appeal has experienced significant change. Prior to the reorganization of the judicial structure in the early 1960's, the process of appeal existed as a privilege provided solely by law: "It is only by virtue of the statute that appeals can be taken in any case, and a substantial compliance with the statute is prerequisite to the right of appeal."<sup>10</sup> That is, each legislative area in which a judicial remedy was specified required separate provisions for appeals: "The right to appeal is purely statutory and may be exercised only within the limits of the legislative grant."<sup>11</sup>

The Judicial Article of 1964 and the 1970 Constitution of the State of Illinois<sup>12</sup> have altered this situation by defining general conditions under which an appeal might be prosecuted. Since the adoption of these documents, "the basis for the right of appellate review in Illinois has been found in the constitution, and not in the statutes."<sup>13</sup> Such a change in status may also affect views concerning the relationship of the right of appeal to due process of law. Illinois courts have consistently maintained that "the right of appeal is not essential to due process of law."<sup>14</sup> At this point time, this settled rule has not been changed, though a future reconsideration of the topic is not unlikely. Because of the present view, however, there are certain classes of cases in which appeals are not allowed by right.

Operating from this context, then, certain generalizations can be made concerning the Illinois form of the appeal. First, because the present civil process utilizes a single mode of appeal and has abandoned the old writ of error, formal exceptions need not be taken during trials in order to preserve judicial actions for review.<sup>15</sup> Yet, all rights that could have been asserted under the old writ of error are materially preserved by the appeal.<sup>16</sup> Also, unlike the Roman version of the appeal or the suit in equity, "an appeal is a continuation of the action"<sup>17</sup> and not a trial de novo. Finally, the procedural aspects of the appeal are subject to both statutory regulation and restriction by rules promulgated by the Supreme Court of Illinois.<sup>18</sup>

The appeal as practiced in Illinois, therefore, is not only a viable judicial instrument but the product of the attempts of many civilizations to satisfy man's quest for justice (see Fig. 1). Undoubtedly, change will continue to be a major aspect of this judicial process. Now, beyond the mere outline of the nature and history of the appeal, the details of how the Illinois versions functions must be examined in order to fully understand the contemporary effort to pursue man's great interest.

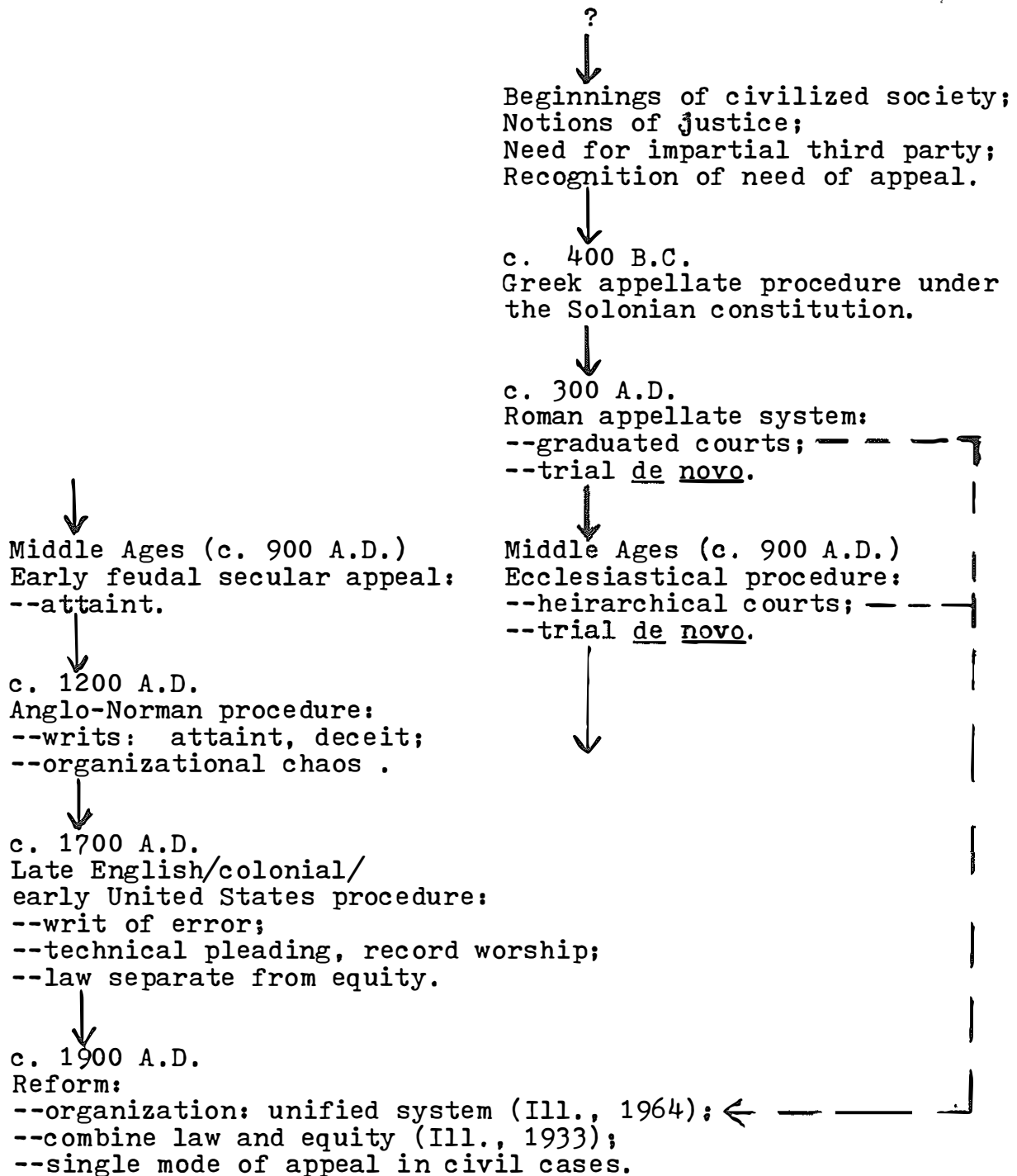


Fig. 1.--The Development of Appellate Procedure

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1. Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973), p. 132.
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3. Ibid., p. 320.
4. Ibid., p. 35.
5. Friedman, op. cit., p. 346.
6. Ibid.
7. I.R.S. 110 § 72(1).
8. Ibid., § 80.
9. Roscoe Pound, Jurisprudence (5 vols.; St. Paul: West Publishing Company, 1959), V, 625.
10. Gorski v. John Featherstone's Sons, 1894, 55 Ill.App. 368.
11. Village of Niles v. Szczesny, 13 Ill.App.2d 45.
12. Article VI, § 6.
13. Hamilton Corporation v. Alexander, 290 N.E.2d 589.
14. Bagdonas v. Liberty Land & Investment Co., 1923, 140 N.E. 49.
15. S.H.A. Ch. 110A, § 303 (Historical and Practice Notes).
16. Ibid.
17. I.R.S. Ch. 110A, § 301.; I.L.P. Appeal and Error, § 5.
18. Constitution of the State of Illinois, Art. VI, § 6. People v. Callopy, 1934, 358 Ill. 11.

PART II

ILLINOIS APPELLATE PROCEDURE AND PRACTICE:  
THE FIRST LEVEL OF REVIEW



## CHAPTER V

### THE COURTS AND THE ROUTES OF APPEAL

The Constitution of the State of Illinois, statutory law, and judicial rules and decisions have not only established the substantive nature of the appeal in Illinois, but they have governed its procedural application as well. The supreme court particularly has exerted a great deal of influence; its rules determine and regulate practice and procedures by which cases are reviewed in the appellate courts and the supreme court.<sup>1</sup> Two general forms of appeals can be identified from these sources: an appeal by right and an appeal by permission. The former allows appeals in cases meeting the constitutional, statutory, and judicial rule requirements subject only to the initiative of the appellant, i.e., the party prosecuting the appeal. The latter version can be pursued only upon the application for and receipt of the reviewing court's discretionary permission to hear the case.

Appeals are processed through two levels of reviewing courts--the appellate courts and the supreme court. Normally, the former functions at the first level of review and the latter at the second, although there are exceptions to that general rule. In Illinois, there are five judicial districts in which appellate courts hear appeals from circuit courts within the district.<sup>2</sup> The districts are divided into divisions,

although only the First Judicial District (Cook County) has more than one.<sup>3</sup> At least three judges sit in each division, subject to assignment by the supreme court, though assignments are usually made within the district.<sup>4</sup> The participation of a majority of the judges in the division and their concurrence are necessary for a decision.<sup>5</sup> The appellate courts sit in continuous session.<sup>6</sup> Appellate judges are elected to ten year terms<sup>7</sup> in public elections.<sup>8</sup>

The courts process appeals from two sources: final judgments and interlocutory orders. A final judgment is one which "fully decides and disposes of the rights of the parties to the cause."<sup>9</sup> Interlocutory orders are decrees which are determinative of certain issues but not of the entire cause-- as in the instance of the granting or denial of a preliminary injunction.

There are, then, three factors which are determinative of the appellate routes or prototypes: the form of the appeal, the nature of the action being appealed, and the level of the reviewing court to which it is brought. At the first level of review in Illinois these components have interacted to form general routes of appellate procedure (see Fig. 2). Though all are, substantially, little more than variations of a theme, a discussion of each is necessary to comprehend the steps necessary to commence the appellate process.

#### First Level Appeals in Appellate Courts

In the entirety of its lawful appellate jurisdiction, the appellate court almost always represents the first level

Appeal as of Right

Source	Court
Final judgments of circuit courts.....	Appellate court
Certain interlocutory orders of circuit courts... ..	Appellate court
Action by circuit court raising constitutional question about the validity of a state or Federal law;.....	Supreme court

Appeal by Permission

Source	Court
Orders of administrative agencies; direct review and review of circuit court actions in review of administrative decisions.....	Appellate court
Certain interlocutory orders of circuit courts, including orders of circuit courts granting new trials.....	Appellate court

Fig. 2.--Appellate Review at the First Level

of review. One possible exception to this generalization exists, and it shall be dealt with first. Administrative agencies such as the Illinois Commerce Commission or the Pollution Control Board hold hearings and issue orders concerning such topics as commercial transportation and environmental protection, respectively. Such hearings are usually described as being "quasi-judicial" in nature--and that label is subject to many interpretations. In most cases, circuit courts are empowered to review the orders of such administrative agencies.<sup>10</sup> If the original administrative hearing is considered to be a truly judicial one, the circuit court would then represent the first level in the appellate process. Since the action of the circuit court is subject to review by the appellate court in such matters,<sup>11</sup> the latter would then function at the second level of review in those type of cases. However, if the original "quasi-judicial" hearing of the administrative agency is not considered to be truly and purely judicial in nature,<sup>12</sup> then the circuit court occupies the position of the trial court while the appellate court functions as the first level of review in the appellate process. Though it may often be reduced to a question of semantics, the exact status of the appellate court is, obviously, subject to varying interpretations.

Another variation in this type of debate has been introduced to the discussion by the legislature. This body has the power to provide for the direct review of administrative orders by appellate courts.<sup>13</sup> Thus far, orders issuing from

*appeal from Pollution Control Board directly to the appellate court*  
*H.K.*  
*You get to it on page 12*

the Pollution Control Board constitutes the only such instance provided for by law. A party to a hearing of the board may

obtain judicial review by filing a petition within 35 days of the entry of the order or final action complained of pursuant to the Administrative Review Act . . . except that review shall be afforded directly in the Appellate Court for the district in which the cause of action arose.<sup>14</sup>

Again, difficulties in determining the functional level of review arise. Following the reasoning outlined previously and substituting the appellate court for the circuit court because it is directly reviewing the orders, the appellate court can occupy the position of a trial court or a court at the first level of review. The latter configuration is favored because of the similarity of the procedural requirements for cases heard directly on review and those appealed from circuit courts. Such review is possible only with the permission of the court and is not available by right. An application or petition for leave to appeal must be filed with and granted by the appellate court before the appeal can be perfected, or brought within the jurisdiction of the reviewing court.<sup>15</sup> Once this is accomplished, however, procedures regarding the record, briefs, excerpts or abstracts, and oral argumentation are similar to those of other appellate proceedings which will be subsequently outlined.

The majority of cases brought to the appellate court for review are those in which a final judgment has been rendered by a trial court. Appeals from the final judgments of circuit courts in civil cases proceed to the appellate court as of right;<sup>16</sup> the permission of the court need not be obtained,

and the appeal can be prosecuted merely by the filing of a notice of appeal in the trial court. Certain interlocutory orders are also appealable by right to the appellate courts. These include: orders involving injunctions; the appointment of receivers or sequestrators and the granting or withholding of powers thereto; orders concerning a mortgagee's possession of his mortgaged premises; the appointment of receivers, liquidators, or rehabilitators for financial institutions; and orders involving parental rights in temporary adoption cases.<sup>17</sup> This rather limited appellate jurisdiction over interlocutory orders is defined by the rules of the supreme court and not by a legislative enactment or a constitutional provision.<sup>18</sup>

There are two procedural routes whereby the appellate court will review issues upon the granting of its permission. As previously noted, the appellate court may review upon permission any final judgment or order of a circuit court entered in an action to review a decision of an administrative agency,<sup>19</sup> or it may directly review such administrative orders as provided by law.<sup>20</sup> The second form of appeal by permission concerns interlocutory orders which the court deems to involve "substantial questions of law" and in which consideration of the case "may advance litigation termination."<sup>21</sup> Cases which do not meet the criteria set forth by law and the rules of the court cannot be appealed.<sup>22</sup>

#### First Level Appeals to the Supreme Court

The supreme court always represents the Illinois court of last resort in its powers to review orders and judgments.

While its status as the final court of review does not change, under certain circumstances the supreme court is empowered to directly review issues and, thus, functions at the first appellate level. Such instances include actions in a trial court in which a statute of the United States or of Illinois has been held invalid,<sup>23</sup> which is by right;<sup>24</sup> proceedings to review orders of the Industrial Commission,<sup>25</sup> which is by permission;<sup>26</sup> and "cases in which the public interest requires expeditious determination."<sup>27</sup>

The supreme court, of course, also functions as a reviewing court operating at the second level of review and as a judicial rule-maker. These topics shall subsequently be discussed.<sup>28</sup> For the present, however, an examination of the procedures which govern the flow of traffic on the avenues of first level appeals is most germane. In the delineation and discussion of such procedures and practices, it should be remembered that, except for the variations produced by intrinsic differences such as an appeal by right vis-à-vis appeal by permission, the sequence of events in each of these prototype processes is much the same. Therefore, in an attempt to avoid an unnecessary waste of the reader's time and the writer's space, a single model appellate process shall be outlined, detailing variations among the different forms where they occur, but assuming an identification of the procedures with all of the forms without specific reference to each when no material differences exist.

ENDNOTES

1. I.R.S. ch. 110, sec. 79.
2. Constitution of the State of Illinois, 1970, Art. VI, sec. 2, 6.
3. Ibid., sec. 5; I.R.S. ch. 37, sec. 25.
4. I.R.S. ch. 37, sec. 25.
5. Ibid.
6. I.R.S. ch. 110A, secs. 801(3), 901.
7. Constitution, op. cit., Art. VI, sec. 10.
8. Ibid., sec. 12(a).
9. Lees v. Chicago & Northwestern Railway Company, 1951, 100 N.E.2d 653.
10. I.R.S. ch. 110, sec. 268.
11. Ibid., sec. 276.
12. This appears to be the dominant view, since the commencement of an action in a circuit court involves the filing of a complaint and the issuance of a summons rather than the filing of a notice of appeal as characterizes true courts of review.
13. Constitution, op. cit., Art. VI, sec. 6.
14. I.R.S. ch. 111 $\frac{1}{2}$ , sec. 1041.
15. Ibid., ch. 110A, sec. 335.
16. Ibid., sec. 303.
17. Ibid., sec 307(a).
18. Constitution, op. cit., Art. VI, sec. 6.
19. I.R.S. ch. 110, sec. 276.
20. Constitution, op. cit.



21. I.R.S. ch. 110A, sec. 308(a).
22. Constitution, op. cit.
23. I.R.S. ch. 110A, sec. 302(a)(1).
24. Ibid., sec. 317.
25. Ibid., sec. 302(a)(2).
26. Ibid., sec. 315(a).
27. Ibid., sec. 302(b).
28. infra., Part III.

## CHAPTER VI

### THE ATTACHMENT OF JURISDICTION

The first step in any judicial proceeding, appellate or otherwise, is the bringing of the subject matter and parties to the cause of action under the jurisdiction of the court. In this initial portion of the process, three questions are of the utmost relevance. First, the nature of the issue as it is likely to be interpreted by the court must be examined to see if it is reviewable. Then, the capacity of the parties to appeal must be assessed. Finally, upon the commencement of the appeal, inquiry into the actions of the litigants must be made in order to ascertain whether there has been sufficient compliance with the regulations so that the appeal can be perfected and prosecuted.

#### Jurisdiction of the Subject Matter

The question of "What is appealable?" is a difficult one answered by statute and judicial decision-making conducted over a long period of time. One of the settled rules concerning this issue is that moot questions shall not be considered on review. "A question is moot when it does not involve any actual controversy."<sup>1</sup> In the case cited above, an appeal to have a zoning ordinance declared invalid and to compel the issuance of a license for a nursing home was declared moot

when the license was issued while the appeal was pending.<sup>2</sup>

The courts will dismiss such an appeal because "the existence of an actual controversy is essential to appellate jurisdiction" (emphasis added).<sup>3</sup> This assertion is judicially supported:

Where the issues involved in the trial court no longer exist, an appellate court will not review a case merely to decide moot or abstract questions, to establish a precedent, or to determine the right to, or the liability for, costs, or, in effect, to render a judgment to guide potential future litigation.<sup>4</sup>

Therefore, the appellate court lacks jurisdiction over the subject matter when the cause of action brought before it is moot.

The various forms that the subject matter may assume and the routes of appeal that may be followed have already been described.<sup>5</sup> The sum of these possibilities provides a concise definition of appellate jurisdiction in regard to subject matter:

Review by the appellate court is limited to final judgments and certain interlocutory orders as specified by the Supreme Court Rules. Before a judgment or order is considered final, it must dispose of or terminate the litigation or some definite part of it on the merits of the case.<sup>6</sup>

The courts, through judicial decisions, have determined that violations of municipal ordinances, though quasi-criminal in nature, must be treated as civil actions and are, thus, appealable as final judgments when trial action has terminated.<sup>7</sup> The courts have also determined that orders from circuit courts granting new trials are interlocutory and, thus, appealable only by permission.<sup>8</sup>

The only other necessary qualification of appellate jurisdiction over subject matter is that it attaches only to the record of the trial court and the additional matter contained in the record on review.<sup>9</sup> Within this information, the scope of subject matter jurisdiction for review includes both errors of law and errors of fact.<sup>10</sup> The former includes rulings on motions, the admission of evidence, and other related actions; the latter, as it usually appears in appeals, concerns the sufficiency of the evidence to support the verdict. Though jurisdictionally empowered to review both errors of law and fact, historical judicial determinations have made it a settled rule that "jury verdicts will not be reversed on the basis of the manifest weight of evidence unless the opposite conclusion is indisputable."<sup>11</sup> Construed a bit more liberally, the appellate courts contend that "it is not the province of this court to disturb the verdicts of juries on questions of fact, unless clearly and palpably erroneous."<sup>12</sup> There is little dispute about the willingness of courts to review errors of law, however; of course, the courts still insist that issues be in the nature of final judgments or orders to be reviewable, and they refuse to reverse lower court decisions which are discretionary in nature unless abuse can be shown.<sup>13</sup> Finally, appellate jurisdiction over subject matter is not forfeited if the appeal is brought before the wrong court.<sup>14</sup> The appeal is automatically transferred to the appropriate appellate court. Therefore, if the subject matter is such that it can be properly be put before the court, the jurisdiction will attach without difficulty even if brought before the wrong court.

Jurisdiction of the Parties

Beyond the question of what issue might be legally and practically brought before a reviewing court, the litigants must also be subjected to the jurisdiction of the reviewing court if the appeal is to be prosecuted. Obviously, both the plaintiff and the defendant to an original action have the nominal legal capacity to appeal. However, certain actions by these parties can affect their capacity to appeal. The acceptance of a judgment can prevent the victorious litigant from appealing: "In general, a voluntary acceptance of the benefits of all or part of a judgment, decree, or order constitutes a release of errors and precludes review."<sup>15</sup> On the other hand, "the payment, performance, or satisfaction of a judgment, decree, or order<sup>which</sup> confers no benefit cannot operate as a release of errors so as to bar review."<sup>16</sup> Finally, both parties must have a material interest in the matter; an appeal can be dismissed for the want of right or interest to appeal.<sup>17</sup>

Parties other than the litigants identified in the record may possess an interest in the action and may attempt to bring an appeal. The question of the capacity of a third party to participate in an appeal is intricate, since the interest of the third party might not be tangibly evident to others. "The applicable standard for determination of whether nonparties have standing on appeal is whether they have a direct, immediate, and substantial interest in the subject matter, which would be prejudiced by the judgment or benefitted by its reversal."<sup>18</sup> An exception<sup>to</sup> this rule, however, involves

the amicus curiae, or friend of the court. This party may be allowed to participate in an appeal at the discretion of the court, but has no standing as an appellant since the only order of the court affecting his rights is the order allowing the petition to intervene. "An amicus curiae is not a party to the action but is merely a friend of the court whose sole function is to advise or make suggestions to the court."<sup>19</sup>

#### Perfecting the Appeal

The courts make the ultimate determinations concerning whether they possess jurisdiction over the subject matter or the parties to an appeal. Before such issues can be considered, however, the party prosecuting the appeal, i.e., the appellant, must initiate the appeal. In the case of an appeal by right, this is accomplished by the appellant's filing of a notice of appeal in the circuit court wherein the original action was tried. "The filing of notice of appeal is the only jurisdictional step required."<sup>20</sup> That is, parties to the appeal need take no other action to bring themselves and the subject matter under the jurisdiction of the court so that it may determine its capacity to hear the appeal. Essential to the filing, however, is the service of the notice of appeal on the other party and the filing of such proof of service in the circuit court.<sup>21</sup> The notice should specify the judgment appealed from; include the relief sought; and should identify the parties.<sup>22</sup> The notice may be amended without leave of the court anytime within 30 days of the order or judgment upon which it is based; thereafter, such an action may be taken

only with the court's permission.<sup>23</sup> Whether amended or not, the filing of the notice attaches the jurisdiction of the court to the action.

It should be understood that the initiation of an appeal by the filing of a notice of appeal is possible only when review proceeds as a matter of right.<sup>24</sup> Even in such instances, variations exist concerning time limits for filing notice of appeal and the execution of any additional actions which may be prescribed by law or rule (see Fig. 3). Notice of appeal from a circuit court judgment must be filed in that court within 30 days of the entrance of the judgment or the last order disposing of a post-trial motion.<sup>25</sup> The notice must be served on the other parties within seven days of the filing date, and proof of service must be filed in the circuit court in the seven day period subsequent to the deadline for service.<sup>26</sup> Within ten days of the service or thirty days of the entry of the judgment or last order disposing of post-trial motions--whichever is later--other parties "may join in the appeal, appeal separately, or cross appeal by filing a notice of appeal."<sup>27</sup> These regulations do not apply to forcible entry and detainer cases or cases concerning local improvements or drainage.<sup>28</sup> The notice as filed in all other instances must designate the parties as appellant and appellee, i.e., the plaintiff and defendant in the appeal, respectively, and should specify the judgment appealed from and the relief sought.<sup>29</sup> The failure to include such items does not automatically necessitate the dismissal of the appeal unless the rights of the

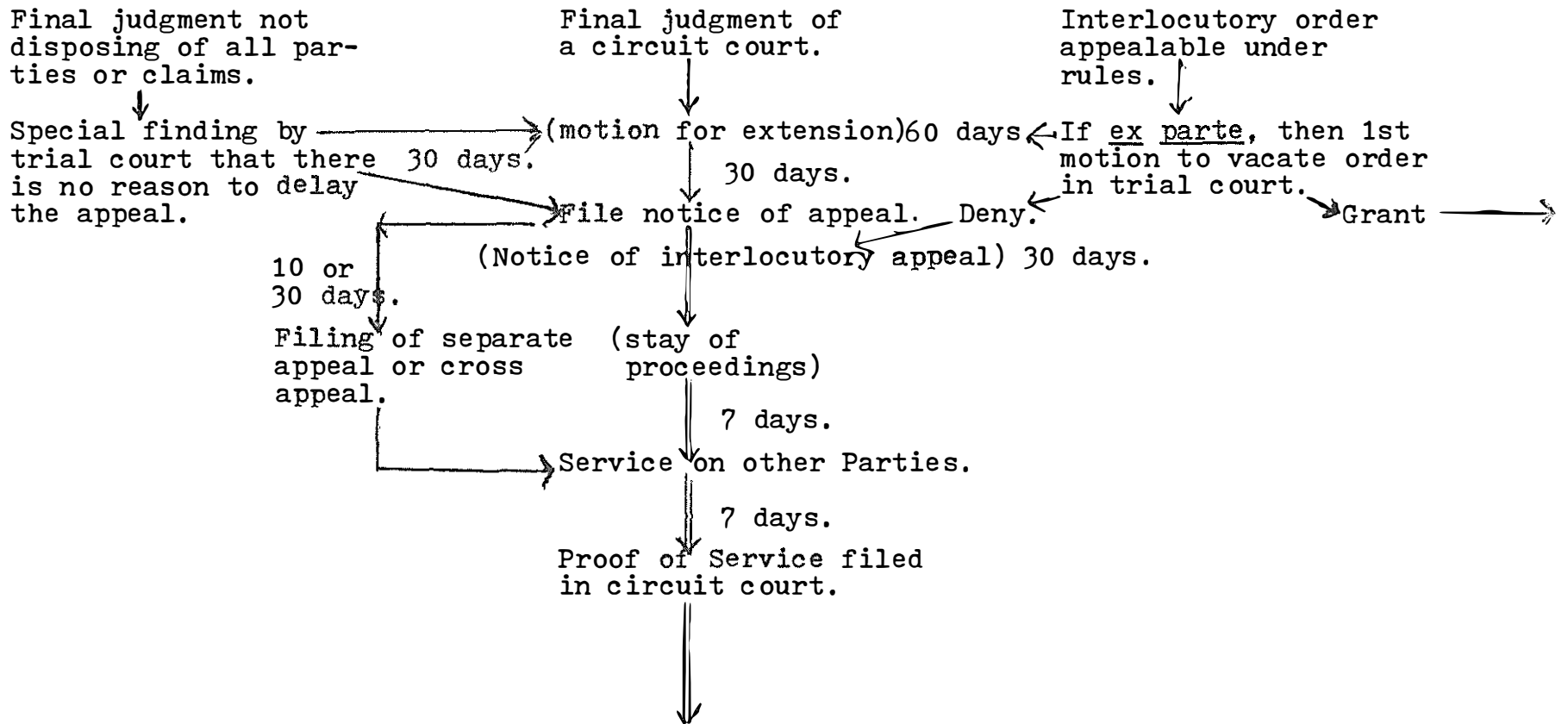


Fig. 3.--The Attachment of Jurisdiction in Appeals by Right



appellee are materially prejudiced.<sup>30</sup> The appeal may be amended without the permission of the court within the thirty day filing deadline.<sup>31</sup> Thereafter, amendment is possible only with the leave of the court.<sup>32</sup> If the appeal is made from a final judgment which disposes of the rights of at least one party but not of all the parties to the cause of action, the appeal can be prosecuted only upon the special finding of the trial court that no just cause exists to delay the appeal.<sup>33</sup> If an attempt is made to pursue the appeal in the absence of such a finding, the appellate court will dismiss the appeal without consideration of the merits of the case.<sup>34</sup>

The attachment of jurisdiction is accomplished in a similar manner for interlocutory appeals by right.<sup>35</sup> The notice is identical in form and content, though it should be entitled "Notice of Interlocutory Appeal."<sup>36</sup> If the order appealed from was entered on ex parte application, a motion must first be made in the trial court to vacate the order before the notice of appeal can be filed.<sup>37</sup>

The final type of appeal by right at the first level of review is a direct appeal by right to the supreme court. In the instance of a constitutional question, the appeal proceeds to the supreme court upon the initiative of the appellant.<sup>38</sup> In cases affecting the public interest, "the Supreme Court or a justice thereof may order that the appeal be taken to it."<sup>39</sup>

In the three types of first level review by permission, jurisdiction is attached through the instrument of a petition

for leave to appeal rather than a notice of appeal (see Fig. 4). Direct review of the administrative orders of the Pollution Control Board is possible only upon the filing of a petition for review within thirty-five days of the entry of the order appealed from;<sup>40</sup> service and proof of service of the petition should be in accordance with that required for a notice of appeal.<sup>41</sup> In the case of an interlocutory order which does not meet the criteria necessary to enable it to be prosecuted by right,<sup>42</sup> a petition for leave to appeal must be filed within fourteen days of the issuance of the order.<sup>43</sup> Finally, in the event of an order of a circuit court granting a new trial--which is, of course, considered interlocutory in nature--<sup>44</sup> a petition for leave to appeal must be filed in the circuit court within thirty days of the issuance of the order.<sup>45</sup> All petitions for leave to appeal ought to contain the order appealed from, a statement of the facts, references to the record, and the points considered to be grounds for hearing the appeal.

In virtually all of the appellate routes, an extension of the time period for filing a notice of appeal or a petition for leave to appeal may be granted by the court upon motion and presentation of just cause. Extensions might even be granted after the expiration of the original time limit; courts usually are quite lenient and do not desire to dismiss appeals on purely procedural grounds. However, there is also a limit to the patience<sup>46</sup> of the court. If the court considers the infringements on the rules to be "flagrant and continued" it may dismiss the appeal without considering it on the merits.<sup>46</sup>

Order of an administrative agency subject to direct or secondary review by the appellate court.

35 days after the entry of the order

Order of a circuit court granting a new trial.

30 days after the entry of the order

Interlocutory order not appealable by right.

14 days after the entry of the order

(Motion for extension of filing date for petition showing cause).

(Supersedeas)

Application for leave to appeal.

Fig. 4.--The Attachment of Jurisdiction in Appeals by Permission

A matter chronologically related to the attachment of appellate jurisdiction but which is not substantially necessary to the process of review is the stay of the judgment or order through the posting of a bond or supersedeas. That is, the execution and enforcement of a judgment or order can be halted pending the outcome of the appeal. This can be accomplished in a number of ways. If the appeal is from a final judgment for money only, the timely filing of the notice of appeal and the presentation, approval by the trial court judge, and filing of a reasonable bond within the same thirty day period will stay the execution of the judgment.<sup>47</sup> For other types of judgments or orders, application must be made to the court accompanied by information contained in the trial record.<sup>48</sup> Normally, the initial application for the stay must be made in the trial court; the reviewing court will hear such an application only if the circuit court has denied the motion or if such an application procedure was not practical.<sup>49</sup> Also, an extension of time in which to file an application for supersedeas may be granted.<sup>50</sup> Bond or security is not always required, though if the judgment affects the rights to tangible property or monetary securities some form of protection is usually afforded the appellee. If bond is required, it ought to be "just"<sup>51</sup> and "fixed with reference to the character of the judgment."<sup>52</sup> The reviewing court has the authority to change the amount or terms of the bond after the docketing of the appeal in that court.<sup>53</sup> In the event that a stay cannot be obtained and the ruling is later changed, the rights of third parties who may have acquired rights to property are not affected.<sup>54</sup>

There is a wide variation from these general rules for supersedeas depending upon the appellate route which is applicable. When an appeal is taken from an order of a circuit court granting a new trial, the proceedings in the trial court are automatically stayed.<sup>55</sup> In the appeal of an interlocutory order by permission, the order or trial court proceedings shall not be stayed unless so ordered by the trial or reviewing court.<sup>56</sup> Finally, in the direct review of administrative order by the appellate court, application for the stay must first be made to the administrative agency (the Pollution Control Board thus far being the only agency so designated) and, in the event of refusal, to the reviewing court with facts supported by affidavit.<sup>57</sup>

In any event, the granting of a stay and the designation of an appeal bond is not essential to the perfection of an appeal.<sup>58</sup> Even if granted, the stay or supersedeas "operates against the enforcement of a judgment, and not against the judgment itself."<sup>59</sup> The provisions for supersedeas, then, exist to protect the rights of both parties pending appeal.

Therefore, the initial step in the appellate process at the first level of review consists of the lawful submission of the subject matter and the parties to the jurisdiction of the court. The way in which this is accomplished is dependent upon the route which the appeal can legally follow. If it can be prosecuted by right, then "when the notice of appeal has been filed the case proceeds in the court of review, not as a new case, but as a continuation of the one that was pend-

ing in the trial court and the jurisdiction of the court then attaches."<sup>60</sup> Essentially the same result is achieved by the filing of a petition or application for leave to appeal in those types of cases which are not appealable by right. Other matters such as supersedeas may then be disposed of at the same time. However, such actions represent only the commencement of an appeal; its prosecution must follow.

ENDNOTES

1. LaSalle National Bank v. City of Chicago, 1954, 3 Ill.App.2d 486, 121 N.E.2d 375.
2. Ibid.
3. I.L.P. Appeal and Error, sec. 22.
4. LaSalle National Bank v. City of Chicago, op. cit.
5. supra., Chapter V.
6. People ex rel. Clark v. Thompson, 1973, 12 Ill.App.3d 378, 298 N.E.2d 765.
7. People v. Wright, 1966, 75 Ill.App.2d 290, 221 N.E.2d 159.
8. Rodriguez v. Chicago Transit Authority, 1965, 206 N.E.2d 828.
9. Infra., Chapter VII.; I.L.P. Appeal and Error, sec. 181.
10. I.R.S. ch. 110A, sec. 366(b)(1).
11. Morrison v. Mitchell, 1968, 239 N.E.2d 289.
12. Thomas v. Smith, 1956, 137 N.E.2d 117.
13. I.L.P. Appeal and Error, secs. 101,102.
14. I.R.S. ch. 110A, sec. 365.
15. I.L.P. Appeal and Error, sec. 76.
16. Ibid., sec. 75.
17. Ibid., sec 588.; Fitzsimmons v. Miller, 1923, 231 Ill.App. 389.
18. Flanagan v. Hulman, 1970, 257 N.E.2d 599.
19. Bee Chemical Company v. Service Coatings, Inc., 253 N.E.2d 512.
20. I.R.S. ch. 110A, sec. 301; Harris v. Sovereign Camp, W.O.W., Inc., 1939, 23 N.E.2d 793.

21. I.R.S. ch. 110A, sec. 303(a),(d).
22. Ibid., sec 303(c).
23. Ibid.
24. supra., p. 38.
25. I.R.S. ch. 110A, sec. 303(a).
26. Ibid., sec. 303(d).
27. Ibid., sec. 303(a).
28. Ibid., sec. 303(b).
29. Ibid., secs. 303(c)(1)(i),(2).
30. National Bank v. Kaspar American State Bank, 1938,  
15 N.E.2d 721.
31. I.R.S. ch. 110A, sec. 303(c)(4).
32. Ibid.
33. Ibid., ch. 110A, sec. 304(a).
34. Peesel v. Peesel, 1973, 11 Ill.App.3d 76.
35. supra., p. 30.
36. I.R.S. ch. 110A, sec. 307(a).
37. Ibid., sec. 307(b).
38. Ibid., sec 317.; sec. 302.(a).
39. Ibid., sec. 302(b).
40. Ibid., ch. 111 $\frac{1}{2}$ , sec. 1041; sec. 335.
41. Ibid., sec. 335(b).
42. Ibid., sec. 307(a).
43. Ibid., sec. 308(b).
44. supra., p. 35.
45. I.R.S., ch. 110A, sec. 306(a)(1).
46. Brantley v. Delnon Hospital, Inc., 1970, 120 Ill.App. 2d  
185, 221 N.E.2d 159.



47. I.R.S. ch. 110A, sec. 305(a)(1).
48. Ibid., sec. 305(b)(1).
49. Ibid., sec. 305(b)(2).
50. Ibid., sec. 305(a)(2).
51. Ibid., sec. 305(b)(3).
52. Ibid., sec. 305(d).
53. Ibid., sec. 305(f).
54. Ibid., sec. 305(i).
55. Ibid., sec. 306(f).
56. Ibid., sec. 308(e).
57. Ibid., sec. 335(g).
58. I.L.P. Appeal and Error, sec. 361.
59. Nemanich v. Long Grove Country Club Estates, 1970,  
119 Ill.App.2d 169, 255 N.E.2d 466.
60. Brenza v. Jordan, 1956, 11 Ill.App.2d 140, 136 N.E.2d 571.

## CHAPTER VII

### THE RECORD ON APPEAL

Since Illinois appellate procedure stipulates that "an appeal is a continuation of the proceeding,"<sup>1</sup> it is obvious that, lacking the power to conduct a complete readjudication of the issues, appellate courts can review only the original proceedings in the trial court. Therefore, the record of the <sup>Trial court</sup> is of vital importance in the disposition of the appeal; of course, it is imperative that the appellate court have access to all official records of the proceeding in the circuit court. Yet, the record cannot be viewed as the instrument of review; it has taken a long time to get away from the "record worship" which has characterized much of our judicial heritage,<sup>2</sup> as "the swollen records which have been the plague of our appellate procedure" would testify.<sup>3</sup> The record on appeal, however, is a vital foundation for disposing of an appeal. In that connection, the record should "fully and fairly present all matters that are material and necessary for a decision of the question involved."<sup>4</sup>

The record on appeal consists of the judgment or order appealed from, the notice of appeal if the appeal is by right, and the report of proceedings from the trial court.<sup>5</sup> The report of proceedings may contain the trial testimony, rulings of the trial court, affidavits utilized in the trial court,

motions, pleadings, exhibits, instructions to the jury, and any other filed documents or recorded proceedings which the appellant or appellee may desire to include.<sup>6</sup> That is, it is not necessary that the entire record be transmitted to the reviewing court, though the entire record may be sent if it is more economical to do so or if that court so orders.<sup>7</sup> The parties to the action may stipulate that certain parts of the record not be included, but usually the record on appeal must minimally show the jurisdiction of the reviewing court, the steps taken to perfect the appeal, the identity of the litigants and their right to seek review, the judgment or order appealed from, and the general errors complained of in the trial court proceeding.<sup>8</sup>

If the record is not to be transported in toto to the reviewing court and the appeal is by right, then the compilation of the record is accomplished by the filing of praecipes in the trial court by the appellant which designate "the parts of the trial court record he desires to have incorporated in the record on appeal"<sup>9</sup>(see Fig. 5). The praecipes must be served on the appellee and any other parties--be they separate appellants or cross appellants--and proof of such service filed.<sup>10</sup> The appellee then has an opportunity to file praecipes of his own to include additional parts of the report of proceedings in the record on appeal which he might think essential to the disposition of the case.<sup>11</sup> The appellant's praecipes must be filed within fourteen days after the filing of the notice of the notice of appeal; the appellee's praecipes (if any) must

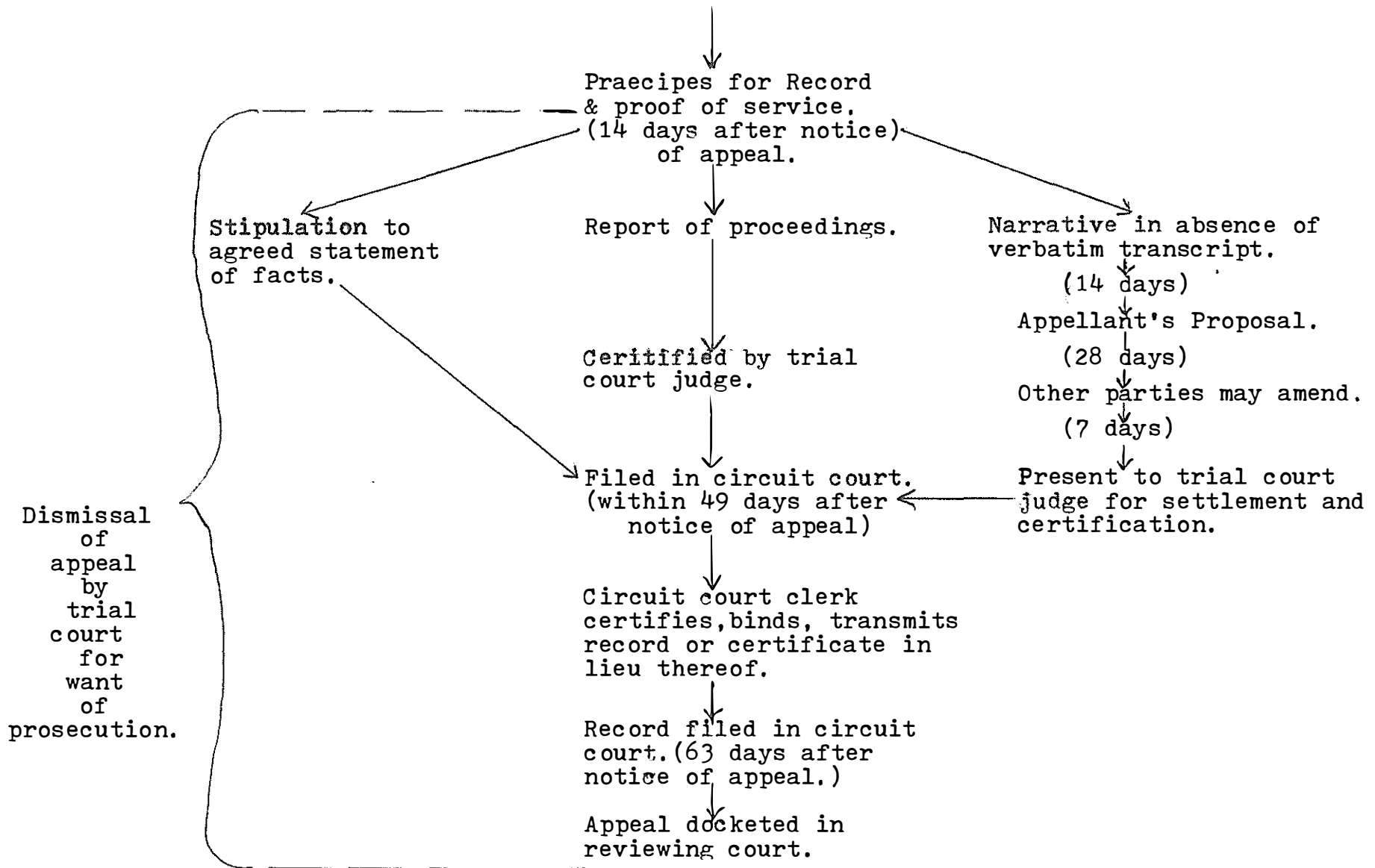


Fig. 5--The Record on Appeal in Appeals by Right

be filed within seven days of the service of the appellant's praecipes.<sup>12</sup> Once the composition of the report of proceedings has been determined, the compiled report must be certified by the trial court judge and filed in the trial court within forty-nine days of the filing of notice of appeal.<sup>13</sup> This trial court report of proceedings, along with the rest of the record on appeal, is bound and certified by the clerk of the circuit court<sup>14</sup> and transmitted to the reviewing court.<sup>15</sup> If the parties so desire, the clerk's certificate that the record on appeal has been properly prepared may be sent to the reviewing court in lieu of the record in order to allow the parties access to the record for the preparation of briefs, excerpts from the record, or abstracts.<sup>16</sup> If a certificate is sent, then the record is transported to the appellate court by the due date of the appellant's reply brief.<sup>17</sup> In any case, the record on appeal or a certificate in lieu thereof must be filed in the appellate court within sixty-three days of the filing of the notice of appeal.<sup>18</sup>

Though some form of record on appeal must be filed in order to prosecute an appeal, under certain circumstances the procedure detailed above may be waived in favor of another. For example, both parties may draw up an agreed statement of the facts of the case, and may present this written stipulation to the court without certification and in lieu of a report of proceedings.<sup>19</sup> Also, under certain trial court jurisdictions no verbatim transcript is kept of the proceedings. In such a case, the appellant compiles and serves the other parties

a proposed report of proceedings gathered from the best sources available--including recollection--within fourteen days after the filing of the notice of appeal.<sup>20</sup> Within twenty-eight days thereafter, other parties may amend the proposal or present a separate one.<sup>21</sup> In the seven days subsequent to that, the appellant must present both the original proposal and any amendments to the trial court for settlement and certification.<sup>22</sup> Extensions of time for the filing of a report of proceedings<sup>23</sup> or the record on appeal<sup>24</sup> may be granted upon the demonstration of just cause.

The requirements for filing the record on appeal varies greatly among the forms of appeal by permission(see fig. 6). In the appeal of an order of a circuit court granting a new trial, the record must be filed with the appellant's petition for leave to appeal.<sup>25</sup> The adverse party has twenty-one days from the due date of the petition to file an answer which may be accompanied by a supplemental record<sup>26</sup> containing portions of the record omitted by the appellant which the appellee believes to be essential to dispose of the case. The situation of an interlocutory appeal by permission is quite similar. In such an instance, the appealing party must include material parts of the record in his application for leave to appeal; the opposing party then has fourteen days to file an answer and any additional parts of the record.<sup>27</sup> Finally, in the event of the review of an administrative order, the entire record of the hearing held by the administrative agency or a certificate in lieu thereof must be filed within thirty-five

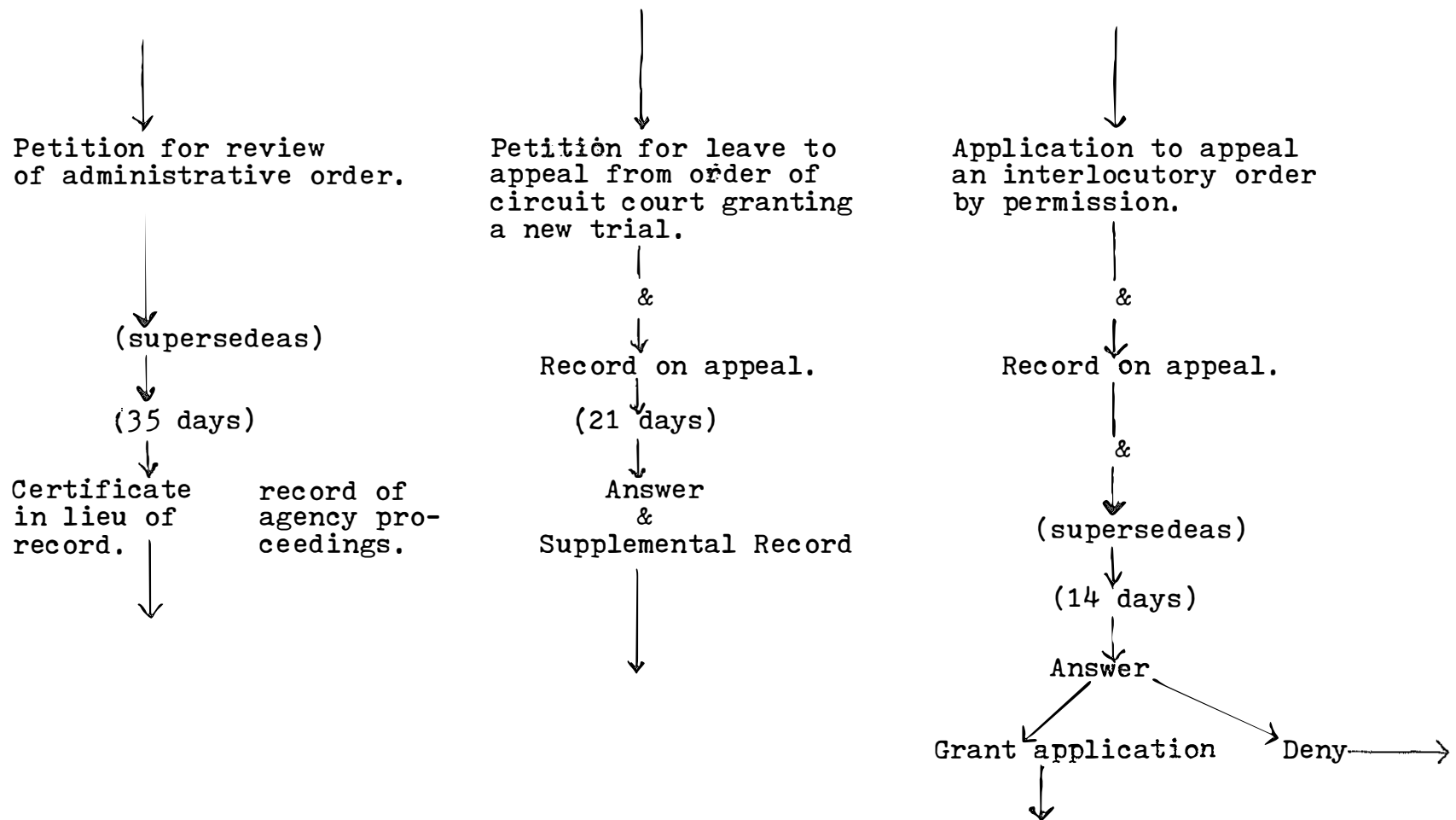


Fig. 6.--The Record on Appeal in Appeals by Permission

days after the filing of a petition for leave to appeal.<sup>28</sup> Thus, the record on appeal is compiled and filed differently in each type of appeal by permission.

The record on appeal plays a role within another type of action in the context of the appeal: that of the application for a supersedeas or stay of execution of a judgment or an order. When an application for a stay is made, it must be accompanied by the record on appeal or a short record.<sup>29</sup> The latter is a brief version of the record on appeal showing the order or judgment appealed from, proof that the notice of appeal or petition for leave to appeal has been filed, and other matter necessary to the determination of the application.<sup>30</sup> The short record may be certified by the circuit court clerk or by affidavit of the prosecuting attorney.<sup>31</sup> It is usually utilized when a party seeks relief--as in the case of supersedeas--and before the record on appeal has been filed.

The filing of the record on appeal or a certificate in lieu thereof allows the appeal to be docketed,<sup>32</sup> i.e., to be entered on an abbreviated court record which sets the date for hearing and includes all important acts performed in the reviewing court.<sup>33</sup> Even in the case of an appeal by permission wherein the court has not yet decided whether it will hear the appeal, the petition for appeal is placed on the court's docket or agenda. Also, at this time any disputes concerning the record on appeal shall be settled by the trial court.<sup>34</sup> Any amendments to the record to correct material omissions or inaccuracies may be made upon the stipulation of the parties



or by the motion of the trial court.<sup>35</sup> Once the docketing process is completed, a docket number is assigned, served within seven days to other parties, and proof of service filed in the court.<sup>36</sup>

Within this general procedural framework of statutory regulations and supreme court rules governing appellate practice in regard to the record on appeal, judicial decision-making has played a major role in providing form and substance to a rather bare skeleton. The basic thrust of the statutes and rules, however--that the record on appeal is a fundamental base for the appeal--is adhered to quite consistently. The affect of judicial decision-making on the practice of compiling and filing the record on appeal has been felt most in two areas: the sufficiency of the record and the conformity of actions to statute and rule.

It has already been noted that a proper or sufficient record on appeal should "fully and fairly present all matters that are material and necessary for a decision of the questions involved."<sup>37</sup> When a reviewing court feels that the record does not contain sufficient information to ascertain the substance of the allegation, it may act at its own discretion. It may choose to dismiss the appeal: "where a party fails to present a proper record, a court of review will of its own motion, dismiss the appeal."<sup>38</sup> On the other hand, it is not required to dismiss the appeal.<sup>39</sup>

In most cases, however, the real problem concerning the record on appeal lies not in its general propriety, but in whether the record preserves errors claimed as grounds for

review. With the abolition of the writ of error in civil cases, formal exceptions noted in the record were no longer necessary to preserve a point for review.<sup>40</sup> However, some objection must usually be made<sup>41</sup> or some step taken to insure that the error claimed<sup>15</sup> in the record and properly preserved, i.e., not waived by the party, as a basis for appeal. The general rule might be stated as follows: "Error is never presumed by a reviewing court but must be affirmatively shown by the record."<sup>42</sup> For example, if an alleged prejudicial remark by the trial judge is not transcribed and not part of the record before the court, it is not properly preserved for consideration and review by the appellate court.<sup>43</sup> This does not mean that a record omitting such things is necessarily improper or insufficient. It does mean, however, that an appellant basing his entire case on evidence not included in the record on appeal has virtually no chance to prevail. "The rule is well settled that where evidence or exhibits are omitted from the record, a court of review will presume that there was sufficient evidence to sustain the decree."<sup>44</sup> Though the record may be silent on certain matters and the court will presume that the conduct was proper, the appellant might still find grounds for reversal in the record though the burden is solely on him and not the trial court to do so.<sup>45</sup> The record on appeal, then, provides the base from which the litigants construct their cases.

Aside from the questions of sufficiency and content of the record on appeal, the action taken by the parties to

comply with statutes and rules relating to it may well determine the outcome of the appeal. While "the failure to file a praecipe for the record is not grounds for dismissing the appeal,"<sup>46</sup> the failure to include the report of proceedings in the record<sup>47</sup> or even to file the record can be grounds for refusing to decide the case on its merits: "the reviewing court shall dismiss the appeal if the record on appeal is not filed in proper time."<sup>48</sup> Also, failure to comply with the rules and statutes in the compilation of the record can warrant dismissal. "Because of the failure to authenticate the purported record, the appeal is dismissed."<sup>49</sup> The strictness with which the courts apply the rule of substantial compliance is, of course, quite discretionary. The instances cited above, while not exceptions to the rule, are also not indicative of the full range of alternatives available to the court in dealing with infringements of procedural rules. In *Brantley v. Delnon Hospital, Inc.*,<sup>50</sup> the exercise of such discretion is defined:

We prefer to decide cases on their merits, and seek to avoid determinations based on procedural or rule violations or omissions. However, flagrant and continued infringements of procedures and rules cannot be tolerated . . . (emphasis added).

Under certain circumstances, the power to dismiss an appeal is vested in the trial court. If, before the appeal is docketed in the reviewing court, the appellant moves for dismissal or the parties stipulate for dismissal, such an action is appropriate.<sup>51</sup> More germane to the subject of the record on appeal, if in thirty-five days after the expiration of the time for

filing the record no motion has been made to extend the time, then the trial court may properly dismiss the appeal for want of prosecution.<sup>52</sup>

Thus, the compilation and filing of the record on appeal is a basic step in the appellate process. Whether taken by right or by permission, the argument for the appeal or even for leave to be heard on review rests ultimately on what happened in the trial court as preserved in the record. However, just as argument without facts is useless, so is the presentation of facts without correlative advocacy worthless in a court of review. The art of appellate advocacy as contained in the preparation of briefs and excerpts or abstracts is, then, an appropriate topic for consideration.

ENDNOTES

1. I.R.S. ch. 110A, sec. 301.
2. Roscoe Pound, Appellate Procedure in Civil Cases (Boston: Little, Brown and Company, 1941), p. 35.
3. Ibid., p. 378.
4. I.L.P. Appeal and Error, sec. 421.
5. I.R.S. ch. 110A, sec 321.
6. Ibid.; I.L.P. Appeal and Error, sec. 446.
7. I.R.S. ch. 110A, sec. 322(b).
8. I.L.P. Appeal and Error, secs. 422-429.
9. I.R.S. ch. 110A, sec. 321.
10. Ibid., sec. 322(a).
11. Ibid.
12. Ibid.
13. Ibid., sec. 323(b).
14. Ibid., sec. 324.
15. Ibid., sec. 325.
16. Ibid.
17. Ibid., sec. 326.
18. Ibid.
19. Ibid., sec. 323(d).
20. Ibid., sec. 323(c).
21. Ibid.
22. Ibid.
23. Ibid., sec. 323(e).

24. Ibid., sec. 326.
25. Ibid., sec. 306(b).
26. Ibid., sec. 306(c).
27. Ibid., sec. 305(c).
28. Ibid., sec. 335(d),(e).
29. Ibid., sec. 305(b)(2).
30. Ibid., sec. 328.
31. Ibid.
32. Ibid., sec. 327.
33. Henry Campbell Black, Black's Law Dictionary (Revised 4th ed.; St. Paul: West Publishing Company, 1968), p. 567.
34. I.R.S. ch. 110A, sec. 329.
35. Ibid.
36. Ibid., sec. 327.
37. supra., p. 50.
38. Libman v. Gipson, 1968, 235 N.E.2d 670; Hayes v. Industrial Commission, 1943, 48 N.E.2d 940.
39. Shell Petroleum Corporation v. Feldman, 1938, 17 N.E.2d 81.
40. I.L.P. Appeal and Error, sec. 216.
41. Ibid., sec. 211.
42. O'Berry v. O'Berry, 1962, 183 N.E.2d 539.
43. Peru Steel Erectors, Inc. v. Yirga, 8 Ill.App.3d 997, 291 N.E.2d 240.
44. Kaplan v. Stein, 1928, 329 Ill. 253, 160 N.E. 552.
45. Orrico v. Brown, 1948, 336 Ill.App. 226, 83 N.E.2d 387.
46. Commissioners of Drainage District No. 5. v. Arnold, 1943, 383 Ill. 498, 50 N.E.2d 825.
47. Shive v. Shive, 1970, 263 N.E.2d 713.

48. In re Merink's Estate, 1957, 144 N.E.2d 591.
49. Second Mercantile Financial Corporation v. Demierne, 1971, 272 N.E.2d 695.
50. 1970, 120 Ill.App.2d 185, 256 N.E.2d 369.
51. Ibid., sec. 309.
52. Ibid.

## CHAPTER VIII

### APPELLATE ARGUMENTATION

The use of facts is an ancient art; they can be interpreted and juxtaposed in a bewildering amount of ways so that, like the Sophists of Greece were accused of doing, the poorer argument can be made to seem the better. Now, this is obviously not the end of justice. However, such an art is necessary insofar as justice can only be served and injustice prevented by the ability of a party to demonstrate the correct relationship of the facts before those who judge. In appellate procedure, this type of argumentation occupies two forms: written and oral. The former, e.g., the written brief, is usually the more extensive of the two and includes a brief representation of the facts in the form of excerpts from the record or an abstract of the case. Often in appellate practice oral argumentation is dispensed with altogether and, when it is utilized, the time allowed for it is minimal.

The relationship of these components is complex. Chronologically, no generalization can be made concerning the sequence or interval of specific fact presentation and argumentation because of the many types of appellate routes. They are, however, materially related insofar as the facts must be argued both in terms of their order and in regard to the application of law to them. In order to best present this important phase



in the appellate process, the nature of the brief and the abstract or excerpts can be examined and their positions in the appellate prototypes assigned. Finally, the nature and place of oral argumentation in the appellate scheme can be defined.

### Briefs

A brief is a document prepared by counsel to serve as a basis for argument and to aid the court in considering the case on appeal. Each party is required to file a brief in the cause of action.<sup>1</sup> A brief, then, is an exercise in the art of written advocacy. In most appeals, three briefs are filed: the appellant's brief, the appellee's brief, and a reply brief by the appellant.

The appellant's brief is one of the most important parts of his appeal. It must state the nature of the action and the judgment appealed from; the issues on review; the statutes, constitutional provisions, regulations, or ordinances involved; the points of the case, the authorities in support of them, and the facts; an argument from the points, facts, and authorities; and a conclusion asking for specific relief.<sup>2</sup> The appellant's brief is limited to one hundred printed pages or seventy-five pages if typed; narrow margins are forbidden; and its cover must state the number of the case in the reviewing court, the court from which the appeal is brought, the identity of the trial judge, and the status (appellant-appellee) of the parties.<sup>3</sup> An important consideration for the appellant concerns the form of the brief. The requirements outlined here must be met.

Of course, the content of the appellant's brief is a central concern in the appeal. Just as it has previously been noted that facts not included in the record can not be argued on review, so it is that facts included in the record but not urged or argued in the brief are waived as grounds for reversal.<sup>4</sup> "Plaintiff's reasons . . . are not argued in their brief before this court . . . we will not consider them because they were not sufficiently presented to us for review, and, consequently, will be deemed to have been waived."<sup>5</sup> This rule is also applicable to specific sections of the brief:

The Points and Authorities is the statement of the grounds upon which appellant relies, and the argument of an appellant is limited to the points made. By not raising questions. . . in his Points and Authorities, the defendant is deemed to have waived it.<sup>6</sup>

The appellant, then, must be careful to argue and brief his assignments of error or grounds for reversal if he wishes the court to consider them.<sup>7</sup>

The appellee also files a brief. Like the appellant, his brief may not be more than one hundred pages printed or seventy-five typed, and should contain the same basic information.<sup>8</sup> Therein, the appellee must "state the propositions by which he seeks to sustain the judgment and should point out and correct insufficiencies in the appellant's statements."<sup>9</sup> For the appellee, such a refutation of the points raised by the appellant is essential. The "failure to meet and answer the grounds for reversal urged by the appellant would alone be sufficient for reversal."<sup>10</sup>

Finally, the reply brief may file a reply brief which must contain only argument and must be limited to the points advanced by the appellee in his brief. The reply brief is limited to twenty-seven pages if printed or twenty pages typed.<sup>12</sup> The inclusion of new or additional material which the appellant might think helpful to his case is not permitted. "We will not consider any issue raised for the first time in a reply brief."<sup>13</sup>

Several generalizations can be made about briefs and the court's strictness in dealing with irregularities in filing. First, as in the case of any legal instrument, "the brief should be comprehensible and prepared in an orderly manner."<sup>14</sup> The courts frown upon documents which require them to search for the points and arguments instead of presenting them in a clear and concise manner. Usually, the court will allow some latitude;

While the filing of briefs after the time allowed is improper and irregular, and a practice not to be encouraged, yet, whether the strict terms of the rule are to be enforced in any particular case, is a matter within the discretion of the court, and the decree will not be dismissed pro forma if the court, on an examination of the record, deems it proper to decide the case on its merits.<sup>15</sup>

Thus, the reviewing court can determine if there was sufficient compliance with the rules and, if it finds that there was not, it may dismiss the appeal.<sup>16</sup> Even if there was not sufficient compliance with the rules, or if <sup>one or</sup> neither of the parties files a brief at all,<sup>17</sup> the court does not have to dismiss the appeal though that option is available. An examination of several

cases may exemplify the wide range within which the court might exercise its discretion. In the instance of default by the appellee in filing his brief, the reviewing court may decide that it should reverse the judgment, since the failure to file a brief "constitutes sufficient grounds for reversing the decree,"<sup>18</sup> "Since the appellee did not file a brief in this court, we would be justified, without further consideration of the merits of the case, in reversing the order of the trial court."<sup>19</sup> On the other hand, the court may be lenient: "No brief has been filed by the defendant in this court, but we shall, nevertheless, determine the appeal on its merits."<sup>20</sup> The brief, then, need not be essential to a successful prosecution or defense on appeal. However, a litigant's opportunity and standing is obviously much improved by the timely filing of a brief setting forth his theory of the case in a clear and concise manner.

The chronological process of the filing and serving of briefs is subject to a great amount of variation because of the many different forms of appeal (see Fig. 7). In an appeal from a final judgment by right, the appellant's brief must be filed within thirty-five days of the filing of the record on appeal.<sup>21</sup> The appellee then has thirty-five days from the due date of the appellant's brief to file his brief.<sup>22</sup> The reply brief must be filed within the fourteen days subsequent to the appellee's due date.<sup>23</sup> Each filing must be accompanied by service and proof of service..<sup>24</sup> The sequence in

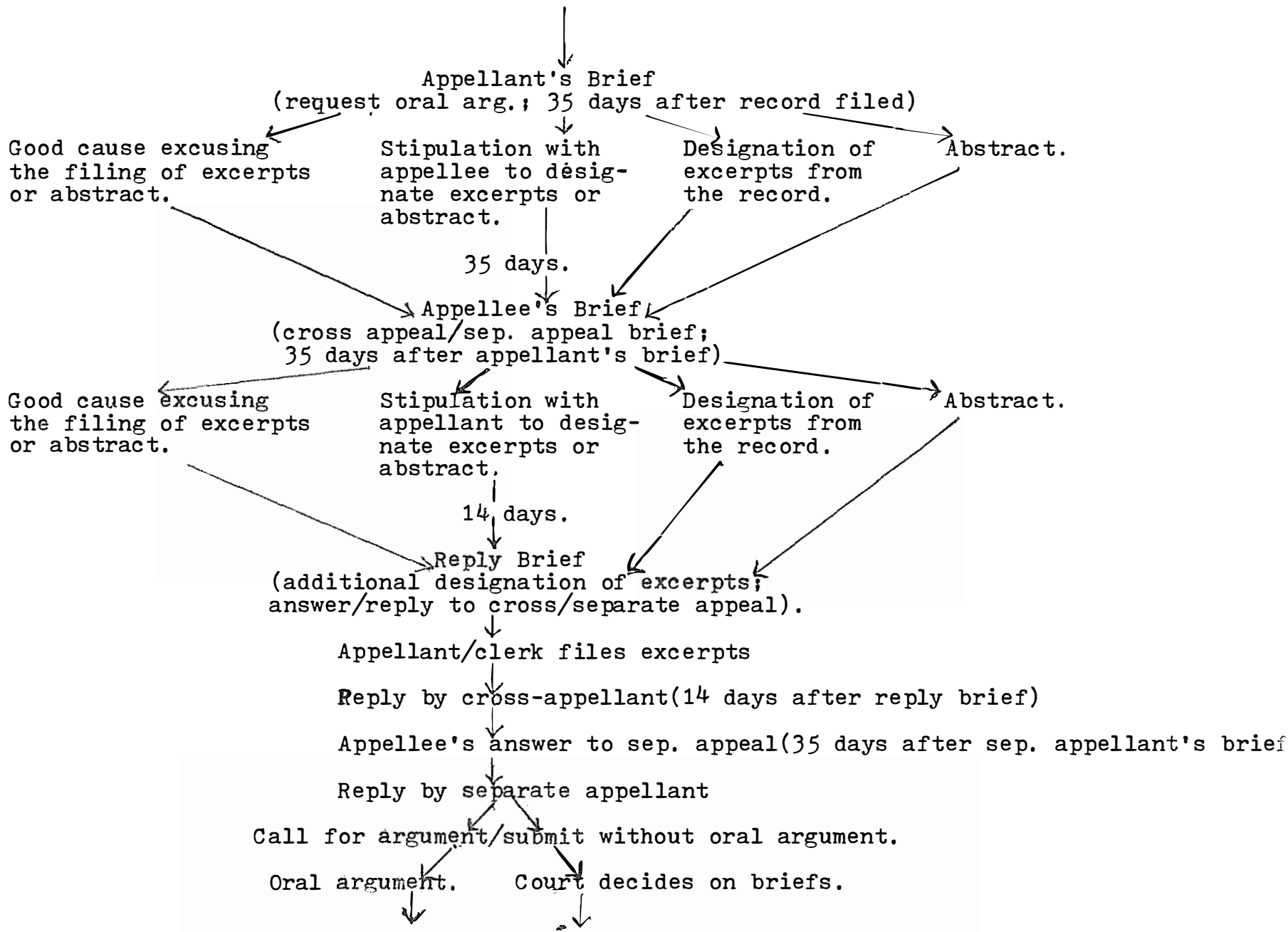


Fig. 7--Written and Oral Argumentation in Appeal by Right.

an interlocutory appeal by right is identical to that proceeding from a final judgment except that the time interval for filing all briefs is seven days.<sup>25</sup>

An appeal by permission presents several different options to the parties (see Fig. 8). The appellant and appellee may allow the petition and answer, respectively, to stand as their briefs.<sup>26</sup> A brief may be filed in addition to, or in lieu of, the petition or answer in the case of an appeal from a circuit court order granting a new trial.<sup>27</sup> In that instance, however, no reply brief is filed unless leave is granted by the court to do so.<sup>28</sup>

The presence of separate or cross appellants further complicates the procedural requirements for briefs. (see Fig. 7). A cross appellant is a designated appellee who has filed a counter or cross appeal. Such a case may arise when the appellee is not satisfied that the judgment or order in his favor has sufficiently disposed of all of his rights. Therefore, in the event of a cross appeal, the cross appellant (original appellee) must file a single brief meeting the points raised by the appellant's brief in the original appeal and urging his own grounds for review in his capacity as a cross appellant.<sup>29</sup> Thereafter, the original appellant shall file his answer to the cross-appellant along with his reply brief in the original appeal.<sup>30</sup> The cross appellant then has fourteen days in which to file a reply to the cross appellee's (the original appellant) answer.<sup>31</sup> Though confusing, such a procedure allows the appeal of both parties—in order to best serve justice.

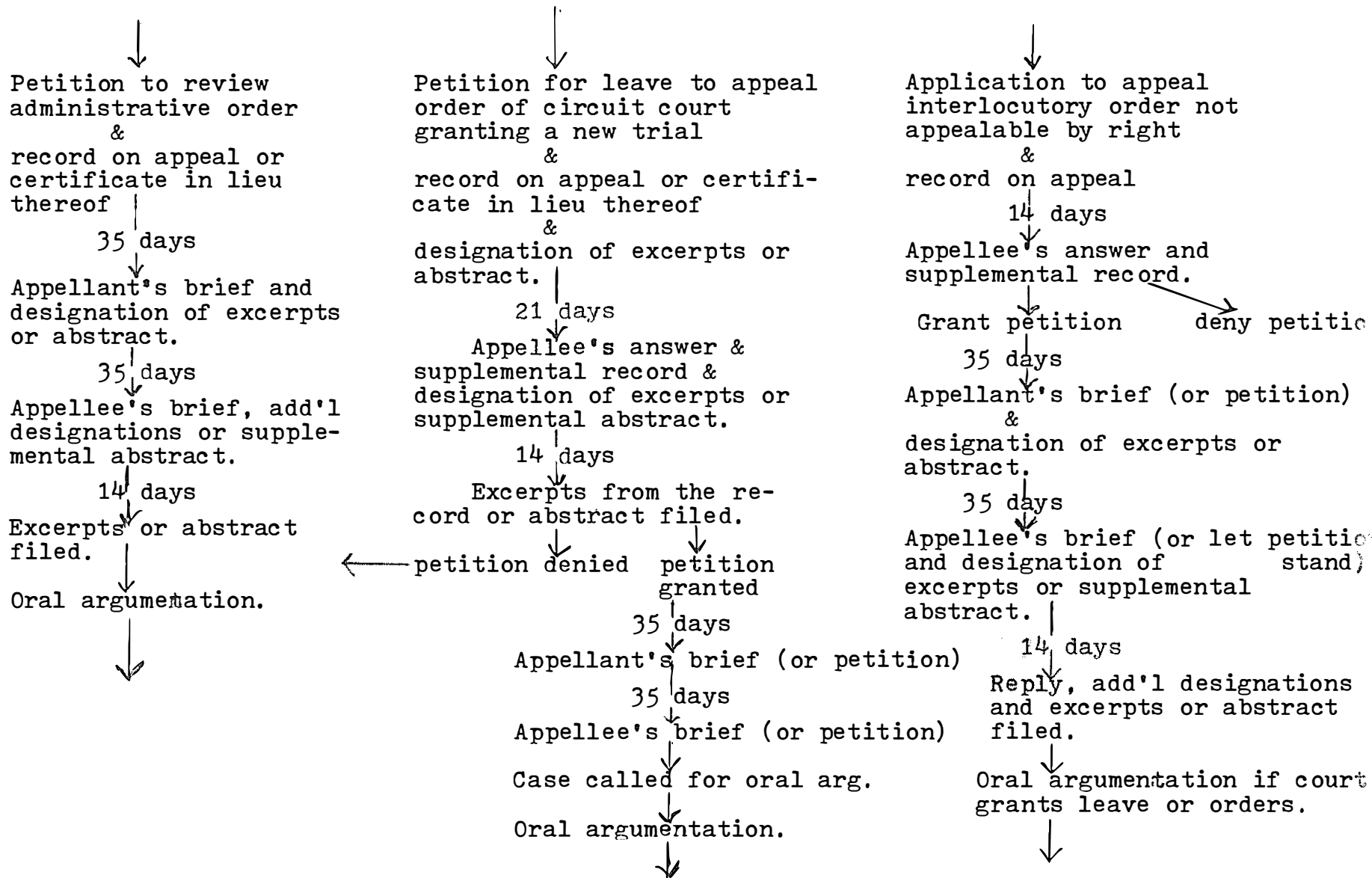


Fig. 8--Written and Oral Argumentation in Appeals by Permission

The instance of a separate appellant usually represents the concurrent prosecution of an appeal by a party besides the parties to the original appeal. The separate appeal might be prosecuted against either the appellant or appellee, depending on the circumstances of the separate party. In such a case, the separate appellant may file a brief within thirty-five days of the due date of the original appellant's brief.<sup>32</sup> The separate appellee brief is filed by whichever party is the defendant or respondent in the separate appeal and must be filed within the thirty-five days subsequent to the due date of the separate appellant's brief.<sup>33</sup> If the defendant in the separate appeal is the original appellant, he may include his answer to the separate appellant's brief in his reply brief for the original appeal.<sup>34</sup> In any case, the separate appellant shall have an opportunity to file a reply brief within fourteen days after the due date of the original appellant's reply brief (see Fig. 7).<sup>35</sup> In this type of appeal or any other form, briefs amicus curiae may be presented upon the leave of the court.<sup>36</sup>

It should be understood that the chronological maze of restrictions is not fixed. The reviewing court may extend or shorten the time allowed for filing a brief sua sponte, i.e., upon the court's own motion, or upon the motion of a party accompanied by an affidavit demonstrating just cause.<sup>37</sup> Such options should be wisely used in order to allow ample time to prepare and file a good brief. By now it should be obvious that a well-organized brief is essential to successful litigation.



The Abstract or Excerpts from the Record

As previously noted, reviewing courts should not have to search legal instruments to find the relevant facts and argumentation of those facts. Rather, these facts and arguments should be presented to the reviewing court in a manner which clearly delineates the issues in the cause of action. The way in which litigants strive to accomplish in the field of argument has already been discussed in the section dealing with briefs. Now, the examination must include the extraction from the record and presentation of material fact to the reviewing court.

An appellate court inherits a vast amount of factual information when it receives the record on appeal. Much of the material in the record does not directly contribute to the disposition of the appeal. In order to assist the court and to demonstrate support for the argumentation contained in the briefs, the parties are required to file an abstract of the record or excerpts from the record. The purpose of either is to illuminate the real issues of contention and to narrow the scope of the record to include only necessary information. "The abstract or excerpts are the pleadings of a case and must contain everything necessary to a decision on the issues."<sup>38</sup>

An abstract is basically a condensed narrative of the record which may contain verbatim accounts of important documents. Excerpts from the record are wholly verbatim extractions from the record which help to precisely demonstrate the issues of the case. The option of using excerpts from the

record in place of an abstract is a rather recent innovation in Illinois appellate procedure. Litigants have the option of filing either form<sup>39</sup> although there are advantages to the use of excerpts. The preparation of excerpts rather than an abstract normally saves time because the entire record does not have to be reduced to narrative form.<sup>40</sup> Also, excerpts are usually considered more objective and reliable, since they cannot be slanted except by omission.<sup>41</sup> If omissions are made, of course, the opposing party always has the chance to correct them.

If the appellant should choose to use excerpts from the record, the process begins with the filing of designations of the parts of the record each party desires to excerpt. The designations list the pages of the record on appeal to be extracted and include other factual matter like the judgment or order appealed from and the notice or petition for leave to appeal.<sup>42</sup> In an appeal from a final judgment of a circuit court<sup>43</sup> or an interlocutory appeal by permission,<sup>44</sup> the appellant begins the procedure by filing his record designations by the due date of his brief. The appellee, then, has the opportunity to designate any additional excerpts he thinks are essential to his case; he must do so by the due date of his brief.<sup>45</sup> The appellant may file additional designations any time before the due date of the excerpts<sup>46</sup> which is within fourteen days after the due date of the appellee's brief or on the due date of the appellant's reply brief.<sup>47</sup> The filing and preparation of the excerpts <sup>are</sup> ~~is~~ the responsibility of the

appellant,<sup>48</sup> though he may request the clerk of the reviewing court to prepare them.<sup>49</sup> The compiled excerpts should contain all of the excerpts designated by the appellant and the appellee.

Of course, time variations for filing exist in the case of excerpts from the record depending upon the appellate route utilized. In the case of an interlocutory appeal by right, the excerpts must be filed within seven days of the due date of the reply brief.<sup>50</sup> In the instance of review of the order of a circuit court granting a new trial, the appellant must file his designations with his petition; the appellee must file his designations with his answer; and the excerpts must be filed within fourteen days after the due date of the answer.<sup>51</sup> Excerpts from the record or an abstract of the record are not used in review of administrative orders. In any of the above cases, procedural simplification is possible by the filing of a written stipulation of the parties designating what shall be included in the excerpts from the record<sup>52</sup> (see Figs. 7 & 8).

Of course, the appellant may elect to file an abstract instead of excerpts from the record. In an appeal by right, he must file his narrative account of the material portions of the record with his brief.<sup>53</sup> The appellee may file a supplemental abstract with his brief if he feels the appellant's abstract is not sufficient.<sup>54</sup> In the case of an appeal by permission, the appellant's abstract should be filed with his petition for leave to appeal while the appellee's additional abstract can be filed with the answer<sup>55</sup> (see Figs. 7 & 8).

In certain cases, the filing of excerpts from the record or an abstract of the record may be waived. If one or both of the parties can demonstrate good cause, the reviewing court may excuse the filing of these documents.<sup>56</sup> This probably does not occur, however, with any amount of regularity.

Like the record on appeal and briefs, the excerpts or abstracts must meet certain substantive and procedural criteria in order to be a valuable part of the appellate process. Substantively, (and, henceforth, abstracts and excerpts will be discussed simultaneously with the same standards applicable to both) these summaries of the record must include the points to be urged as grounds for review;<sup>57</sup> "where a party seeks to have a judgment reversed, the error must be made to appear in the abstract [excerpts]."<sup>58</sup> Also, the abstract must summarize the record in an accurate fashion or the excerpts must include all the parts designated by the parties. If the appellant's abstract appears to be "so unfair and defective that it cannot be supplemented by a further abstract,"<sup>59</sup> the judgment may be affirmed and the appeal dismissed.

Procedurally, the litigants must substantially comply with the regulations for filing excerpts or abstracts. As in the case of procedural violations of other rule of the appellate process, late filing need not necessitate the dismissal of the appeal. Dismissal depends on how the court exercises its discretion in viewing the infringement. "Appeals have been dismissed only where there has been an omission or failure that is flagrant in its character, but . . . there must

of necessity be substantial compliance with the rules " (emphasis added).<sup>60</sup> Usually, the absolute failure to comply at all warrants the dismissal of the appeal: "When an appellant fails to file either an abstract of the record or excerpts from the record, the reviewing court may dismiss the appeal."<sup>61</sup> Once again, though the court is not required to dismiss the appeal in such circumstances, it is manifestly in the best interest of both parties to comply with the procedural and substantive rules to the fullest extent possible.

A final device which narrows the issues is available to litigants throughout the prehearing time period. Either before the filing of briefs and excerpts or abstracts or before the presentation of oral argumentation, a prehearing conference can be held in the reviewing court to simplify the issues by stipulation.<sup>62</sup> A judge who will not participate in the disposition of the case in the reviewing court should preside at such a conference.<sup>63</sup>

#### Oral Argumentation

Thus, the court is supplied with fact in the form of excerpts or abstracts and pure written advocacy in briefs. Yet, in order to insure that the requirements of justice are met, a further step is interposed in the process so that it can be assumed with utmost certainty that the courts have received an accurate interpretation of the facts and have been ~~subjected~~ to the most compelling arguments that each side can advance. Though written argumentation might well dwarf its

oral brother in bulk under our appellate system, it grows in stature when its content and contribution to adjudicating the cause of action is considered. Chief Justice Charles E. Hughes described the role of oral argumentation in this manner: "It is a great saving of the time of the court in the examination of extended records and briefs, to obtain the grasp of the case is made possible <sup>by</sup> oral discussion and to be able more quickly to separate the wheat from the chaff."<sup>64</sup> Oral argumentation, then, represents an important part in the appellate process.

To say that oral advocacy can be an important element in the appeal, however, is not to maintain that it is a universal practice. In the instance of the appeal of an interlocutory order by permission, no oral argument is allowed unless expressly ordered by the court.<sup>65</sup> In all of the other cases, oral argumentation is obtained by requesting it in the brief or mailing the request to the court.<sup>66</sup> After all required instruments have been filed, the case is called for oral argumentation before the appellate court according to its docket number.<sup>67</sup> The clerk of the court should give each attorney ample notice of the time for their oral presentations.<sup>68</sup>

Unless the court alters the time upon its own motion or that of one of the <sup>of</sup> parties, the time allowed for oral advocacy is very limited. Thirty minutes are normally allotted to each side for the main argument, with the appellant allowed ten minutes at the end for rebuttal.<sup>69</sup> If the hearing is ex

parte, only twenty minutes are allowed to the party.<sup>70</sup> Usually, the courts frown on extended quotation or reading from written sources such as briefs during oral argument; original and imaginative argumentation clearly defining the issues and stating the litigant's case is the object. In the case that oral argument has not been requested or allowed, then the court will dispose of the case on the basis of the briefs submitted by the parties.<sup>71</sup> If oral argumentation is pursued, however, the case goes before the court for determination upon completion of the arguments. At such a time, any remaining motions should be filed and alterations or amendments in the legal instruments made. Once the cause goes to the court, no further motions on the cause can be made.

In this manner, then, the procedural input of the parties to an appeal is completed. The notice of appeal, the record on appeal, briefs, excerpts or abstracts, and oral argumentation should provide the reviewing court with the information requisite for a judicial determination on the merits of the cause of action. The alternatives of disposition by the appellate courts are, thus, a logical next step in the discussion of the appellate sequence.

## ENDNOTES

1. I.L.P. Appeal and Error, sec. 551.
2. I.R.S. ch. 110A, sec. 341(e).
3. Ibid., sec. 341(a),(b).
4. Ibid., sec. 341(e)(7).
5. Quinn v. Larson, 1966, 77 Ill.App.2d 240,  
222 N.E.2d 77.
6. Varap v. Varap, 1966, 76 Ill.App.2d 402,  
222 N.E.2d 77.
7. Clore v. Friedman, 1973, 13 Ill.App.3d 913,  
301 N.E.2d 15.
8. I.R.S. ch. 110A, sec. 341(a),(b).
9. I.L.P. Appeal and Error, sec. 558.
10. Marcus v. Green, 1973, 13 Ill.App.3d 699,  
300 N.E.2d 512.
11. I.R.S. ch. 110A, sec. 341(g).
12. Ibid., sec. 341(a).
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## CHAPTER IX

### DETERMINATION AND DISPOSITION

The judicial determination of an appeal is the end product of a lengthy and complex process. Ideally, it is synonymous with whatever the term "justice" connotes. Of course, the exigencies of the real world often prevent the realization of such a neat theoretical correlation. The Illinois appellate system, however, attempts to approach the ideal by the providing of a wide range of decision-making alternatives for the judiciary. Along with a system in which law and equity are fused, this wide-ranging adjudicatory structure allows the reviewing courts to dispense justice in cases of varied circumstance.

The basis for this flexible framework resides in the discretionary powers allotted to the reviewing courts and the scope of review in which they may exercise such powers. An appellate court may, according to its own discretion, allow the substitution of parties; exercise powers of amendment; correct the record; draw inferences of fact; and "give any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, that the case may require."<sup>1</sup> These

powers can be exercised over causes of action relating to errors of law and errors of fact.<sup>2</sup> Thus, the court has recourse to a wide range of judicial remedies within its broad scope of review.

In the exercise of such power as limited by the scope of review, the reviewing courts have developed de facto rules which guide them in the disposition of appeals. Resting principally on precedent or stare decisis, these rules reveal basic tenets of appellate justice. One concerns the nature of the question on review. It has generally been held that the reviewing courts will not go beyond the immediate issues in their determination of the case. The courts will review only questions or contentions that are essential to the determination or final disposition of the case;<sup>3</sup> they will not rule on an issue merely to establish a precedent or to "render a judgment to guide potential future litigation."<sup>4</sup> Thus, "the review cannot go beyond the issues appearing in the record."<sup>5</sup>

Another rule concerning the nature of the question reviewed is that the court is concerned with the correctness of the ruling appealed and not the reasons given in the trial court for reaching that conclusion. "It is the decree, of course, and not the reasons . . . which is under review, and the decree, if right, will be affirmed."<sup>6</sup> The opinion of the lower court, though it might be informationally valuable, is not the issue under consideration by the reviewing court.

Appellate courts have also held that in certain defined situations where presumption exists, it will assume lower

court actions to be proper unless the appellant affirmatively demonstrates the errors charged. Such a presumption, naturally, exists in support of the judgment or decrees of lower courts.<sup>7</sup> This also applies to all areas of discretionary action by the lower courts, such as jurisdictional decisions, the allowance of evidence, and similar decisions. "The exercise of discretion by the trial court will not be disturbed on review unless it has been abused."<sup>8</sup> An example of a discretionary action by a court is demonstrated by the refusal of a trial court to assume jurisdiction in a case in which both of the litigants were non-residents.<sup>9</sup> In that case, the reviewing court refused to overturn the decision because the appellant failed to show abuse of the trial court's discretionary powers.<sup>10</sup>

Even where the court finds that review is warranted, it will not alter an order or judgment if the errors urged by the appellant are purely technical, errors of form, or harmless and not prejudicial of any rights. "Technical or formal errors will not cause a reversal of the judgment where substantial justice is done between the two parties"(emphasis added).<sup>11</sup> The application of such a rule includes errors in the form of the verdict which is not prejudicial of rights<sup>12</sup> as well as simple procedural rule violations: "We will not reverse merely to compel compliance with purely technical matters which can in no way affect the substantial justice."<sup>13</sup> It seems, then, that the appellate courts have decided that substantial justice is the proper end product of judicial review. Undoubtedly, such a flexible system would greatly impress

Roscoe Pound who so long descried appellate "record worship."<sup>14</sup> Therefore, "a court will not reverse for harmless error."<sup>15</sup> A complaining party must show that the error caused him prejudice or some material injury.<sup>16</sup> Harmless error ceases to retain that adjective only when the requirements of substantial justice are violated by it.

A final rule concerns the waiver of errors. It has already been noted that, in the interest of substantial justice and upon its own discretion, a court may consider a case on the merits even in the absence of the appellee's brief.<sup>17</sup> Normally, however, if a party fails to urge, argue, or discuss an error, it is thereafter considered waived.<sup>18</sup> Such an error may be expressly waived by a litigant, or it may be implicitly waived by the party's failure to include it in the argument.<sup>19</sup> Again, the refusal to consider such errors is largely discretionary on the part of the court. In terms of substantial justice, however, the adherence to this rule detracts from the flexibility which has been noted as a positive trait of the Illinois appellate system.

In accordance with the rules laid down by its own practice and within the limits delineated by its discretionary powers and lawful scope of review, the reviewing court acts to dispose of appeals through the medium of several remedies. These alternatives--dismissal, affirmance, reversal, modification and remandment--allow the court to render substantial justice according to the facts and circumstances presented by each case. The court, of course, has a responsibility to

issue a decree which is proper according to the record and, whenever possible, to make a final disposition of the issues in the cause of action.<sup>20</sup> An investigation into the use and nature of each of these remedies may further illuminate the procedural functioning of the appellate process (see Fig. 9).

### Dismissal

The remedy of dismissal is appropriately considered first since it is utilized throughout the sequence of events in each of the appellate prototypes. It has already been noted that the trial court may dismiss an appeal for want of prosecution before it is docketed in the reviewing court.<sup>21</sup> The reviewing court has established by practice a wide range of circumstances under which it might dismiss an appeal.

Some cases brought before the reviewing court obviously call for dismissal. An appeal will be dismissed if it is taken under a statute which has been repealed or declared void.<sup>22</sup> Also, if the appeal is considered by the court to be "frivolous" or "wholly lacking in merit" it may decide not to hear the cause.<sup>23</sup> If the prosecuting party lacks a real interest in the cause or has no right to appeal, the appeal will be dismissed.<sup>24</sup> The lack of an actual controversy (moot question)<sup>25</sup> or want of jurisdiction by the court<sup>26</sup> may also cause review to be rejected. The reviewing court may, like the trial court, dismiss an appeal for want of prosecution;<sup>27</sup> failure of a party to appear and a lack of preparation for the hearing constitute a common example.<sup>28</sup> The failure to comply with the requirements for perfecting the appeal<sup>29</sup> carries a

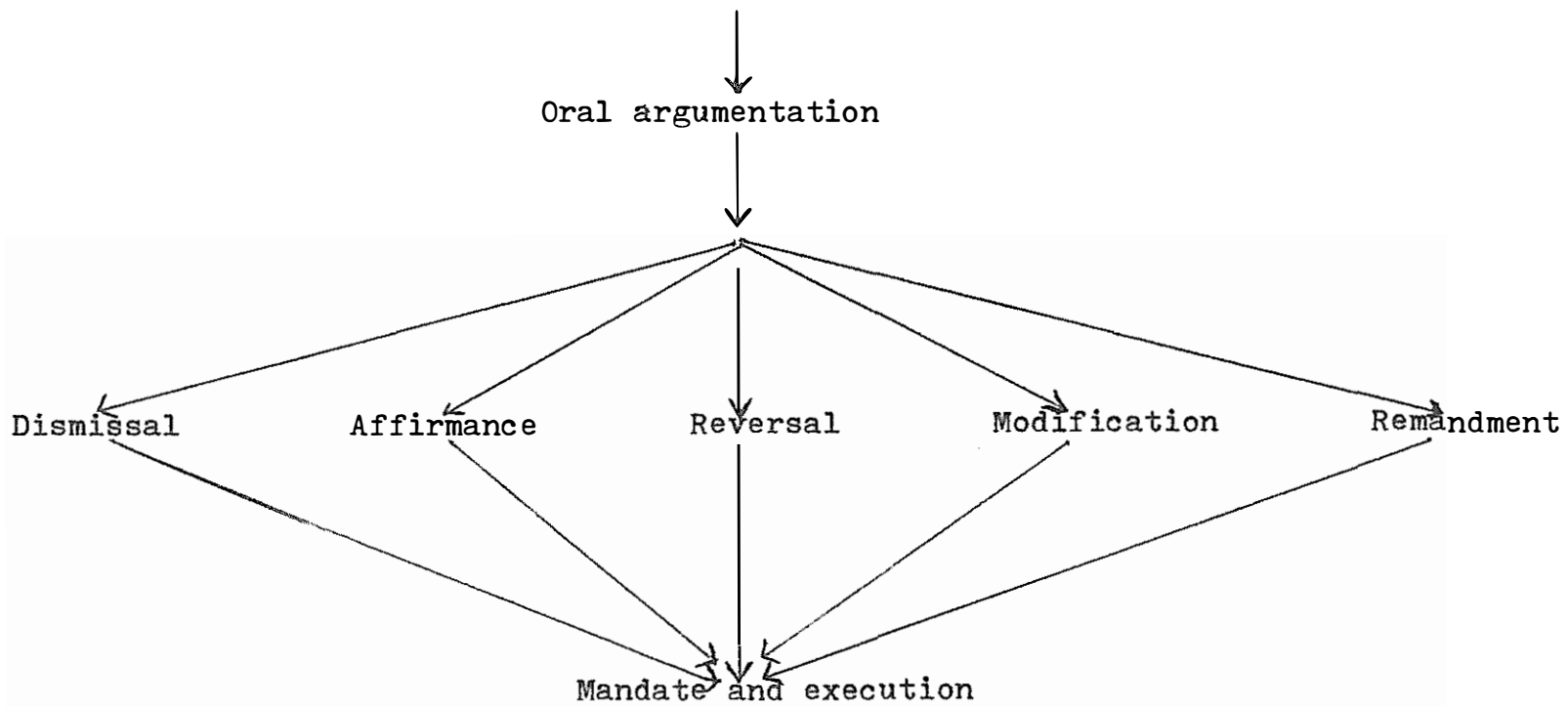


Fig. 9--The Disposition of an Appeal



similar penalty. Other discretionary grounds for dismissal include procedural rule violations concerning the record, briefs, and excerpts or abstracts, and these have already been described.<sup>30</sup> Finally, an appeal will not be dismissed if it is brought before the wrong court; it will be transferred to the appropriate reviewing body without prejudice to the litigants.<sup>31</sup> However, if the wrong avenue of appeal is taken, the cause may be dismissed. For example, if an appeal is taken from a final judgment and the court finds the order to be interlocutory in nature, it may dismiss the appeal.<sup>32</sup>

Thus, there are many grounds--both procedural and substantive--upon which a settled rule dictates that the reviewing court dismiss the appeal. The dismissal of an appeal, however, does not differ greatly from another remedy--the affirmance of the trial court's judgment or decree. That, then, is properly the next remedy before this investigation.

#### Affirmance

The appellate alternative of affirming the decree of the trial court is similar in substance to dismissal in that its effect on the prosecuting party is like that of dismissal--the appellant's prayer for relief is not granted. A major difference resides in the procedural effect of affirmance vis-à-vis that of dismissal. In the event of dismissal, the actions which caused that remedy to be employed may be rectified and the appeal may be re-entered. The affirmance of a judgment, however, concludes the rights of the parties and prevents the

issues involved from being reviewed in the same court under most circumstances.<sup>33</sup> Thus, affirmance is a distinct remedy available to the appellate courts to meet the circumstances of each cause of action.

"An adjudication may be affirmed where the record will not warrant reversal, where the appellant fails to make out his case on appeal, or where the submission of an appeal is improper or incomplete."<sup>34</sup> In the instance wherein the record does not justify reversal, the court may affirm the judgment or order because the appellant has not demonstrated and the court has not discovered any substantial error in the record which materially alters the presumption in favor of the trial court's actions. If the appellant "fails to make out his case on review," that may involve the failure to urge or argue points which are necessary to support a reversal of the judgment.<sup>35</sup> An improper or incomplete appeal has already been described several times; an excellent example is the instance in which "the cause has been submitted in entire disregard of the rules of the court."<sup>36</sup> Specifically, the affirmance of the judgment for such violations may be based on the failure to file a proper and complete transcript and abstract<sup>37</sup> or the failure on the part of the appellant to file a brief.<sup>38</sup> Affirmance may also be used when the court believes that the appellant is abusing the process, e.g., when an appeal is brought for the purposes of delay.<sup>39</sup> Finally, a judgment may be affirmed if the reviewing court determines that the appellant lacks the legal capacity to appeal.<sup>40</sup>

Thus, the affirmance of a judgment or order, along with the dismissal of an appeal, represents a remedy by which the appellee might prevail upon review. These two judicial alternatives--particularly the action of affirmance which usually finally disposes of the issue on review--are the only one's which positively defeat the appellant's prayer for relief. There is, of course, a specific remedy which grants the appeal, and that alternative shall be discussed next.

### Reversal

The goal of any appellant in an appeal is the reversal of the order, judgment, or decree which is the subject of the prayer for relief. Upon the demonstration of an error of fact, of law, or in the application of the relevant law, an appellate court may declare that the conclusion reached by the trial court is incorrect. The effect of such a reversal is restorative; "a reversal abrogates the judgment reversed and restores the parties to their original rights."<sup>41</sup>

The grounds for reversal must be found in the record and are included in the two general areas of law and fact. Of course, the error shown must also materially affect or prejudice the substantial rights of a party: "A court will not reverse for harmless error."<sup>42</sup> It will, however, reverse a judgment upon the stipulation of the parties, or upon the demonstration of a defect in the jurisdiction of the trial court that rendered the order or judgment. "A judgment, order, or decree of a court that lacked jurisdiction or one that

is void for any other reason will be reversed by this court."<sup>43</sup> Also, "a judgment may be reversed in part if the erroneous portion can be segregated from the correct part."<sup>44</sup> Thus, the action of reversal is clearly not an all or nothing remedy.

The reversal process does not operate in isolation. Often a reviewing court may follow up the overruling of a judgment or order with the substitution of the judgment that "the court below ought to have rendered."<sup>45</sup> In some cases, however, the court might not be legally competent to do this. If the trial court did not render a final judgment, then the reviewing court cannot interpose its judgment in the matter. It still may, of course, reverse the trial court's decision. Generally, then, reversal is used with the substitution of the appellate court's for that of the trial court where the former is legally competent to do so.<sup>46</sup>

Thus, the reversal process is one which terminates the litigation or at least some part of it in favor of the appellant. The latter instance in which only a portion of the cause is determined reveals that the courts have remedies other than those which fully dispose of the cause of action on appeal. These remedies--modification and remandment-- must be dealt with before this discussion of dispositive alternatives available to the reviewing courts can be considered complete.

#### Modification and Remandment

Though these remedies may be rather general in their connotative sense, they are significant alternatives for a reviewing court. Obviously, these instruments work in con-

junction with reversal. The changing or modifying of a judgment necessarily implies the reversal of at least some part of it, as does a decision to remand or send the case back to the trial court for reconsideration.

"The reviewing court has the power to correct or modify a judgment or decree."<sup>47</sup> This may include a complete reversal of the judgment and the substitution of that of the appellate court: "If there be error in this record, the court will enter such judgment as the court below should have entered."<sup>48</sup> On the other hand, the court may choose or be forced (lacking legal capacity) to remand the case to the trial court.<sup>49</sup>

This latter example represents a final remedy utilized by the reviewing courts--remandment. The remandment of a cause means that it is sent back to the trial court for reconsideration or further action. The remandment may simply be the reversal of an order, or it may involve no decision by the appellate court: "The reviewing court may remand a case to the lower court without decision for additional action in the court."<sup>50</sup> Again, the decision to remand may or may not be discretionary. If, for example, the issue before the court is an interlocutory order, then the reviewing court may determine the propriety of that order but may not pass a final judgment in the cause of action. An appellate court is not authorized to pass final judgment when the trial court has not entered a final judgment in the case disposing of the rights of all of the parties.<sup>51</sup>

If the reviewing court does not pass final judgment in a case, it often remands the cause to the trial court with instructions. Often the instructions concern the disposition of the case that the trial court ought to make. "A judgment may be reversed and the cause remanded with directions to the trial court to enter a specific judgment."<sup>52</sup>

Thus, the modification and remandment of judgments or orders may be exercised jointly or separately. Both represent valuable alternatives which do not necessarily dispose of the cause in favor of either of the litigants. In such a manner, a reviewing court can utilize a wide variety of remedies to meet the exigencies of each case.

#### ENDNOTES

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2. Ibid., sec. 366(b)(1).; supra., p. 36.
3. I.L.P. Appeal and Error, sec. 631.
4. LaSalle National Bank v. City of Chicago, 1954,  
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5. Kioutas v. City of Chicago, 1965, 59 Ill.App.2d 441,  
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6. Harrison v. Kamp, 1946, 69 N.E.2d 261.
7. I.L.P. Appeal and Error, sec. 711; Davis v. Davis,  
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21. supra., pp. 59-60.
22. Taylor v. Kirby, 1889, 31 Ill.App. 658.
23. I.L.P. Appeal and Error, sec. 583; Chicago Title & Trust Co., v. Shambery, 1938, 17 N.E.2d 236.
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26. I.L.P. Appeal and Error, sec. 587.
27. Ibid., sec. 583.
28. Lawler v. Gordon, 1879, 91 Ill. 602.
29. Kennedy v. Court of Honor, 1908, 84 N.E. 702.
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31. I.R.S. ch. 110A, sec. 365.
32. Anderson v. Samuelson, 1950, 92 N.E.2d 343.
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35. People ex rel. Dailey v. Ross, 1916, 111 N.E. 987.
36. Campbell v. Campbell, 1917, 116 N.E. 679.
37. Early v. Early, 1957, 141 N.E.2d 758.
38. Hutchinson v. Moore Bros. Furniture Co., 1898, 85 Ill.App. 456.
39. Ording v. Burnett, 1899, 52 N.E. 851.
40. People ex rel. Yohnka v. Kennedy, 1937, 10 N.E.2d 806.
41. I.L.P. Appeal and Error, sec. 960.
42. Gauger v. Mills, 1950, 90 N.E.2d 790.
43. Moffat Coal Co. v. Industrial Commission, 1947, 73 N.E.2d 423.
44. I.L.P. Appeal and Error, sec. 947.; School Directors v. Kimmel, 1889, 31 Ill.App. 537.



45. Pearsons v. Hamilton, 1837, 2 Ill. 415.
46. I.L.P. Appeal and Error, sec. 949.
47. Ibid., sec. 931.
48. Peck v. Stevens, 1846, 10 Ill. 127.
49. Electrical Contractor's Association v. A.S. Schulman, 1945, 119 Ill. 30.
50. Goodrich v. Sprague, 1944, 52 N.E.2d 250.
51. I.L.P. Appeal and Error, sec. 894.
52. Ibid., sec. 954.

## CHAPTER X

### POST-JUDGMENT MOTIONS AND TERMINATION OF THE APPEAL

Depending on the alternative which the reviewing court selects, the cause will either be disposed of by that court or will be remanded to an inferior court. Even in the case of the latter instance, however, the litigation will eventually terminate. In order to comprehensively satisfy the demands of justice, post-appellate-hearing motions are possible. Once they have been disposed of, the judgment entered by the first level of reviewing courts can be executed (see Fig. 10).

The most important post-appellate motion is the motion for rehearing. This request asks for another hearing in the reviewing court for the appeal in order to correct "inadvertent errors which are substantial"<sup>1</sup> which may have occurred in that court. The petition for rehearing should be filed within twenty-one days after the declaration of the court's opinion.<sup>2</sup> It should include the points supposedly overlooked or misapprehended by the court and the parts of the record relied on.<sup>3</sup> If granted, the appellee has twenty-one days in which to file an answer, and the appellant may reply to that answer in the following fourteen days.<sup>4</sup> There is no oral argumentation unless leave is granted or ordered by the court.<sup>5</sup> Substantial compliance with these rules should follow.

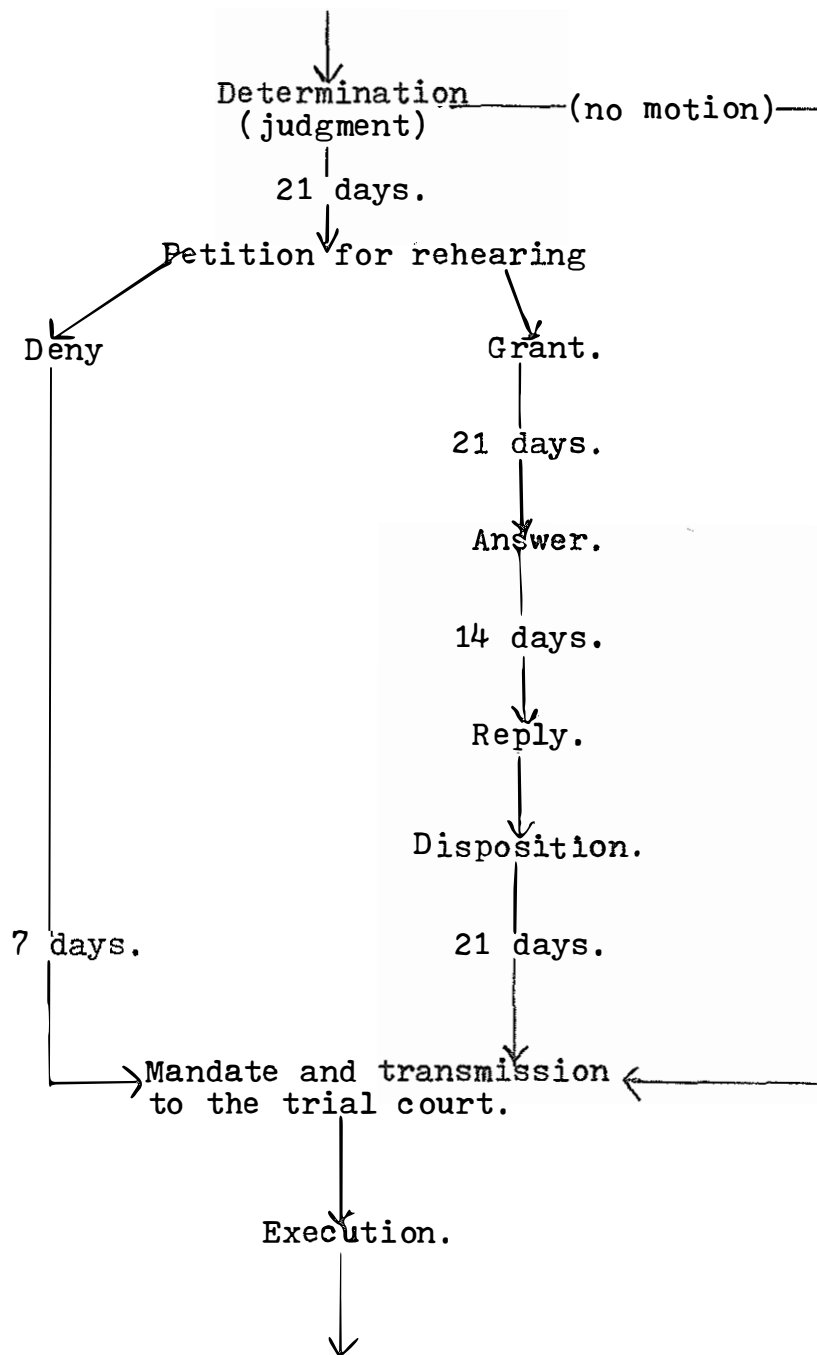


Fig. 10--Post-Judgment Motions and Execution.

There are a number of general rules governing the use of a motion for rehearing. The original hearing is determinative of the subject matter admissible in the second.<sup>6</sup> "Parties cannot for the first time on petition for rehearing raise questions which were not urged or argued on appeal."<sup>7</sup> Furthermore, a second petition--after the granting or denial of one--is not favored.<sup>8</sup> Finally, action on the petition consists of an examination of the record.<sup>9</sup> "On petition for rehearing the record is examined to ascertain whether or not in the opinion filed the court has overlooked or misapprehended matters material to the decision."<sup>10</sup>

There is one instance, in particular, wherein a petition for rehearing is efficacious in securing a favorable decision. "Where the decision which the court followed in making the determination was subsequently reversed on appeal,"<sup>11</sup> then the court will, on a motion for rehearing, reverse its prior judgment. This reversal is possible because "the power to vacate a judgment during term is inherent in all courts."<sup>12</sup> Beyond the expiration of the term, redress is possible by appeal to a higher level, which shall be examined later.

The filing of a petition for rehearing accomplishes one other purpose; it delays the execution of the judgment of the court. "Where a petition for rehearing is filed, the judgment of the appellate court does not become final until the petition is denied."<sup>13</sup> Once the petition is determined, however, all litigation between the two parties--unless there is a possibility of a further appeal to a superior court--is

terminated. This is also true of subsequent appeals to the same court. No question considered (or one that could have been considered) in a prior appeal on the merits of the case can be argued in a subsequent appeal; likewise, those points not raised in the original review are held to have been waived.<sup>14</sup> Thus, second appeals--like a petition for rehearing--can argue only misapplication of facts in the record. Rehearings and subsequent appeals are, therefore, restricted in the circumstances under which they may be brought.

Where a cause is brought to this court and considered, its judgment as to all the points and questions presented will forever conclude the parties, and if the cause is again brought before the court for review such questions cannot be reconsidered and they will not be open for discussion (emphasis added).<sup>15</sup>

The disposition of all post-appellate motions, then, allows the execution of the judgment to proceed.

The execution of the judgment entered by a reviewing court is effected by the use of a mandate. The mandate is merely "the judgment of the reviewing court transmitted to the lower court."<sup>16</sup> The timely filing of the judgment or mandate of an appellate court reinstates the case in the trial court,<sup>17</sup> reinvesting that court with jurisdiction and allowing execution to issue from it.<sup>18</sup> Upon the filing of the mandate with the clerk of the trial court, "execution may issue and other proceedings may be held on the judgment, the same as if no appeal had been prosecuted" (emphasis added).<sup>19</sup> Thus, whether the reviewing court has affirmed or reversed the lower court's judgment, or remanded the case back to that court, the

filing of its mandate executes its judgment in the original court. Of course, if dismissal or affirmance resulted from the appeal, the original judgment of the trial court is implemented. If, however, the judgment in the cause is reversed and remanded--particularly if the remandment is with instructions--execution consists of the trial court's adherence to the letter of the reviewing court's decision. "Where a judgment is reversed and the cause remanded with specific directions, the trial court must carry out such directions."<sup>20</sup>

Thus, the first level in the appellate process is procedurally empowered and forced to conform to rigorous standards generally acknowledged to be essential to the realization of man's great interest on earth--justice. From the attachment of jurisdiction by the reviewing court to the termination of its judicial hegemony over the cause, Illinois appellate procedure is saturated with safeguards to insure that everyone receives his due in the process of litigation. Yet, the recognition that humanity connotes a measure of frailty necessitates a safety clause in the judicial policy. A second level of review is permitted in order to achieve the maximum certainty that the requirements of justice have been met. Such a structure is represented by the Illinois Supreme Court, which is now, therefore, a most appropriate topic for discussion.

## ENDNOTES

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3. Ibid., sec. 367(b).
4. Ibid., sec. 367(d).
5. Ibid.
6. I.L.P. Appeal and Error, sec. 617.
7. Sobina v. Busby, 1965, 210 N.E.2d 769.
8. I.L.P. Appeal and Error, sec. 620.
9. Ibid., sec. 621.
10. Glasser v. Essaness Theatres Corp., 1952, 346 Ill.App. 72, 104 N.E.2d 510.
11. I.L.P. Appeal and Error, sec. 616; People ex rel. Ratkowski v. Kelly, 1941, 37 N.E.2d 570.
12. Glasser v. Essaness Theatres Corp., op. cit.
13. Ibid.
14. Kazubowski v. Kazubowski, 1970, 259 N.E.2d 282.
15. Gillum v. Central Illinois Public Service Co., 1928, 250 Ill.App. 617.
16. Busser v. Noble, 1961, 32 Ill.App.2d 181, 177 N.E.2d 251.
17. I.L.P. Appeal and Error, sec. 981.
18. Busser v. Noble, op. cit.
19. First National Bank of Palatine v. Hahneman Institutions of Chicago, 1934, 190 N.E. 707.
20. People ex rel. Shake v. Lord, 1925, 146 N.E. 506.

PART III

ILLINOIS APPELLATE PROCEDURE AND PRACTICE:  
THE SECOND LEVEL OF APPELLATE ACTION



## CHAPTER XI

### THE SUPREME COURT

In Illinois, "judicial power is vested in a Supreme Court, an Appellate Court, and Circuit Courts."<sup>1</sup> The former institution not only occupies the position of the court of last resort, but it is also the rule-maker for Illinois courts.<sup>2</sup> This power includes the promulgating of rules of "pleading, practice and procedure" for all levels of courts, limited only by the stipulation that the rules not be inconsistent with legislative enactments such as the Civil Practice Act.<sup>3</sup> The rules of the court, insofar as valid, have the binding force and effect of law.<sup>4</sup>

Of course, the supreme court is important for reasons other than its administrative and quasi-legislative duties. In Illinois, it always represents the judicial body of last resort. In <sup>such</sup> a unified court system, the supreme court occupies the second and final level of review. As such, the court is vested with the necessary power to execute all of its "judgments, decrees, and determinations in all matters within its jurisdiction according to the rules and principles of the common law and the laws of this state."<sup>5</sup> As the final link in the judicial chain, its pronouncements are final and conclusive upon all of the litigants bring a cause before the court.<sup>6</sup>

The supreme court is composed of seven judges,<sup>7</sup> elected at general or judicial elections<sup>8</sup> for ten year terms.<sup>9</sup> Three of the seven judges are selected from the First Judicial District,<sup>10</sup> which is Cook County,<sup>11</sup> while one is selected from each of the four remaining districts.<sup>12</sup> The concurrence of four judges is necessary for a decision on a case, and the same number constitutes a quorum.<sup>13</sup> The Chief Justice is chosen by his colleagues on the court for a term of three years.<sup>14</sup>

The supreme court possesses original jurisdiction in certain instances,<sup>15</sup> but the bulk of its activity concerns the disposition of appeals. Like the appellate courts at the first level of review, appeals may proceed to the supreme court both as of right and by permission. The procedural routes by which appeals may be brought before the court, then, form an appropriate topic for the next part of the discussion.

## ENDNOTES

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3. Ibid.
4. People v. Callpy, 1934, 358 Ill. 11.
5. I.R.S. ch. 37, sec. 12.
6. Ibid., sec. 18.
7. Constitution, op. cit., sec. 3.
8. Ibid., sec. 12(a).
9. Ibid., sec. 10.
10. Ibid., sec. 3.
11. I.R.S. ch. 37, sec. 1.1.
12. Constitution, op. cit., sec. 3.
13. Ibid.
14. Ibid.
15. Ibid., sec. 4(a).

## CHAPTER XII

### APPELLATE PROCEDURE AT THE SECOND LEVEL OF REVIEW

In its appellate capacity, the supreme court always functions as the court of last resort and nearly always represents the second level of appellate review (see Fig. 11). In civil cases, it <sup>will</sup> hear an appeal directly from the Industrial Commission, if a question involving the validity of a Federal or state statute arises in a trial court, or if the public interest requires prompt disposition of the matter.<sup>1</sup> In the hierarchical classification scheme that has been utilized here, such appeals are most properly placed with those of the first level of review discussed in Part II.<sup>2</sup> Procedurally, however, they bear the greatest affinity to appeals by right which proceed from the appellate court to the supreme court; therefore, they shall be implicitly included in the procedural description of practices at the second appellate level.

An appeal from an appellate court to the supreme court may be by right if a Federal or state constitutional question was first raised "in and as a result of the action of the appellate court."<sup>3</sup> Though semantically described as an appeal by right, review can only be achieved by the filing of a "Petition for Appeal as a Matter of Right" with the supreme court which argues the grounds by which the appeal is properly taken by right.<sup>4</sup> The petition should also include the points

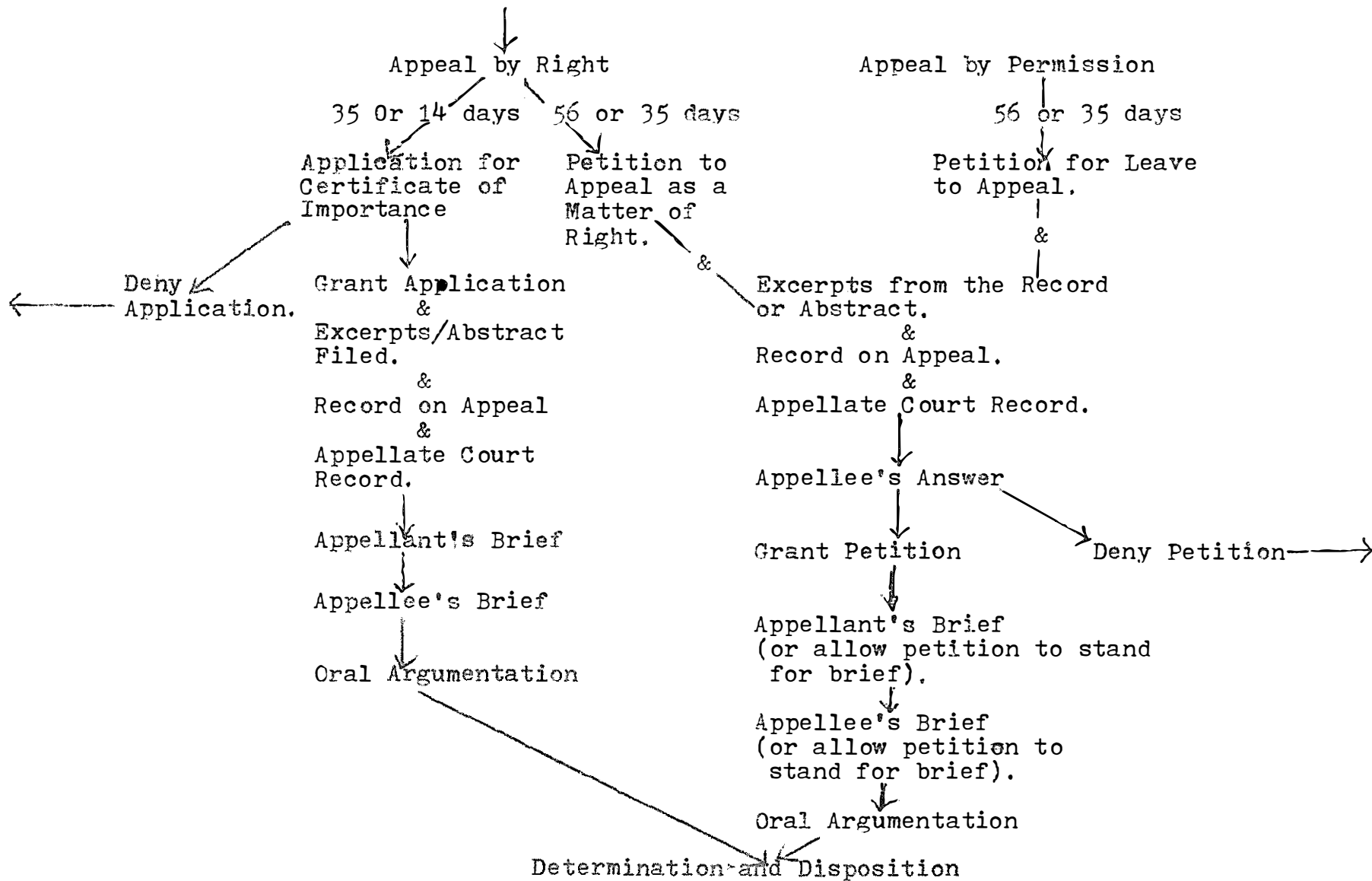


Fig. 11--The Second Level of Review

relied on for reversal and a short description of the facts of the case.<sup>5</sup> The petition should be filed within fifty-six days after the entry of judgment by the appellate court or within thirty-five days after the disposition of a petition for rehearing.<sup>6</sup> The excerpts or abstracts used in the appellate court should be filed in the supreme court along with the record on appeal and the appellate court record.<sup>7</sup> The appellee, or respondent, may file an answer within fourteen days of the due date of the petition specifying why the petition should not be granted.<sup>8</sup> The petition will then be either granted or denied, and briefs may then be filed in addition to the petition or answer, or the petition or answer may be allowed to stand as briefs.<sup>9</sup> Oral argument may be requested and allowed as in appellate court appeals.<sup>10</sup>

An appeal may also be taken by right "upon the certification by a division of the appellate court that a case decided by it involves a question of such importance that it should be decided by the Supreme Court."<sup>11</sup> An application can be filed for the certificate in the appellate court within thirty-five days after the entry of its judgment or within fourteen days after a petition for rehearing is disposed of.<sup>12</sup> If the certificate is granted, then the record on appeal and the appellate court record are transmitted to the supreme court.<sup>13</sup> Excerpts or abstracts and briefs are filed as in the appellate court,<sup>14</sup> and provisions for oral argumentation are also the same. This type of review by right is also somewhat inaccurately described, for the "right" of review is

predicated upon the granting of a petition, in this case one addressed to the appellate court instead of the supreme court. Once granted, however, the certificate of importance gives an appellant a right to review and confers jurisdiction upon the supreme court.<sup>15</sup>

An appeal may also be brought to the supreme court by its permission in any case not appealable to that court by right.<sup>16</sup> The procedure for initiating and prosecuting a petition for leave to appeal is identical to that taken in a petition to appeal by right, with the exception that the former petition begins with a prayer for leave to appeal and contains argument why review is warranted instead of the latter's argument for why the appeal can be taken by right.<sup>17</sup> If the petition is granted, the presentation of briefs and oral arguments is also the same as in the procedure for an appeal by right.

Upon the examination of the various appellate routes to the supreme court, it becomes clear that the term "appeal by right" is really a misnomer. All prototypes--both by "right" and by permission--involve a petition of some form that need not be granted. The key in all appeals to the supreme court, then, is that court's judicial discretion. In an appeal by certificate, the discretion of <sup>the</sup> appellate court determines how important it is that the case be heard by the supreme court. The supreme court exercises its discretion in deciding if the grounds for an appeal by right have been met. When leave for permission to appeal to the supreme court is sought, "sound judicial discretion"<sup>18</sup> becomes the sole criterion for review.

Certain characteristics are prime considerations in the court's execution of its discretion: the importance of the question; the existence of a conflict between the relief prayed for and prior judicial decisions; and the final or interlocutory nature of the judgment.<sup>19</sup>

Statutes, rules, and historical judicial decision-making have combined to establish a number of settled guidelines which govern the procedural framework. Firstly, appeals of interlocutory orders to the supreme court are "not favored."<sup>20</sup> The authority of the supreme court to review judgments of appellate courts ordinarily extends only to judgments that are final or made final by statute.<sup>21</sup> However, "where a constitutional question is involved, it is immaterial whether the Appellate Court's orders are interlocutory."<sup>22</sup> The importance of a constitutional question in a case--which, of course, allows the appeal to be taken by right--is of the first order. However, the intricacy of the process of appeal by right can be understood since the fabrication of a "constitutional question" is an undeserved way to obtain review. In order to satisfy the demands of justice and avoid unnecessary appellate litigation, the courts have developed another rule. "It is settled that this court will not pass on constitutional questions if the case can be decided without doing so."<sup>23</sup> Another judicial tenet concerns the review of appellate court decisions; it is the judgment or order and not the opinion or reasons for the decision given by the appellate court that is reviewed by the supreme court.<sup>24</sup> Conversely, "denial by the Supreme



Court of a petition for leave to appeal from a decision of the Appellate Court of Illinois is an approval of the decision, or the result reached, although not necessarily an approval of the reasons expressed by the appellate court."<sup>25</sup> Finally, decisions or instructions issued by the supreme court are binding on appellate courts.<sup>26</sup>

Thus, the supreme court functions as the final link in the appellate chain. Procedurally, it differs little from the courts at the first level of review except that virtually all appeals to it are, in fact if not in name, discretionary. Administratively and judicially, it acts to finally conclude the rights of the parties properly within its jurisdiction.

ENDNOTES

1. I.R.S. ch. 110A, sec. 302(a).
2. supra., p. 31.
3. I.R.S. ch. 110A, sec. 317.
4. Ibid.
5. Ibid., sec. 315(b).
6. Ibid.
7. Ibid., sec. 315(d).
8. Ibid., sec. 315(e).
9. Ibid., sec. 315(g).
10. supra., pp. 77-79.
11. I.R.S. ch. 110A, sec. 316.
12. Ibid.
13. Ibid.
14. supra., pp. 65-77.
15. Spivy Building Corporation v. Illinois-Iowa Power,  
30 N.E.2d 641.
16. I.R.S. ch. 110A, sec. 315(a).
17. Ibid., sec. 315(b).
18. Ibid., sec. 315(a).
19. Ibid.
20. Ibid., sec. 318(e).
21. Phelps v. Elgin, Joliet and Eastern Railway Company,  
1963, 191 N.E.2d 241.
22. Ibid.
23. Commissioners of Drainage District No. 5 v. Arnold,  
1943, 50 N.E.2d 825.

24. Gould v. Gould, 1951, 97 N.E.2d 826.
25. Corbett v. Devon Bank, 1973, 12 Ill.App.3d 559,  
299 N.E.2d 591.
26. Ibid.; Hensley v. Hensley, 62 Ill.App.2d 252.  
210 N.E.2d 568.

## CHAPTER XIII

### CONCLUSION

Little can be said in the way of summation in an examination of appellate procedure. The details of practice have been outlined with substantive points included to illuminate what the procedural requirements mean and how they work. However, this investigation began with a consideration of how appellate procedure satisfies the demands of justice. Perhaps a general evaluation of how well the Illinois system of appellate procedure functions is necessary in order to fully conclude the discussion.

Of course, the evaluation of any system must be predicated on some standard base. To historically compare the detailed functioning of the present system with those that have existed would require a volume far bulkier than this. Yet, a few general remarks can be made in terms of some of the advances the Illinois system has made vis-à-vis the historical schemes outlined in Part I. Then, possibly, this judicial idea can be compared with standards prepared by the foremost appellate jurist of the century--Roscoe Pound. Though his criteria may not be the measure applicable to this problem, it certainly can be well argued that his rating scheme is as good as any other proposed. Finally, then, some answer may be reached concerning the ability of modern man to obtain justice.

Several aspects of the present system of appellate justice in Illinois deserve comment before the entire system is rated. The court system is a unified one in which a three level structure functions with an efficient single trial court level of original and virtually unlimited jurisdiction, an intermediate appellate court (somewhat of a rarity among the states), and a final judicial tribunal in the form of the supreme court. Original actions are usually not subject to multiple trials or disputes of jurisdiction and the route and procedure for appeal are clearly prescribed. Indeed, the review of civil cases has been immeasurably improved by the reorganization of the courts.

Other improvements include a general tendency away from regarding an appeal as a trial de novo,<sup>1</sup> less reliance on formal writs at each procedural juncture,<sup>2</sup> and "a very general relaxing of rules requiring new trials for error in the record and review of the record rather than of the case"<sup>3</sup> The strong trial court is essential to good review, for it can delineate the issues before it clearly so that the issues and not an "inflated record"<sup>4</sup> is the subject under review. Of course, the courts can function only as well as those who represent litigants before them. Counsels' mistakes can often tie the hands of the courts in their efforts to achieve justice just as effectively as poor procedures and organization. "It is not the office of the court to teach litigants how to appeal."<sup>5</sup> Thus, a well-trained and ethical legal class is essential to the attempts of any court system to obtain justice.

With these positive achievements and inherent limitations in mind, the Illinois appellate system can now be evaluated. One of the necessary qualities of a good appellate structure is that procedure should be entrusted to rules promulgated by the courts.<sup>6</sup> This has obviously been fulfilled in the Illinois system.<sup>7</sup>

A good appellate framework attempts to "get rid thoroughly of the last remnants of the old procedure upon writ of error."<sup>8</sup> Illinois has largely achieved this goal in civil practice through the merger of actions at law and equity,<sup>9</sup> though it still retains the concept that an appeal is a "continuation of the proceeding"<sup>10</sup> in which the appellate courts are not empowered to receive new evidence. Pound terms this latter practice an "anachronism,"<sup>11</sup> noting that justice is the end product desired and advocating the acceptance of any evidence--old or new--which helps to achieve that end.

Thirdly, there should be one mode of obtaining review.<sup>12</sup> This is accomplished by the single appeal which is heard by all appellate courts. Of course, distinctions are made between appeal by right and by permission. However, the old choice between appeal and writ of error is gone.<sup>13</sup>

Furthermore, efforts should be made to reduce the expense of appeals.<sup>14</sup> In Illinois, certain modifications of practice have fostered this tendency. Certainly, the ability to file excerpts from the record in place of abstracts is a good example of financial efficiency. In the case of excerpts, time and expense is saved by not reducing the record to narrative form.

The procedure for review should not be any more complex than the hearing of a motion to modify a judgment is in the trial court.<sup>15</sup> This is probably the most blatant shortcoming of the Illinois appellate system. It is simplified in relation to historical practice, but the bulk of the procedure outlined in the preceding pages testifies to the essential complexity which envelops this process.

Double appeals ought to be avoided.<sup>16</sup> This is satisfied by the Illinois system in two ways. Cross appeals and separate appeals are disposed of in the same proceeding.<sup>17</sup> Also, subsequent appeals on the same subject matter are not allowed.<sup>18</sup> The latter point supports the mode of thinking which considers an appeal a continuation of the proceeding and not a trial de novo in which new evidence can be received. Perhaps Pound's criteria conflict in this area.

Finally, Pound urges that good appellate systems should "restore oral argument to its rightful place in the hearing of causes in courts of review."<sup>19</sup> The importance of oral argumentation has already been discussed.<sup>20</sup> The strict time limits which Illinois procedure provides<sup>21</sup> obviously do not adequately meet this standard.

On the whole, and assuming the general validity of Pound's evaluatory criteria, the Illinois appellate system does rather well in satisfying the requirements of justice (see Fig. 12). Certainly, great strides have been made in the thirty years between Pound's writing and the establishment of the present Illinois system. Institutional structures

<u>Criteria</u>	<u>Rating</u>
1. Court promulgates rules of procedure.....	+
2. Abolish writ of error, law-equity distinctions	
a) abolition of writ and distinction.....	+
b) inability to receive new evidence	....0
on appeal.....	-
3. Single mode of appeal.....	+
4. Reduction of expense.....	+
5. Procedural complexity in prosecuting appeal....	-
6. Double appeals.....	+
7. Reliance on oral argument.....	"
<hr/>	
Overall rating.....	+

Fig. 12--Evaluating the Illinois Appellate System



change slowly, and it is to the credit of the lawmakers that this system has progressed so far in so short a period of time. Of course, while institutions may change slowly, they are also, fortunately, in a continuous state of flux. Hopefully, this barely perceptible rate of change will enable the procedural structure of appellate justice will continue to adapt itself to satisfy "the great interest of man on earth."

#### ENDNOTES

1. I.R.S. ch. 110A, sec. 301.
2. Roscoe Pound, Appellate Procedure in Civil Cases (Boston: Little, Brown and Company, 1941), p. 375.
3. Ibid., p.376.
4. Ibid., p. 378.
5. Ibid., p. 382.
6. Ibid., p. 385.
7. supra., p. 105.
8. Pound, op. cit., p. 385.
9. supra., p. 19.
10. I.R.S. ch. 110A, sec. 301.
11. Pound, op. cit., p. 387.
- 12.. Ibid., p. 388.
13. supra. p. 19.
14. Pound, op. cit., p. 389.
15. Ibid., p. 390.
16. Ibid., p. 392.
17. supra., pp. 70, 72.
18. supra., p. 101.
19. Pound, op. cit., p. 392.
20. supra., pp. 77-79.
21. Ibid.

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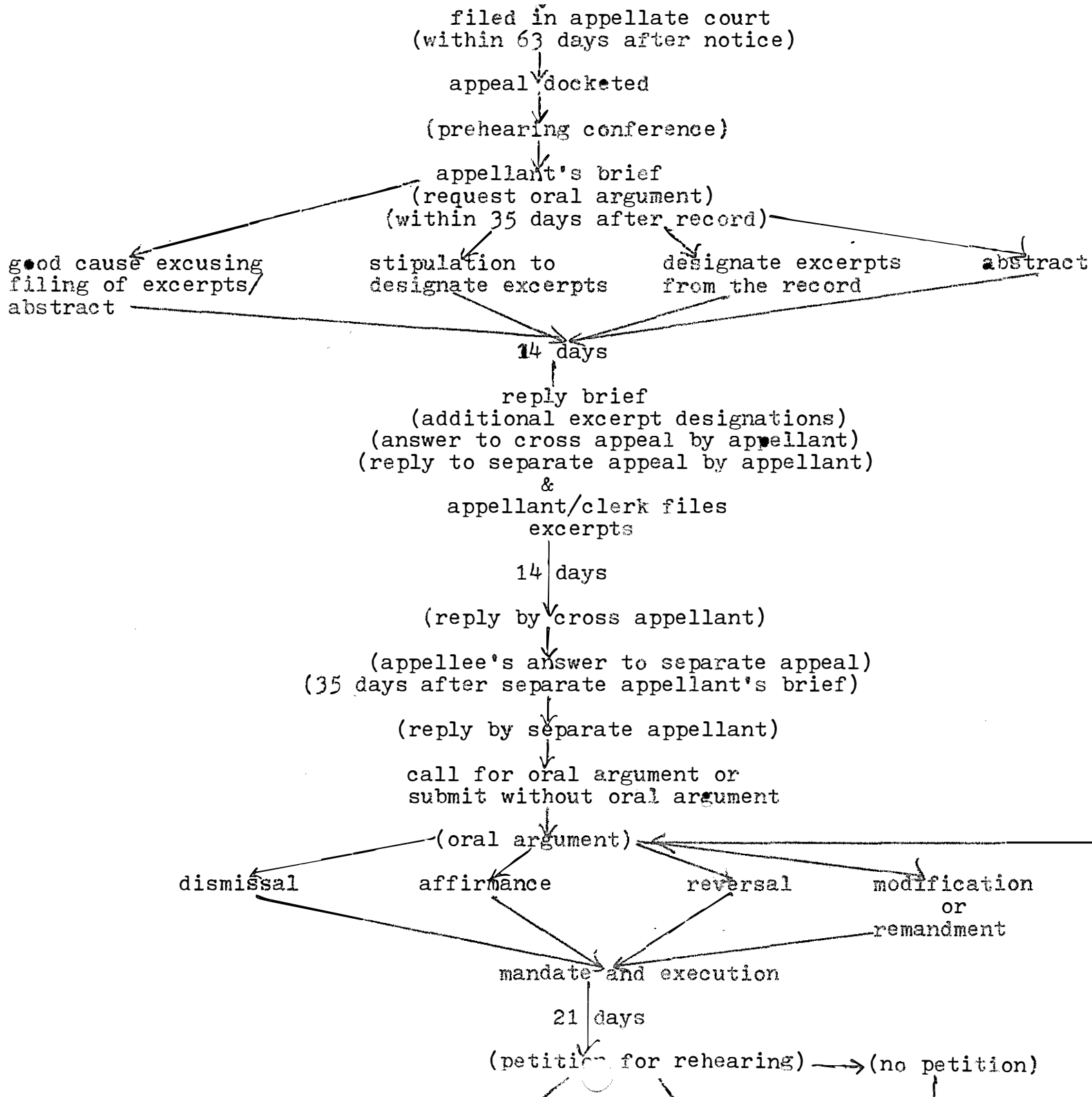


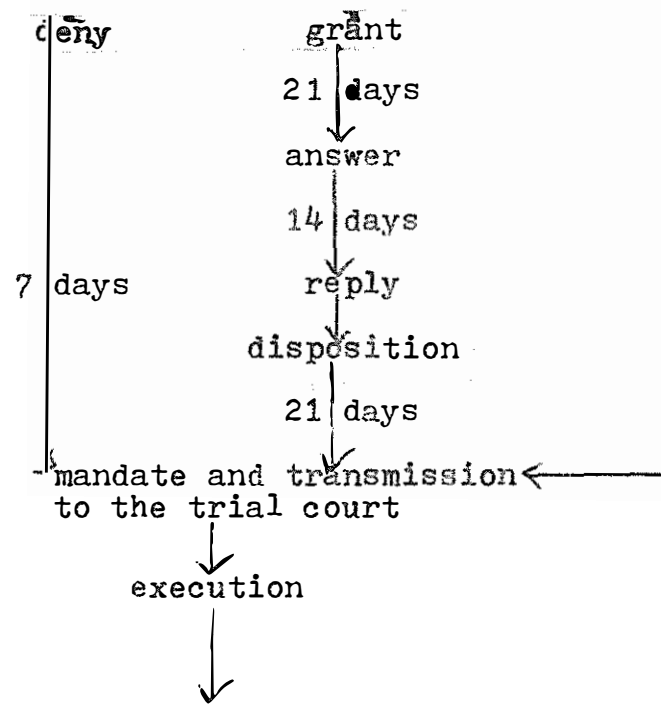
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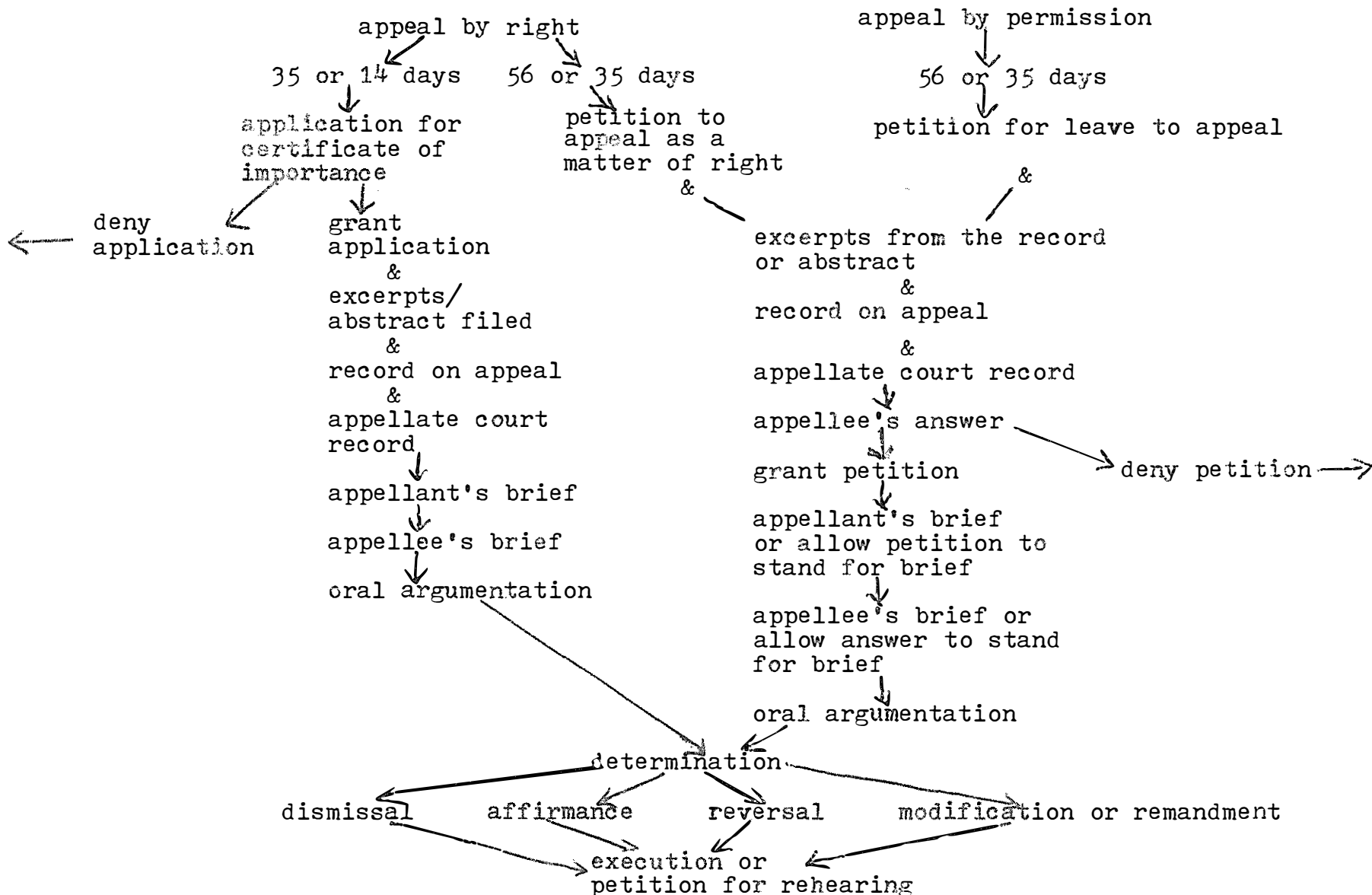
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