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## Constitutional Law—Retroactive Constitutional Right to Appeal

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was no appearance by or for the defendant. Defendant's appeal to the Court of Appeals was granted because of the change in constitutional law brought about by the cases of *Griffin v. Illinois*,<sup>54</sup> and *People v. Pride*.<sup>55</sup>

Defendant contended, that under the circumstances, his right to appellate review had been unconstitutionally denied. The *Griffin* and *Pride* cases decided, that a state violates the rights of due process and equal protection if it allows all convicted persons to have appellate review, except those who cannot afford to pay for the records of their trial. Formerly, the rule was, that it was within the discretion of the state to allow or disallow appeals, or to grant appeals on such terms and conditions as to the legislature seemed proper.<sup>56</sup> Therefore, it was held that an appeal *in forma pauperis* was a privilege and not a right, and refusing to grant one the right to thus appeal did not violate the requirements of due process.<sup>57</sup>

A state is not required to provide appellate review, but if it does so, the grant must not be made in a discriminatory manner.<sup>58</sup> The ability to pay costs in advance, bears no rational relationship to a defendant's guilt or innocence, and cannot be used as an excuse to deprive a defendant of a fair trial.<sup>59</sup> Therefore, where an indigent defendant must have a transcript, the state must provide some means whereby the defendant and the appellate court will have access to such record.<sup>60</sup>

The State is not required to assign counsel on appeal, or in any post-conviction proceeding in which a defendant is involved, irrespective of the merits of the appeal, except in first degree murder cases.<sup>61</sup> However, if the defendant is incarcerated, he does not have access to the record of the trial, filed in the county clerk's office, pursuant to Section 456 of the Code of Criminal Procedure. Therefore, the court must assign counsel in order that someone may inspect the records for the indigent defendant.<sup>62</sup> The Court held, that defendant was unconstitutionally denied his right to appellate review, since no record was filed under Section 456, until after his appeal had been dismissed by the Appellate Division, and since he was physically unable to inspect the record, even had it been properly filed.

#### RETROACTIVE CONSTITUTIONAL RIGHT TO APPEAL

Defendant was convicted for robbery in 1948 as a second offender, and appealed by right. He requested his appeal to be allowed *in forma pauperis*. This request was denied and the appeal subsequently dismissed for failure to

54. 351 U.S. 12 (1956).

55. 3 N.Y.2d 545, 170 N.Y.S.2d 321 (1958).

56. *State v. Edwards*, 157 Ohio St. 175, 105 N.E.2d 259 (1952), *cert. denied*, 343 U.S. 936 (1951).

57. *Clough v. Hunter*, 191 F.2d 516 (10th Cir. 1951).

58. *McKane v. Durston*, 153 U.S. 684 (1894); *Cochran v. Kansas*, 316 U.S. 255 (1942).

59. *Supra* note 54 at 17.

60. *Supra* notes 54 and 55.

61. *People v. Breslin*, 4 N.Y.2d 73, 172 N.Y.S.2d 157 (1958).

62. *People v. Kalan*, 2 N.Y.2d 278, 159 N.Y.S.2d 480 (1957).

## COURT OF APPEALS, 1958 TERM

prosecute. At that time, no appeal could be had from a denial of defendant's request to have his conviction reviewed *in forma pauperis*.<sup>63</sup> Eight years later defendant's first conviction was vacated. Consequently, defendant appealed for resentencing as a first offender. In conjunction with this appeal defendant also applied for a review of the merits of his 1948 conviction.<sup>64</sup>

In 1959, the Court of Appeals, in *People v. Pitts*,<sup>65</sup> held that the denial of an appeal in a criminal action because the defendant is unable to pay the costs of his appeal, is a denial of equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution.<sup>66</sup>

*People v. Williams*,<sup>67</sup> a companion case to *People v. Pitts*, held that the defendant could no longer procure a review on the merits of his 1948 conviction because his request was untimely.<sup>68</sup> However, in view of the *Pitts* decision, the defendant should now have the privilege which was unavailable to him at the time of his conviction, i.e., to show that the refusal to allow his appeal *in forma pauperis*—"which led to the later dismissal of the appeal, deprived him of a 'right' to appeal and constituted a denial of the equal protection of the law."<sup>69</sup>

The Court's decision may enable the defendant, if the constitutional question is decided in his favor, to gain review of the merits of his 1948 conviction. This result seems equitable in view of the possibility that the defendant may have served a sentence for over ten years which, had he been able to afford to appeal, might never have been imposed.

## CORPORATIONS

### POWER OF CORPORATION PRESIDENT TO BRING SUIT ON BEHALF OF THE CORPORATION

In the case of *West View Hills, Inc. v. Lizau Realty Corp.*,<sup>1</sup> three men owned all of the plaintiff's stock, and also constituted its board of directors, with one of them being its president as well. The remaining two owned all of the defendant's stock, the president of the plaintiff having sold his interest in the defendant (along with some nine other corporations) to the other two. Without any meeting or other authorization of the board of the plaintiff, its president instituted suit against the defendant, in the name of the plaintiff, to recover amounts which it was allegedly wrongfully required to pay to the defendant, for a building which the latter had built for the former. The remaining two directors of the plaintiff, the complete owners of the defendant,

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63. *People v. O'Rafferty*, 291 N.Y. 801, 53 N.E.2d 571 (1944).

64. *People v. Williams*, 6 N.Y.2d 193, 189 N.Y.S.2d 149 (1959).

65. 6 N.Y.2d 288, 189 N.Y.S.2d 650 (1959); See Note, 9 BUFFALO L. REV. 97, *supra*.

66. *Griffith v. Illinois*, 351 U.S. 12 (1956).

67. *Supra* note 63.

68. *People v. Baumeister*, 283 N.Y. 625, 28 N.E.2d 32 (1940).

69. 6 N.Y.2d 193, 196, 189 N.Y.S.2d 149, 152 (1959).

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1. 6 N.Y.2d 344, 189 N.Y.S.2d 863 (1959).