Chicago-Kent Law Review

Volume 33 | Issue 3 Article 5

June 1955

Recent Illinois Decisions

Chicago-Kent Law Review

RECENT ILLINOIS DECISIONS

CRIMINAL LAW—APPEAL AND ERROR, AND CERTIORARI—WHETHER PAYMENT OF FINE BY CONVICTED DEFENDANT OPERATES AS WAIVER OF RIGHT TO SECURE REVIEW—The Illinois Supreme Court, through the medium of the case of *People* v. *Shambley*,[1] appears to have been presented with a legal problem which, heretofore, had never conclusively been resolved in this jurisdiction. The case was one in which the defendant, following conviction for a criminal offense, paid the fine which had been imposed and thereafter sued out a writ of error to obtain a review of the proceedings. He was met at the outset with a contention interposed by the prosecution that, by payment of the fine, all questions presented by the writ of error had been rendered moot, thereby operating to waive the defendant's right to secure review. The court, however, entertained a review of the proceedings on the ground the mere presence of a conviction for crime was itself an injury which would be sufficient to entitle a defendant to an opportunity to secure reversal even though, on the practical aspects of the situation, he might gain no financial relief from a reversal.[2]

The problem involved, comparable to the one presented when a defendant seeks review of a conviction after a plea of guilty or following an application for probation,[3] has been previously presented to the Appellate Courts of the state with somewhat contradictory results,[4] with the most recent of these holdings favoring review[5] on the ground that the mere presence of a conviction is an injury *per se* which the defendant should have opportunity to avoid by means of review proceedings. Since the Supreme Court has already determined that the presence of an erroneous civil judgment would be enough to warrant review, albeit the judgment had been paid,[6] the legal reasoning there employed would lend itself even

1 4 Ill. (2d) 38, 122 N. E. (2d) 172 (1954). See also People v. Williams, 4 Ill. App. (2d) 506, 124 N. E. (2d) 537 (1955).

2 Following review, the court nevertheless voted to affirm the conviction.

3 People v. Collis, 344 Ill. App. 539, 191 N. E. (2d) 594 (1951); People v. Brown, 345 Ill. App. 610, 194 N. E. (2d) 353 (1952), abst. opin.

4 The Fourth District, in Lambert v. People, 43 Ill. App. 223 (1892), held that a motion to dismiss an appeal taken after a fine had been paid should be sustained. In People v. Donahoe, 223 Ill. App. 277 (1921), arising in the First District, the appeal was determined on the merits and the discussion as to waiver is in the nature of dictum. The Third District holding in People v. Bandy, 239 Ill. App. 273 (1925), operated to overrule a motion to dismiss the appeal, despite the fact that the defendant had pleaded guilty and had paid the fine, when it was found that the information was fatally defective.

5 People v. Lee, 334 Ill. App. 158, 78 N. E. (2d) 822 (1948).

6 First Nat. Bank v. Road Dist. No. 8, 389 Ill. 156, 58 N. E. (2d) 884 (1945); Lott v. Davis, 262 Ill. 148, 104 N. E. 199 (1914); Page v. People ex rel. Weber, 99 Ill. 418 (1881).

more strongly to the case of a criminal conviction, hence the final solution of the problem is not an unsound one. One is led to speculate, however, whether the same rationale would be followed, after a pending proceeding to procure review of a criminal conviction had been rendered moot by the death of the defendant,[7] in the event the legal representative or next of kin of the defendant desired the court to complete the review so undertaken. If it would, then a long step forward would have been taken with respect to the achievement of abstract justice.

CRIMINAL LAW—PUNISHMENT AND PREVENTION OF CRIME—WHETHER PERSON ARRESTED FOR MISDEMEANOR MAY ENJOIN POLICE OFFICIALS AGAINST THE TAKING AND FILING OF IDENTIFICATION DATA—The facts in the recent case of *Poyer* v. *Boustead*[1] indicate that some twenty-three plaintiffs had been arrested for the violation of a city ordinance[2] and, after being placed in jail, were fingerprinted and photographed over objection. Three days later, apparently before any determination had been had as to their guilt or innocence on the criminal charges, the plaintiffs instituted suit to enjoin the police from circulating the identification records so taken. The trial court sustained a motion to dismiss the petition[3] and, on appeal from this holding, the Appellate Court for the Second District affirmed when it concluded that no right of the petitioners had been invaded by the action of the police officials.

Although statutory provisions exist with regard to the taking and filing of identification data with the state Department of Safety,[4] and for the return hereof in the event the defendant is found not guilty, these provisions are irrelevant to the issue presented in the instant case for they deal only with the records of persons convicted for felonies or who have been arrested for other designated acts, none of which were involved in the instant case. For that matter, there is no case law in this state

7 See O'Sullivan v. People, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143 (1892).

1 3 Ill. App. (2d) 562, 122 N. E. (2d) 838 (1954). See also the related case of People v. Guzzardo, 4 Ill. App. (2d) 355, 124 N. E. (2d) 39 (1955), which appears to have arisen from the same labor dispute as the one involved in the instant case. The court there held that a city alderman was not, simply by virtue of that fact, immune from prosecution under the statute prohibiting unlawful assemblies: Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 507.

2 The plaintiffs had apparently assembled in the vicinity of a plant where a strike was then in progress, but the opinion does not disclose whether the plaintiffs were striking employees nor does it indicate the nature of the alleged misdemeanor for which they were arrested.

3 Justification for this action could have rested on the fact that the petition failed to allege that the defendants still had the records in their possession. It is familiar law that equity will not exercise jurisdiction to enjoin against the commission of past acts, particularly where the defendant is in no position to restore the status quo: 28 Am. Jur., Injunctions, § 5.

4 Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 780e.

which deals directly with the point[5] so the court felt impelled to draw on the decision in the case of *Young* v. *Chicago Housing Authority*[6] for analogy.

In that case, the employees of a public housing authority were held not entitled to secure an injunction against a proposal to fingerprint all of the employees, with intent to match the same against existing records, as the program was said to bear a clear relation to the welfare of the residents of the projects operated by the housing authority. It is true that the court there indicated that no stigma attached to fingerprinting as the same had come to be a widely accepted device to aid in determining employee fitness, to serve as a deterrent to the furnishing of false information, and as a quick and certain means of identification in the event of death.[7] But it should be noted that the practice there sanctioned had support in a special statute,[8] one which conferred on the public authority the right to adopt the means in question, and the purpose intended to be subserved was not one to implement a rogues' gallery or to uncover information useful to law enforcement officials so much as it was to provide a screen by which to determine the fitness of prospective workmen to serve in certain quasi-public capacities.[9]

The analogy so provided is weak, to say the least, and little support is provided for the current holding in decisions reached elsewhere for, in most instances, the persons there fingerprinted and the like were held on felony, not misdemeanor, charges.[10] It would be specious to say, as did

[5] In Maxwell v. O'Connor, 1 Ill. App. (2d) 124, 117 N. E. (2d) 326 (1953), wherein the petitioner appears to have been arrested on, but was later discharged with respect to, two misdemeanor charges, the court refused to approve an order for the return of identification data taken at the time of arrest inasmuch as the petition had been directed to the wrong court.

[6] 350 Ill. App. 287, 112 N. E. (2d) 719 (1953).

[7] For this purpose, the Federal Bureau of Investigation maintains separate files, one devoted to persons with established criminal records and the other designated as the civil or non-criminal identification file. The infinite number of records obtained from military personnel, war-plant workers, and civil service employees in recent years have been placed in the second of these files.

[8] Ill. Rev. Stat. 1953, Vol. 1, Ch. 67½, § 8, confers on the housing authority the right to "make and from time to time amend and repeal by-laws, rules and regulations not inconsistent with this Act, to carry into effect" the powers there conferred.

[9] See 350 Ill. App. 287 at 290, 112 N. E. (2d) 719 at 720. Justification for the fingerprinting of law students and applicants for admission to the bar, if justification exists at all, likewise rests on the fact that lawyers, being officers of the judicial department, are public servants. In that regard, see Crotty, "Standards for Bar Examiners," 41 A. B. A. J. 117 (1955), particularly p. 120.

[10] Felony is clearly indicated in the cases of Shannon v. State, 207 Ark. 658, 182 S. W. (2d) 384 (1944); State ex rel. Bruns v. Clausmier, 154 Ind. 599, 57 N. E. 541 (1900); Downs v. Swann, 111 Md. 53, 73 A. 653 (1909); Bartletta v. McFeeley, 107 N. J. Eq. 141, 152 A. 17 (1930); People v. Hevern, 127 Misc. 141, 215 N. Y. S. 412 (1926). The case of Mabry v. Kettering, 92 Ark. 81, 122 S. W. 115

one court, that the matter should be left to the discretion of police officials[11] for, in short order, such officials would undoubtedly adopt the easy way out by requiring the taking of records in all cases.[12] If the liberties of American citizens are to be invaded in the fashion apparently sanctioned by the holding in the instant case, it should be done only after their representatives have authorized such invasion by the adoption of an appropriate statute.

HUSBAND AND WIFE—DISABILITIES AND PRIVILEGES OF COVERTURE—WHETHER SPOUSES WHO HAVE ENTERED INTO CRIMINAL CONSPIRACY BETWEEN THEM *ARE* IMMUNIZED BECAUSE OF COMMON LAW FICTION OF UNITY —The Illinois Supreme Court appears to have taken jurisdiction on review, in the case of *People* v. *Martin*,[1] for the purpose of settling the question as to whether or not a husband and wife can be held guilty of conspiring with one another to violate the criminal law of the state. In that case, a man and his wife were charged, under a multiple-count indictment,[2] with conspiring to violate the Uniform Narcotic Drug Act.[3] Both were found guilty by jury verdict and punishment was imposed on both.[4] On writ of error by

(1909), does not indicate the nature of the charge against the arrested person. Only in U. S. v. Kelly, 55 F. 67 (1932), and People v. Sallow, 100 Misc. 447, 165 N. Y. S. 915 (1917), does it appear that the person fingerprinted was arrested on a misdemeanor charge and, in each instance, the fingerprinting was done to ascertain whether the defendant had been previously convicted of the same offense in order to support enhanced punishment as a repeater.

11 See Bartletta v. McFeeley, 107 N. J. Eq. 141, 152 A. 17 (1930).

12 Such seems to be the practice of the Chicago Police Department, judging from the situation presented in the case of Maxwell v. O'Connor, 1 Ill. App. (2d) 124, 117 N. E. (2d) 326 (1953).

1 4 Ill. (2d) 105, 122 N. E. (2d) 245 (1954), affirming 350 Ill. App. 196, 112 N. E. (2d) 526 (1953).

2 In certain of the counts the principal defendants were charged with conspiring with a third person to sell and dispense narcotics. As the other person had acted as purchaser, it was held he could not be a party to a conspiracy to sell or dispense to himself: 350 Ill. App. 196, 112 N. E. (2d) 526. The Supreme Court agreed with this view. The conviction reviewed, therefore, dealt with the counts charging the spouses with a conspiracy to possess narcotic drugs.

3 Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 192.1, et seq. As that statute makes no reference to conspiracy, the prosecution must have rested on ibid., § 139, which makes it a crime to conspire to commit either a felony or certain misdemeanors there enumerated. The last-mentioned section was held to be limited in character in People v. Dorman, 415 Ill. 385, 114 N. E. (2d) 404 (1953), dealing with a conspiracy to operate a handbook, and in People v. Balkin, 351 Ill. App. 95, 113 N. E. (2d) 813 (1953), to sell horse-meat without the required labelling. The point does not appear to have been urged in the instant case that the conduct of possessing narcotics, punished as a misdemeanor for the first offense, did not fall within the scope of the general conspiracy statute. In that regard, compare Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 139, with Ch. 38, § 192.13 and § 192.23.

4 The wife sought, and was granted, probation so it was held that the writ of error in her behalf had to be dismissed: People v. Mayfield, 414 Ill. 146, 111 N. E. (2d) 164 (1953).

the husband, based on the contention that, under the common law doctrine of unity between the spouses, it was a legal impossibility for the spouses to conspire with one another, the conviction was affirmed when the Supreme Court held that no relevant reason existed at this late date to support an immunity which the spouses may, at one time, have enjoyed in this respect.

The common law doctrine which recognized a unity between a husband and his wife, based primarily upon the disability of the wife to own separate property and on her lack of capacity to maintain a legal action independently of her husband,[5] was recognized quite early in this state but its applicability to the matter of criminal conspiracy was only indirectly concerned until the instant case arose,[6] with one court indicating that, if it were possible for a husband and wife to be guilty, some difficulty would be experienced in establishing the fact since one spouse would not be a competent witness for or against the other.[7] Even as recently as two years ago it was possible to avoid a decision for, in *People* v. *Estep*,[8] the court found that the spouses had joined with others, hence could be convicted of conspiracy even if the jury should find them acting as one person.

Now that the precise question has arisen, it is not entirely surprising to find the court deciding the problem as it did for the general outlook of that tribunal is reflected in other recent decisions which have dealt with aspects of the common law fiction.[9] As the reasons which supported the fiction no longer exist today, since wives, in general, have been granted equal rights with their husbands,[10] the presumption as to coercion with relation to criminal acts has been weakened,[11] and the spouses may now be competent to testify for or against one another,[12] it would seem as if the legislature intended to establish the separate identity of a married woman for all practical purposes. It is reasonable, therefore, that the court should conclude, as it did, that a husband and wife are sufficiently, if not completely, separate persons before the law so as to be able to conspire criminally together.

5 I Blackstone, Comm., *441-2.

6 In Merrill v. Marshall, 113 Ill. App. 447 (1904), for example, the action was one at law for slander, alleged to have occurred in stating that a man and wife were involved in a conspiracy to cheat and defraud.

7 Worthy v. Berk, 224 Ill. App. 574 (1922).

8 346 Ill. App. 132, 104 N. E. (2d) 562 (1952).

9 See, for example, Brandt v. Keller, 413 Ill. 503, 109 N. E. (2d) 729 (1953), and Welch v. Davis, 410 Ill. 130, 101 N. E. (2d) 547 (1951), but note that the holding in the Brandt case was nullified by subsequent action by the legislature: Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 1.

10 Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, §§ 1-21.

11 Ibid., Ch. 38, § 596.

12 Ibid., Ch. 38, § 734.

PARTIES—DEFECTS, OBJECTIONS, AND AMENDMENT—WHETHER MOTION TO DISMISS FOR LACK OF CAPACITY TO SUE IS APPROPRIATE WHERE PLAINTIFF LACKS RIGHT TO SUE—In the case of *Nordland* v. *Poor Sisters of St. Francis Seraph of Perpetual Devotion*,[1] the plaintiff, an intern, brought a common law tort action against the defendant hospital to recover for injuries sustained when an anesthetic machine exploded during the course of an operation at which the plaintiff was assisting. The trial court, on motion by the defendant based on Section 48 of the Civil Practice Act,[2] dismissed the suit on the ground the plaintiff and defendant were in the relation of employee and employer at the time of the accident, hence were subject to the provisions of the Workmen's Compensation Act which operate to bar suit by the employee for negligent injuries occurring in the course of the employment.[3] On appeal from this ruling, the Appellate Court for the First District affirmed the judgment, holding that, as the plaintiff was in covered employment,[4] the motion to dismiss for the grounds assigned[5] had been properly sustained.

The opinion in the case is noteworthy for the emphasis it places on the point of whether a motion to dismiss specifying lack of capacity to sue should be sustained when, in fact, the plaintiff is without the right to sue. It is not the first case in which the question has arisen for, in reaching its decision, the court relied heavily upon the employee-employer situation revealed in the case of *Duvardo* v. *Moore*[6] wherein the Appellate Court for the Fourth District stated that the "filing of the amended motion supported by affidavits under Section 48 of the Civil Practice Act

1 4 Ill. App. (2d) 48, 123 N. E. (2d) 121 (1954).

2 Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172.

3 Ibid., Vol. 1, Ch. 48, § 138.1 et seq.

4 The plaintiff had claimed that he was either an independent contractor or, if an employee of the hospital, had been temporarily loaned to the operating surgeon so as not to be, at the time in question, under the statute. After examining into the functions performed by an intern, the court concluded the plaintiff was, at all times, under the control of the hospital, so was properly deemed to be an employee.

5 Defendant had not only relied on the ground that plaintiff lacked capacity to sue but also urged, pursuant to Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172(b), that the court did not have "jurisdiction of the subject matter of the action or suit." On that point, the court said that, since the common law right of action by employee against employer had been abolished, "it would seem evident that the court has no jurisdiction to hear and determine such an action or suit." 4 Ill. App. (2d) 48 at 53, 123 N. E. (2d) 121 at 124. There is doubt whether the matter is as "evident" as the court would seem to think. Sub-section (b) of Section 48 of the Civil Practice Act, following immediately upon a ground for motion resting upon a lack of jurisdiction over the person of the defendant, would appear to be intended to apply to *in rem* proceedings wherein control over the *res* or subject matter would be essential to the rendition of a valid judgment. The emphasis should be placed on subject matter, rather than in terms of jurisdiction in the general sense.

6 343 Ill. App. 304, 98 N. E. (2d) 855 (1951). See also Hayes v. Marshall Field & Co., 351 Ill. App. 329, 115 N. E. (2d) 99 (1953), noted in 32 CHICAGO-KENT LAW REVIEW 351.

was a proper means of raising the question of legal capacity to sue, in view of the provisions of the Workmen's Compensation Act.''[7] In addition, other cases from the Third District[8] and the Fourth District[9] are in accord on the point.

It would seem, however, that both in the prior cases and in the instant case the courts have engaged in a free interchange of the words ''right'' and ''capacity'' although the statutory ground for the use of a Section 48 motion is confined to the latter instance. The hybrid motion there authorized is more nearly akin to a common law plea in abatement than it is to either a common law plea in bar[10] or to a common law general demurrer.[11] In the light of this fact, it would seem that the legislative intent was solely one to allow a defendant to take issue by motion with the plaintiff's capacity to sue where an unquestioned right to sue existed but the plaintiff was under some form of disability, as would be the case of an enemy alien, an undomesticated foreign corporation, a natural person under a disability, or a natural person asserting a representative capacity not actually occupied.[12] By contrast, it would appear to be better procedure to require the defendant to challenge the plaintiff's right to sue in some other fashion, as, for example, a motion under Section 45 in the event the defect appeared on the face of the complaint or, in the absence of this, by way of answer.

TELECOMMUNICATIONS — TELEGRAPHS AND TELEPHONES — WHETHER PRIVATE CONTRACTOR, OPERATING UNDER PLANS DRAWN BY MUNICIPALITY, IS LIABLE FOR DAMAGE DONE TO UNDISCLOSED BURIED TELEPHONE CABLE— The liability of a sewer contractor for damage done to a buried telephone cable, the presence of which had not been disclosed on certain sewer construction plans prepared by the city engineer of the interested municipality, was considered in the recent case of *Illinois Bell Telephone Company* v. *Chas. Ind Company*.[1] The defendant therein had been engaged to lay out a

[7] 343 Ill. App. 304 at 307, 98 N. E. (2d) 855 at 856.

[8] Parker v. Alton Railroad Co., 295 Ill. App. 60, 14 N. E. (2d) 665 (1938).

[9] Classen v. Heil, 330 Ill. App. 433, 71 N. E. (2d) 537 (1947).

[10] Of the nine grounds specified in Section 48 of the Civil Practice Act, a judgment dismissing the suit based on any one of the first four, including the one in question, could not be pleaded in bar to another suit, when the latter is properly brought. The converse would be true as to the five remaining grounds. The internal arrangement of this section reveals a conscious effort to avoid an indiscriminate mingling of unrelated propositions.

[11] Demurrer practice is regulated by Section 45 of the Civil Practice Act: Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 169.

[12] See Ill. Civ. Prac. Act Anno., p. 118.

[1] 3 Ill. App. (2d) 258, 121 N. E. (2d) 600 (1955).

storm sewer and, while operating a mechanical hoe or ditch-digging device, came into contact with and damaged the cable which had been placed beneath the surface of a parkway strip by the plaintiff, a utility, pursuant to authority previously granted to it by the city council.[2] Although the utility had filed a plat of its underground installations with the municipality, the defendant, operating from plans furnished as aforesaid, did not appear to have any direct advance warning of the presence of the utility cable so the trial court found in defendant's favor. On appeal by plaintiff, this decision was reversed and the cause was remanded for judgment in plaintiff's favor when the Appellate Court for the Second District held that the plaintiff had a sufficient possessory interest in the portion of the street where the cable was located to be able to complain that the defendant had committed a trespass when it entered therein with its hoe, for which trespass the defendant had to respond in damages.

In the absence of any prior Illinois holding in point, the court felt impelled to recognize the fact that streets in modern cities are so likely to be underlined with pipes and conduits of various kinds that one who plans to dig therein should be required to take notice that, in digging, he may encounter some such pipe or conduit.[3] Such being the case, a contractor would have a duty to inform himself of the existence of underground facilities and a failure to do so, particularly when the information was a matter of public record, would make him liable for all damage occasioned by the trespass. While he would be required to use no more than ordinary care in the event the location of the buried property was not recorded,[4] no amount of care[5] would operate to relieve from liability if the conduct amounted to a trespass. In that connection, the court correctly decided that, since the plaintiff's right to the use of the land occupied by its cable could be considered in the nature of an exclusive and continuing easement,[6] one which arose prior to any right on the part of the defendant, a suit in the form of trespass would be the proper type of remedy to be utilized. Under that form of proceeding, proof of a forceful invasion by the defendant into the possessory interest enjoyed by the plaintiff would be all that would be necessary to support the judgment.

[2] After the cable had been put in place, the surface area had been filled and seeded, so no visible evidence existed to indicate the presence of the cable. One conscious of the possibility that an underground installation might be present could, however, have quickly ascertained the fact on inquiry addressed to the utility. The defendant made no such inquiry.

[3] Frontier Telephone Co. v. Hepp, 66 Misc. 265, 121 N. Y. S. 460 (1910).

[4] New York Steam Co. v. Foundation Co., 195 N. Y. 43, 87 N. E. 765 (1909).

[5] Public Service Ry. Co. v. Mooney, 99 N. J. L. 58, 125 A. 328 (1923).

[6] Edison Illuminating Co. v. Misch, 200 Mich. 114, 166 N. W. 944 (1918).

WILLS—REQUISITES AND VALIDITY—WHETHER OR NOT WIFE OF TESTATOR IS COMPETENT TO SERVE AS AN ATTESTING WITNESS TO WILL—A significant decision regarding the competency of a wife to attest her husband's will was recently rendered by the Illinois Supreme Court in the case of *In re Estate of Kent.*[1] The case was one in which a testator had executed a last will many years before the suit in question and on the same day that his first marriage had been annulled. The testator remarried, divorced his second wife, and subsequently married a third.[2] Some time thereafter, the testator prepared a typewritten document, intended to be a codicil to the earlier will, which he requested his third wife to sign as a witness thereto. On the following day, the testator executed the instrument[3] and a friend then signed as a witness. When the will and the purported codicil were offered for probate, the probate court rejected the instruments and the circuit court affirmed this order. On direct appeal to the Supreme Court,[4] the appellants contended that the instrument executed as an intended codicil operated to revive and republish the earlier will.[5] The Supreme Court, however, affirmed the judgment of the lower courts, holding that, as the wife was incompetent to serve as an attesting witness to her husband's will, the instrument intended as a codicil was void and of no effect because it was not attested by at least two credible witnesses.[6]

It does not appear that the precise factual situation presented in the instant case has been passed upon before in Illinois, but the legal issue therein is identical to the one presented in the earlier case of *Gump* v.

1 Sub nom. Kent v. Vollmer, 4 Ill. (2d) 81, 122 N. E. (2d) 229 (1954).

2 Prior to this marriage, the intended spouses entered into an antenuptial agreement under which each released all rights in the other's property but by which the wife-to-be was to receive regular monthly payments. The court does not appear to have given consideration to the effect this agreement may have had on the rights of the parties, saying the validity thereof "was not an issue in the proceedings below and is not subject to review in this court." 4 Ill. (2d) 81 at 86, 122 N. E. (2d) 229 at 231.

3 The court found it unnecessary to decide whether there was anything in the order of attestation to make the codicil invalid since the determination of the issue as to the competency of the wife to be a witness precluded further inquiry. On the point of whether or not the testator must sign first, see Gibson v. Nelson, 181 Ill. 122, 54 N. E. 901 (1899), and 57 Am. Jur., Wills, § 337.

4 Direct appeal was proper as a freehold was involved: Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199.

5 Revival was considered necessary as the earlier will had been automatically revoked by the second marriage, in conformity with statutory requirements then in effect: Ill. Rev. Stat. 1939, Ch. 3, § 197. The statute was amended, in 1941, so as to now provide that a marriage after execution of a will "shall be deemed a revocation" of the existing will but that the presumption is rebuttable: Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 197.

6 See Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 194.

Gowans.[7] In that case, certain deeds of conveyance signed by a wife, in which her husband had joined as grantor, were offered as testamentary instruments because not delivered, as deeds should be, in the lifetime of the wife. It was urged that the husband and the notary public, whose signature also appeared on the instruments, should be treated as attesting witnesses. The court declared that the husband had acted as a grantor and not as a subscribing witness, leading to the result that the instruments failed for lack of sufficient attestation. It did, however, say that even if the husband had acted as an attesting witness his act would have been of no avail as he was not regarded as being competent to be a witness to his wife's will. While the common-law disqualification which made husbands and wives incompetent to testify as witnesses for or against one another[8] has, to some extent, been removed by statute,[9] it is important to note that the same statute has preserved the disqualification in a number of areas, including the one at hand.[10] In the light thereof, the result attained in the instant case must be regarded as being the correct one.

[7] 226 Ill. 635, 80 N. E. 1086, 117 Am. St. Rep. 275 (1907).
[8] 57 Am. Jur., Wills, § 315; 68 C. J., Wills, § 331.
[9] Ill. Rev. Stat. 1953, Vol. 1, Ch. 51, § 5.
[10] Ibid., Ch. 51, § 8.