FITZROY ASHLEY WELSTEAD *(Plaintiff)* ..... } APPELLANT;

AND

CHARLES BROWN *(Defendant)* .....RESPONDENT.

1951

*May 31
*June 1
*Oct. 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Evidence—Legitimacy, common law presumption of—Access by husband and also adultery established—Effect of blood group tests—Presumption rebuttable in Ontario, The Evidence Act, R.S.O. 1937, c. 119, s. 5a (R.S.O. 1950, c. 119, s. 6)—Admissibility of: (a) wife's declaration to husband of adultery and as to paternity; (b) as to resemblance of child—Effect of trial judge's failure to advise wife of protection afforded her by the Evidence Act, s. 7.

In an action for criminal conversation and alienation of affections, evidence was adduced that following the birth of a child to her the appellant's wife confessed to him to having committed adultery with the respondent who she declared to be the father. It was also established that during the time in which the child must have been conceived, the appellant and his wife had had sexual intercourse but that contraceptives were used, and further that the child's birth was registered pursuant to *The Vital Statistics Act,* R.S.O. 1937, c. 88. Two qualified medical practitioners, whose evidence was uncontradicted, testified to having had tests made of the blood of the appellant, of his wife and of the child, and that the tests indicated that if the child was born of the wife, which was admitted, it was not merely improbable but impossible that the appellant was its father.

Held: (1) that there was ample evidence to support the jury's finding of adultery.

(2) that on the evidence the case should be treated as one in which it was established that the appellant had had sexual intercourse with his wife during the period within which the child must in the course of nature have been conceived, and if the matter ended there it would have followed that the child must be held to be legitimate, but that the uncontradicted evidence of two qualified medical practitioners to the effect that tests carried out with samples of blood of the appellant, of his wife and of the child, indicated that if the child was born of the wife, as was admitted, then it was not merely improbable but impossible that the appellant was the father: rebuts the presumption of legitimacy. *R.* v. *Luffe* 8 East 193; *Preston-Jones* v. *Preston-Jones* [1951] 1 All. E.R. 124.

(3) that under the circumstances of the case the failure of the trial judge to deal with the presumption of legitimacy could not have occasioned any substantial wrong or miscarriage of justice.

*PRESENT: Kerwin, Taschereau, Kellock, Locke and Cartwright JJ.

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(4) that the presumption of legitimacy referred to in *The Vital Statistics Act,* 1948 (Ont.) c. 97, is a rebuttable presumption of law in Ontario since the enactment of s. 5*a* of *The Evidence Act,* R.S.O. 1937, c. 119 (now s. 6 of R.S.O. 1950, c. 119).

(5) that since the sufficiency of proof that the samples of blood tested came respectively from the appellant, his wife, and the child, was not called in question at the trial, it must be taken as being established. *Earnshaw* v. *Dominion of Canada Insurance Co.* [1943] O.R. 385 at 395-96.

(6) that evidence of certain conversations between the appellant and his wife in the absence of the respondent (in which the wife confessed to adultery with the respondent and declared him father of the child) was properly admitted: (i) on the principle the letters of the Countess of Aylesford were admitted in the *Aylesford Peerage Case* 11 App. Cas. 1; (ii) to show consistency. Phipson on Evidence 8 Ed. 480; *R.* v. *Coyle* 7 Cox 74 at 75; *Flanagan* v. *Fahy* [1918] 2 Ir. R. 361 at 381.

Per: Kerwin J.: A charge of conspiracy having been made by the respondent in his pleadings, evidence was admissible upon this branch of the case, if for no other reason.

(7) that evidence that the child resembled the defendant (respondent) was admissible. *Doe Marr* v. *Marr* 3 U.C.C.P. 36.

(8) that the failure of the trial judge to advise the wife of the appellant of the protection afforded her by the proviso in s. 7 of *The Evidence Act* was, since it was obvious that the wife had decided to give evidence as to her adultery, unimportant. *Elliot* v. *Elliot* [1933] O.R. 206 at 212 approved. *Allen* v. *Allen and Bell* [1894] p. 248 at 255, *Laffin* v. *Laffin* [1945] 3 D.L.R. 595 and *Waugh* v. *Waugh* [1946] 2 D.L.R. 133, distinguished.

Appeal allowed and judgment at trial restored.

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing an appeal by the defendant from the judgment of Gale J. after a trial with a jury.

J. J. Robinette K.C. and *Benjamin Laker* for the appellant. Evidence of conversations between the plaintiff and his wife in which she is said to have admitted her misconduct with the defendant and declared him the father of the child, was admissible evidence: (i) on the ground that it was *res gestae.* (ii) If the evidence was inadmissible, there was no substantial wrong or miscarriage of justice by reason of the fact that the plaintiff's wife was called and gave evidence of the same matter which the plaintiff gave in his evidence. (iii) Counsel for the defendant did not

(1) [1950] O.W.N. 643.

object to such evidence, but cross-examined both the appellant and his wife thereon, and thereby waived the rule excluding the said evidence.

The Court of Appeal erred in penalizing the plaintiff in costs of the trial and of the Appeal, for a reason which had no foundation in fact, i.e. that the trial was abortive due to the persistence of counsel for plaintiff in offering testimony which was inadmissible as evidence; no objection thereto was offered by counsel for the defence, nor by the trial judge, nor was there persistence by the plaintiff thereon.

The Court of Appeal erred in holding that no evidence was produced to prove the identity of the plaintiff, his wife or the child as being the persons whose blood was tested, and that they were in fact the plaintiff, his wife and the child. (*a*) There was sufficient identification by the evidence of Dr. Fremes. (*b*) Exhibit 8 sufficiently identified the plaintiff, his wife, and the infant Susan Welstead, as the persons whose blood was tested. (*c*) In the absence of any evidence to the contrary or any suggestion that the said persons were not the plaintiff, his wife and the infant Susan Welstead, the plaintiff made a *prima facie* case of identity. (*d*) There was sufficient identification of the persons having in mind that the action is a civil one and not a criminal case.

The Court of Appeal erred in setting aside the trial judgment on the basis that the trial judge failed to tell the jury that the fact that the birth of the child was registered raised a presumpion of legitimacy under s. 6(3) of *The Vital Statistics Act,* R.S.O. 1937, c. 88.

(*a*) That Act was repealed by *The Vital Statistics Act,* 1948, c. 97. The latter Act was in force at the date of the issue of the writ and at the date of trial. The learned justice in Appeal proceeded on the basis the 1937 Act was still in force. The birth certificate was put as corroborative evidence of the place and date of birth only.

(*b*) The gist of the action of criminal conversation being damages for adultery, the jury was entitled to find that adultery had taken place irrespective of the question as to illegitimacy.

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(c) There was direct evidence of adultery, and further evidence of opportunity and of familiarity sufficient to conclude that the appellant's wife and the defendant had engaged in sexual intercourse. The jury so found, as they were entitled to, irrespective as to whether a child was or was not born as a result thereof.

The Court of Appeal erred in setting aside the trial judgment on the ground that the trial judge erred in failing to direct the jury that in considering the legitimacy or illegitimacy of the child as evidence of adultery there is a strong presumption of law in favour of legitimacy.

(a) The presumption as to illegitimacy is a rebuttable one, and there was medical evidence, re the blood tests, which a jury acting reasonably, could have found rebutted the presumption.

(b) Apart from the presumption of legitimacy there was a finding by the jury of adultery based upon a preponderance of credible evidence.

(c) The jury was entitled to find that adultery had been committed whether the child in question was legitimate or not and counsel for the defendant did not ask that a question as to legitimacy be put to the jury.

(d) There was no substantial wrong or miscarriage of justice by reason of the fact that the trial judge did not tell the jury of the presumption as to legitimacy and counsel for the defendant did not ask the trial judge to tell the jury of the common law presumption of legitimacy.

C. L. Dubbin K.C. for the respondent. The Court of Appeal for Ontario were right in holding that the trial was unsatisfactory and that the verdict could not stand and must be set aside. The trial judge erred in failing to direct the jury that in considering the legitimacy of the child, Susan, on the issue of adultery, that there was a presumption in favour of legitimacy. He left the question of legitimacy or illegitimacy as if no presumption existed and erred in failing to direct the jury that the child is conclusively proven legitimate where the evidence disclosed that the husband and wife co-habited together, and

where no impotency is proved. *Russell* v. *Russell* (1); *Gordon* v. *Gordon* (2); *Brown* v. *Argue* (3).

The trial judge erred in failing to direct the jury that the fact that the child born to Mrs. Welstead, was registered in the name of the plaintiff, was *prima facie* evidence of legitimacy, and misdirected the jury on that issue when that very question was asked of him by a juror. *Smith* v. *Smith* (4); *Crone* v. *Crone* (5); R.S.O. 1950, c. 412, s. 41.

The learned trial judge erred in failing to direct the jury on the issue of legitimacy or illegitimacy that the presumption of legitimacy could only be overcome by producing in the minds of the tribunal of fact a moral certainty. *Clark* v. *The King* (6); *Morris* v. *Davies* (7). Non-access not having been shown, but in fact the contrary having been proved, the other evidence which was submitted which tended to bastardize the child was inadmissible. It is contrary to public policy to admit such evidence save and except where non-access is first established. Wigmore on Evidence 3rd Ed. Vol. 1 s. 134.

Parents are not permitted in order to bastardize a child, from which adultery can be inferred, to give evidence that although they carried on normal marital relations they practiced birth control devices. Here both so testified. They cannot give evidence tending to bastardize a child born in lawful wedlock from which adultery could be inferred, even though the judgment sought for did not result in a declaration of illegitimacy. It may be that a wife's admission as to adultery is admissible and even perhaps she may be permitted to say that she is pregnant by a man other than her husband, so long as her evidence stops there, since that is merely evidence of misconduct, but does not tend to bastardize the child. *Warren* v. *Warren* (8). The spouses cannot go further and try to prove the child illegitimate by suggesting that birth control methods used by them made conception impossible. It is contrary to public policy to permit a jury to be the forum to determine the effectiveness of birth control devices. *Russell* v. *Russell, supra* at 700,726; *Goodright* v. *Moss* (9). Since the amendment to the *Evidence Act* (1946

(1) [1924] A.C. 687 at 705-708.
(2) [1903] P. 1 at 141, 142, 143.
(3) 57 O.L.R. 297 at 299.
(4) [1942] O.W.N. 282.
(5) [1946] O.R. 573, 576.
(6) 61 Can. S.C.R. 608, 617.
(7) 5 Cl. & F. 165.
(8) [1925] P. 107.
(9) (1777) 2 Cowp. 591.

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Ont. c. 25, s. 1) certain hardships that the rule in *Russell* v. *Russell* imposed with respect to the evidence of non-access have been removed and spouses pursuant to the amendment can now give evidence of non-access but apart from that exception the common law provision against a married person giving evidence tending to bastardize a child remains unimpaired. *Crone* v. *Crone supra* at 574. The evidence of the plaintiff as to what his wife told him was inadmissible and could not under any circumstances be evidence against the defendant.

Neither the plaintiff nor his wife gave any evidence as to a blood test or that they took the baby in question to Dr. Fremes. The doctor was called and told of examining a Mr. and Mrs. Welstead and a baby, Susan, but he did not identify either of them, who were in the court room at the time, as the persons who had been to see him and, even more significant, there was no evidence tendered that the baby he examined was the baby in question. There was no suggestion in the evidence that he knew the Welsteads prior to the time of the visit. His evidence was inadmissible; there being an essential gap in the required proof. The effect of his evidence was merely to give an opinion that the child in question was illegitimate and was inadmissible by reason of it being contrary to the policy of law to embark on such an investigation unless non-access is first proved; furthermore, the only effect of his evidence being to bastardize the child and not to advance the adultery, it was irrevelant and inadmissible.

The trial judge erred in permitting Mrs. Welstead to be examined by counsel for the plaintiff without first advising her of the protection afforded by the *Evidence Act* and it is not at all clear from the evidence that if she had been so advised, that she would have testified. The *Evidence Act* R.S.O. 1937, c. 119, s. 8: *Laffin* v. *Laffin* (1); *Waugh* v. *Waugh* (2); *Elliot* v. *Elliot* (3). The trial judge erred in directing the jury as to the onus of proof to establish adultery. He ought to have directed the jury that before they could find adultery they must be satisfied beyond a reasonable doubt that the defendant committed

(1) [1945] 3 D.L.R. 595. (2) [1947] 2 D.L.R. 133.
(3) [1933] O.R. 266.

adultery with the wife of the plaintiff. *Ginesi* v. *Ginesi* (1); *DeVoin* v. *DeVoin* (2); *Campbell* v. *Campbell* (3); *George* v. *George* (4).

The Court of Appeal were right in setting aside the verdict on the ground that the trial was not satisfactory, and having rightfully come to that conclusion had a judicial discretion to direct a new trial on such terms as they saw fit and proper and no appeal lies to the Supreme Court of Canada from the exercise of such discretion. *The Supreme Court Act* 1927 R.S.C. c. 35, s. 44 as amended.

The plaintiff having resumed co-habitation with Mrs. Welstead at the time of the issue of the writ, did not suffer any damages and even if the Court of Appeal erred in setting aside the judgment herein, this appeal should be dismissed.

KERWIN J.:—This is an action for damages for criminal conversation tried before Gale J. and a jury. Three questions were submitted to the jury which, together with the answers, are as follows:—

1. Was adultery committed between the defendant Charles Brown and the plaintiff's wife, Lucy Irene Welstead?

A. Yes.

2. If your answer to question 1 is "yes", where and when was such adultery committed?

A. On the Base Line Road between Whitby and Pickering Beach on or about February 17th, 18th or 19th, 1948.

3. If your answer to question 1 is "yes", at what amount do you assess the damages of the plaintiff Fitzroy Ashley Welstead?

A. $4,000.

On these answers judgment was entered for the plaintiff for $4,000 and costs. On appeal to the Court of Appeal for Ontario that judgment was set aside but a new trial was permitted the plaintiff on condition that within a fixed time he pay the costs of the abortive trial and of the appeal. As this was not done, the Court ordered that the appeal be allowed and the action dismissed, with costs. It is from that judgment that the present appeal is taken.

(1) [1948] P. 179; 1 All E.R. 373.
(2) [1946] 2 W.W.R. 304.
(3) [1950] O.R. 297.
(4) [1950] O.R. 787.

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The adultery testified to by the appellant's wife was denied by the defendant respondent. A child was born to the wife on November 28, 1948. This birth was registered on December 21, 1948, at which time the *Vital Statistics Act* of the Province of Ontario was R.S.O. 1937, c. 38, and by s. 24 thereof it was provided that no child born in wedlock should be registered as illegitimate. The action was commenced in 1949 and the trial commenced February 21, 1950, and in the meantime the 1948 *Vital Statistics Act*, c. 97, had been proclaimed to be in force as of January 1, 1949. By s. 38 thereof a birth certificate shall contain only the name of the child, date and place of birth, sex, date of registration, and registration number. The following certificate was issued pursuant to s. 39 and was filed as an exhibit at the trial:—

PROVINCE OF ONTARIO
THE VITAL STATISTICS ACT, 1948.

Name: Welstead, Susan Margaret.
Date of Birth: Nov. 28, 1948. Sex F.
Place of Birth: Pickering Twp. Ontario.
Registration: Dec. 21, 1948. 48-05-098516
Issued at Toronto, Ontario.
The 22 Day of Feb. 1950.

G. W. DUNBAR
Registrar-General.

Subsections 1 and 4 of s. 41 provide:—

41(1). A certificate purporting to be issued pursuant to section 39 and signed by the Registrar-General shall be admissible in any court in Ontario as *prima facie* evidence of the facts certified to be recorded, and it shall not be necessary to prove the signature or official position of the person by whom the certificate purports to be signed.

(4). Notwithstanding subsections 1 and 3, no birth certificate and no certified copy of a registration of birth or still-birth shall be admissible in evidence to affect a presumption of legitimacy.

The presumption of legitimacy referred to in subsection 4 of s. 41 is a rebuttable presumption of law that a child born during lawful wedlock is legitimate and that access occurred between the parents. Under the decision of the House of Lords in *Russell* v. *Russell* (1), the evidence of the parents would not have been admissible to prove their access or non-access during marriage with the object or possible result of bastardizing a child born during wedlock

(1) [1924] A.C. 687.

but in 1946 the Ontario legislature intervened to alter this rule by enacting s. 5*a* of *The Evidence Act*, R.S.O. 1937, c. 119, in the following terms:—

> 5*a*. Without limiting the generality of section 5, a husband or a wife may in any action, give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage.

Both the appellant and his wife testified that at the time the child Susan could have been conceived they did not have sexual intercourse except with the use of contraceptives. Under s. 5*a*. of *The Evidence Act* (now s. 6 of R.S.O. 1950, c. 119) this evidence is admissible, its effect being, of course, an entirely different matter. However, it also appears in evidence that samples of the blood of the child and of the appellant were taken and that in the opinion of the medical men called on behalf of the appellant, and whose evidence was not contradicted, the appellant could not have been the father of the child. This evidence is also admissible: *Wigmore on Evidence*, 3rd edition, vol. 1, para. 165a.

This is not an action for divorce so that we are not faced with the problem whether the word "satisfy" in sections 29 and 30 of the *British Matrimonial Causes Act*, 1857, or in section 178 of the *British Supreme Court of Judicature (Consolidation) Act*, 1925, as amended by section 4 of the *Matrimonial Causes Act*, 1937, connotes something less than proof beyond reasonable doubt: *George* v. *George* (1); *Preston-Jones* v. *Preston-Jones* (2). The present is a civil action as is an action for dissolution of marriage: *Mordaunt* v. *Moncrieffe* (3). However, in proceedings to establish legitimacy Lord Lyndhurst in *Morris* v. *Davies* (4) stated as follows:—

> The law was laid down by the learned Judges in the *Banbury Peerage* case in these terms: "That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse the husband could, according to the law of nature, be the father of such child."

(1) [1950] O.R. 787.
(2) [1951] 1 All E.R. 124.
(3) (1874) L.R. 2 Sc. & Div. 374.
(4) (1837) I Cl. & F. 163 at 215.

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and, again, when sitting in the House of Lords, at page 265:—

> It (the presumption of legitimacy) is not to be broken in upon, or shaken, by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

The same rule applies where "the result of a finding of adultery in a case such as this is in effect to bastardize the child. That is a matter in which from time out of mind strict proof has been required" per Lord Simonds in *Preston-Jones* v. *Preston-Jones*. In the same case Lord MacDermott states: "The evidence must no doubt be fair and satisfy beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what Lord Stowell, when Sir William Scott, described in *Loveden* v. *Loveden* (1), as "the guarded discretion of a reasonable and just man."

In *Baxter* v. *Baxter* (2), the House of Lords had to construe s. 7(1) (*a*) of the *Matrimonial Causes Act*, 1937:

> In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground (*a*) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; * * *

It was held that a marriage may be consummated within that section although artificial methods of contraception are used. To say, however, that the parties to a marriage could not testify that they did not have sexual intercourse except with the use of contraceptives is another matter. If neither the appellant nor his wife testified as they did, the evidence of the doctors would have been admissible; although the spouses did testify, the doctors' evidence is still evidence, and the effect of their evidence was for the jury to determine.

The trial judge said to the jury that the appellant must show by a preponderance of credible evidence the adultery charged, that it should be "strictly proved", that "you should exercise a cautious discretion", that "you should proceed with caution before you decide that adultery had been established. So that to that extent there is a rather heavy duty cast upon the plaintiff to establish his case."

The jury should have been charged in accordance with the authorities cited as to the presumption of legitimacy

(1) (1810) 2 Hag. Con. 1 at p. 3. (2) [1948] A.C. 274.

and as to the kind of evidence there must be in order to overcome that presumption. However, s. 28(1) of *The Judicature Act*, R.S.O. 1950, c. 190, provides:—

> A new trial shall not be granted on the ground of misdirection * * * unless some substantial wrong or miscarriage has been thereby occasioned.

In view of the uncontradicted evidence of the doctors, I am unable to say that any miscarriage of justice has occurred, and unless the respondent is able to justify the other reasons of the Court of Appeal for setting aside the verdict, the order complained of cannot stand.

That Court determined that there was no evidence to prove the identities of the appellant and the child as being the persons whose blood was tested. However, upon a reading of the record, I am satisfied that there was such evidence and that in fact the trial proceeded upon the basis that there was no question about such matters. The Court of Appeal also considered that the evidence of conversations between the appellant and his wife, in which she is said to have admitted her misconduct with the respondent was inadmissible but a charge of conspiracy was made by the respondent in his pleadings, and such evidence was admissible upon that branch of the case if for no other reason. Henderson J.A. stated that there were a number of other instances of inadmissible evidence but only two were mentioned before us. One was as to what was said to have been the likeness of the child to the respondent. This evidence was admissible: Wigmore, 3rd Ed. para. 166; *Doe Marr* v. *Marr* (1). The other was that the trial judge should have advised the wife of the appellant of the protection afforded her by s. 7 of the Ontario Evidence Act. On this point I agree with what my brother Cartwright has said.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment at the trial restored.

The judgment of Taschereau, Locke and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—In this case the appellant claimed damages for criminal conversation. At the trial before Gale J. the jury found that the respondent had committed adultery with the wife of the appellant on or about the

(1) (1853) 3 U.C.C.P. 36 at 51.

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17th, 18th or 19th of February, 1948, and assessed the damages at $4,000. Judgment was entered accordingly but was set aside by the Court of Appeal, a new trial being directed on terms. The appellant asks that the judgment at trial be restored.

On the 28th of November, 1948, the appellant's wife gave birth to a daughter. The appellant pleaded that the respondent was the father of such daughter. No question as to this was put to the jury, but it would seem probable from the amount of the verdict that the jury were of the view that this fact was proved.

It may be stated at once that there was ample admissible evidence to support the finding of adultery. The appellant's wife testified to the commission of an act of adultery between herself and the respondent. There was evidence of other witnesses as to familiarities between them and as to opportunity. The defence was a complete denial of this charge. In addition it was alleged in the statement of defence that the appellant and his wife had "schemed, connived, planned and conspired to concoct circumstances to give rise to this fictitious action" for the purpose of enabling them to become possessed of a property which the appellant had purchased under agreement from the respondent.

The following four grounds for setting aside the judgment at the trial are mentioned in the reasons of the Court of Appeal delivered by Henderson J.A.:—

(i) Failure to charge the jury that there is a strong presumption of the legitimacy of a child born of a married woman.

(ii) Failure to charge the jury that the registration of the child's birth raised a presumption of her legitimacy.

(iii) Lack of evidence that three samples of blood submitted to certain tests came respectively from the plaintiff, his wife and the child.

(iv) The wrongful admission of evidence of certain conversations between the appellant and his wife in the absence of the respondent in which the wife confessed adultery with the respondent and stated that he was the father of the child.

The learned justice of appeal added that there were a number of other instances of the admission of inadmissible evidence but did not specify what these were.

Before us counsel for the respondent sought to support the judgment of the Court of Appeal on the following grounds in addition to the four mentioned above.

(v) That, it having been admitted that sexual intercourse between the appellant and his wife had taken place during the period within which the child must, in the course of nature, have been conceived, no evidence should have been received tending to bastardize the child and particularly the evidence of the doctors as to certain blood tests should have been rejected.

(vi) Falure to charge the jury correctly as to the degree of proof required to establish adultery.

(vii) Failure of the learned trial judge to advise the wife of the appellant of the protection afforded her by section 7 of the Ontario Evidence Act.

(viii) Wrongful admission of evidence that the child resembled the respondent.

As to the first ground, above set out, the learned trial judge did not in his charge make any reference to the presumption of legitimacy. Counsel for the respondent directed attention to this in the course of his objections to the charge which occupy several pages of the transcript but the learned trial judge declined to recall the jury. There is no doubt that the presumption exists. The following statements in Halsbury (2nd Edition) Vol. 2, sections 766 and 768 are fully supported by the authorities there cited:

766. Every child born of a married woman during the subsistence of the marriage is *prima facie* legitimate, and the presumption of legitimacy arises also where the child is born not more than nine months after the dissolution of the marriage by death or otherwise. But in every case the husband and wife must have had opportunity of access to each other during the period in which the child could be begotten and born in the course of nature, and they must not be proved to be impotent. The presumption, however, is not a presumption *juris et de jure,* which cannot be rebutted, but a presumption only, which may be rebutted by evidence of circumstances proving the contrary, and such evidence must not be slight in its nature, but strong and satisfactory.

768. The presumption of legitimacy continues notwithstanding that the wife is shown to have committed adultery with any number of men. The law will not permit an inquiry whether the husband or some other man is more likely to be the father of the child, and it must be affirmatively proved, before the child can be bastardized, that the husband did not have sexual intercourse with his wife at the time when it was conceived.

In the case at bar both the appellant and his wife testified that they had had sexual intercourse from time to time during the period within which the child must have been conceived but had used artificial means designed to prevent conception, such means being used sometimes by

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the husband, sometimes by the wife and sometimes by both. No medical evidence was tendered to indicate how effective such precautions were likely to be but it would appear that the appellant did not himself regard them as being certain to accomplish their purpose for he testified that he was "stunned" when his wife first told him that the child was not his. In my view on the evidence in this record the case should be treated as one in which it is established that the appellant had sexual intercourse with his wife during the period within which the child must in the course of nature have been conceived, and if the matter ended here it would have followed that the child must be held legitimate. In this case, however, the evidence of two qualified medical practitioners was to the effect that tests carried out with samples of the blood of the appellant, of his wife, and of the child indicated that if the child were born of the wife, as is admitted, then it was not merely improbable but impossible that the appellant was the father. It is not necessary to go at length into the details of the evidence. The salient feature was that the blood of the child contained a certain factor, that it was a scientific certainty that such factor must have been present in the blood of at least one of her parents, that it was not present in the blood of her mother, that it must therefore have been present in the blood of her father, that it was not present in the blood of the appellant and therefore he could not be the father. This medical evidence was not contradicted nor was it shaken or weakened in cross-examination. The doctors testified that the test described is a comparatively recent development in the science of genetics and counsel did not refer us to any case in the courts of this country or of England in which the admissibility or effect of such evidence has been considered. It appears to me to be admissible and, if accepted, to be effective to bastardize the child. No case suggests that the presumption of legitimacy will not yield to proof that it was impossible, in the course of nature, that the husband could be the father of the child. I do not think that any case prescribes a higher degree of proof in order to rebut the presumption than that required in *R.* v. *Luffe* (1). In that case it was proved that the husband had no access to his wife from the 9th April, 1804, until two

(1) (1807) 8 East 193.

weeks before the birth of her child on 13th July, 1806. The Court,—Lord Ellenborough and Grose, Lawrence and Le Blanc, JJ. were unanimous in upholding the decision that the child was illegitimate. At page 207 Lord Ellenborough said:—

* * * And therefore, if we may resort at all to such impediments arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to shew the absolute physical impossibility of the husband's being the father: I will not say the improbability of his being such; for upon the ground of improbability, however strong, I should not venture to proceed.

and further at the same page:—

* * * the general presumption will prevail, except a case of plain natural impossibility is shewn.

At pages 209 and 210 Lawrence J. said:—

Now without going over the whole ground of the argument again, the doctrine of the *quatuor maria* has been long exploded; and it has been shewn by the authorities mentioned by my lord, that imbecility from age, and natural infirmity from other causes, have always been deemed sufficient to bastardize the issue; all which evidence proceeds upon the ground of a natural impossibility that the husband should be the father of the child. Then why not give effect to any other matter which proves the same natural impossibility?

and at page 212 Le Blanc J. said:—

But where it can be demonstrated to be absolutely impossible, in the course of nature that the husband could be the father of the child, it does not break in upon the reason of the current of authorities, to say that the issue is illegitimate. If it does not appear but what he might have been the father, the presumption of law still holds in favour of the legitimacy. But if, as in this case, it be proved to be impossible that he should have been the father, then, within the principle of the modern cases, there is nothing to prevent us from coming to that conclusion.

It may be that the phrase "demonstrated to be absolutely impossible" requires some modification in view of the judgments recently delivered in the House of Lords in *Preston-Jones* v. *Preston-Jones* (1), but even if it were accepted without modification the evidence of the doctors in this case would appear to fall within it. The question put by Lawrence J. in *R.* v. *Luffe* (*supra*) "Then why not give effect to any other matter which proves the same natural impossibility?" appears to me when applied to this evidence to be unanswerable. I wish to make it plain that what I regard as being decisive is the fact that the evidence was to the effect that the appellant could not be

(1) [1951] 1 All E.R. 124.

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the father of the child. Had the doctors testified that the result of the tests indicated that it was in the highest degree improbable, but not impossible, that the appellant be the father of the child it would, in my opinion, have been the duty of the trial judge to direct the jury that as a matter of law such evidence could not avail against the presumption. Had the learned trial judge charged the jury as to the presumption of legitimacy, as, with respect, I think he should, it would have been necessary for him to instruct the jury that if they accepted the evidence of the doctors it effectively rebutted the presumption. I can find no ground on which acting reasonably, the jury could have rejected this evidence. The witnesses were possessed of high professional qualifications and their testimony was neither contradicted by other evidence nor weakened on cross-examination. Under these circumstances, I am of opinion that the failure of the learned trial judge to deal with the presumption can not have occasioned any substantial wrong or miscarriage of justice. For these reasons I think that the grounds of attack upon the trial judgment numbered (i) and (v) above can not be sustained.

For the reasons given by my brothers Kerwin and Kellock I agree that the argument that the learned trial judge should have told the jury that the fact of the registration of the child's birth gave rise to a presumption of legitimacy can not succeed.

As to ground (iii), mentioned above, I am of opinion that the evidence of Dr. Fremes was sufficient to establish that the samples of blood tested came respectively from the appellant, his wife and the child. Certainly the sufficiency of their identification was not called in question at the trial. The following passage from the judgment of Robertson C.J.O. in *Earnshaw* v. *Dominion of Canada Insurance Company* (1) appears to me to be applicable:—

> In these circumstances, if counsel for appellant desired to contend that the evidence of identification was defective or insufficient because the means or method of identification was not stated, or because there was none, in my opinion the time to raise that question was when these witnesses were giving their evidence. No objection was taken that evidence of the result of the test was inadmissible because the witnesses did not state how they identified the sample, and I do not think that objection can be taken now.

(1) [1943] O.R. 385 at 395-6.

The evidence which the Court of Appeal regarded as inadmissible to which reference is made in ground (iv) above, was that of statements made to the appellant by his wife the effect of which may be briefly summarized as follows. On the morning after the wife's return from the nursing home some ten days after the birth of the child she was feeling upset and unhappy. The appellant was treating her with kindness and consideration and endeavouring to encourage and console her. He was either about to get her some tea or had just done so. Up to this time any thought that the child was not his was completely absent from his mind. In these circumstances the wife "blurted out" that she did not deserve his sympathy or kindness, that she had been unfaithful to him and that the child was not his but the respondent's. An account of this conversation was given in chief by both the appellant and his wife. No objection was taken by counsel for the respondent. In cross-examination of each of these witnesses counsel for the respondent went fully into the details of the conversation and it became apparent that he had explored the subject matter fully on his examination for discovery of the appellant. I think it may properly be inferred that even if counsel for the appellant had not dealt with the conversation in chief, it was the intention of counsel for the respondent to do so in cross-examination. Under that circumstance and in view of the fact that there was ample other admissible evidence to fully support the verdict I do not think that it could be held that any substantial wrong or miscarriage had resulted from the admission of this evidence in chief. I am, however, of opinion that the evidence was admissible on two grounds, although not, of course, as evidence of the truth of the matter stated. I think the evidence of the wife's statement was admissible on the principle on which the letters of the Countess of Aylesford stating that an adulterer was the father of her child were admitted in *The Aylesford Peerage* (1). At page 10 of the report of that judgment the Earl of Selborne said:—

> These declarations are facts as well as statements. It is a fact that for some purpose or other the mother wrote a letter containing such statements at such a time. Your Lordships will not take them as proving the fact; but the fact that the mother did write such a letter, at such a time and for such a purpose, as it appears to me, is a thing

(1) (1885) 11 App. Cas. 1.

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which, on the principles which were certainly acted upon in *Morris* v. *Davies* (1) (and which appear to me to be sound principles, and quite consistent with the rule), ought not to be excluded from consideration.

In the case at bar the fact that the wife made such a statement to her husband at such a time and under such circumstances was, I think, a relevant item of circumstantial evidence falling within the reasoning of the passage just quoted.

The second ground on which I consider the evidence was admissible is that stated in *Phipson on Evidence* (8th Edition) at page 480, where after stating the rule that evidence that a witness had made a previous statement similar to his testimony in court is now generally inadmissible to confirm his testimony the learned author lists certain exceptions, the first being:—

> Such statements are, however, receivable in the cases mentioned below, not to prove the *truth* of the facts asserted, but merely to show that the witness is consistent with himself: (1) where the witness is charged with having *recently fabricated* the story, e.g., from some motive of interest or friendship, it may be shown both by the witness himself and the person to whom it was addressed, that he had made a similar statement before such motive existed.

In my opinion this extract is supported by the authorities cited and is a correct statement of the law. In *R.* v. *Coyle* (2), Erle J. said:—

> The point is to prevent the observation that the witness has now invented the story.

In *Flanagan* v. *Fahy* (3) at pages 381 and 382, Sir Ignatius O'Brien expressly approved the statement from *Phipson on Evidence,* quoted above, which had appeared *ipsissimis verbis* in an earlier edition. In the case at bar the respondent pleaded that the charge of adultery made against him was a fiction concocted in pursuance of a conspiracy to obtain damages from him. He led evidence in an endeavour to support this allegation. This plea was apparently pressed by counsel for the respondent in addressing the jury for the learned trial judge deals with it at some length in his charge and refers to it as having been "alleged most strongly". It would have been proper for the learned trial judge to point out to the jury that the statements made by the wife to the appellant were not

(1) 5 Cl. & F. 163.
(2) 7 Cox C.C. 74 at 75.
(3) [1918] 2 Ir. R. 361.

in themselves direct evidence of the truth of the facts stated, but he was not asked to do so, and the omission appears to me to be of little importance in the circumstances of this particular case, the wife having given evidence at the trial and having testified as to the truth of all the facts which she had related in the conversation in question. I cannot think that the omission referred to could have caused any substantial wrong or miscarriage.

The next ground of attack upon the trial judgment, numbered (vi) above, is that the learned trial judge should have charged the jury that before they could find that the respondent had committed adultery with the appellant's wife they must be satisfied of that fact not on a mere preponderance of evidence but beyond a reasonable doubt. This point was taken in the notice of appeal and was fully argued before us but the Court of Appeal did not find it necessary to deal with it. We were assisted by an able argument on the question as to the degree of proof of adultery required in Ontario in an action for divorce and the question whether the same degree of proof is required in an action such as this for damages for criminal conversation in which proof of adultery is an essential part of the cause of action but neither the status of the defendant nor the legitimacy of a child are directly affected by the judgment in the sense that either would be *res judicata* if, for example, the wife of the defendant were to bring action against him for divorce or the child should claim to inherit on the death intestate of the appellant. I do not find it necessary to decide these questions.

In the case at bar if the jury accepted the medical evidence, as in my opinion they must have done, the facts that the appellant's wife had committed adultery with someone and that the child was illegitimate were proved, beyond all reasonable doubt. The learned trial judge made it plain to the jury that the medical evidence in no way implicated the respondent. He explained to them that to succeed the plaintiff must prove that the respondent had committed adultery with his wife. As to the degree of proof required he put the matter as follows:—

* * * Now, summing up what I have just said to you, and having regard to the evidence that has been given here, the two issues to be determined by you gentlemen, as I understand it, are these: first, has the plaintiff established by a preponderance of credible evidence that Charlie Brown

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committed adultery with the plaintiff's wife and, secondly, if so, has Welstead sustained a loss or damage or injury as a result of the commission of that adultery. That is why, gentlemen, the questions are framed in the manner in which they are, and which I read to you. The third issue is, what is the amount of the damage. I will come to that later.

In all these issues the burden of proof rests upon the plaintiff Welstead to show a preponderance of evidence in favour of what he asserts. Adultery should be strictly proved, and when you come to consider whether or not it has been established you should exercise a cautious discretion in the matter, because,—apart from some of the matters which I will mention to you briefly—really the only evidence of adultery comes from the lips of Mrs. Welstead. Since it is a serious matter charged, as I say, you should proceed with caution before you decide that adultery has been established. So that to that extent there is a rather heavy duty cast upon the plaintiff to establish his case.

Assuming, without deciding, that the learned trial judge should have instructed the jury that a somewhat heavier burden lay upon the plaintiff in this regard, I am of opinion, after a consideration of all the evidence, that it can not be said that any miscarriage of justice resulted from the use of the language which he in fact employed.

Dealing with ground (vii) above, it does not appear in the record that the learned trial judge advised the wife of the appellant of the protection afforded to her by the proviso in s. 7 of the *Ontario Evidence Act*, R.S.O. 1937, c. 119, reading as follows:—

The parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties shall be competent to give evidence in such proceeding; provided that no witness in any proceeding whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

Counsel referred us to two divorce cases, *Laffin* v. *Laffin* (1), and *Waugh* v. *Waugh* (2), in which the Court of Appeal for Nova Scotia decided that evidence of a witness as to his own adultery given without objection in answer to questions put to him was inadmissible. It is not necessary to consider whether those cases were rightly decided. The relevant statutory provision is not identical with the Ontario section quoted above, or the corresponding statutory provision in force in England. The Nova Scotia section

(1) [1945] 3 D.L.R. 595, 18 M.P.R. 417.

(2) [1946] 2 D.L.R. 133, 19 M.P.R. 216.

is s. 38 of the *Evidence Act* of that Province as amended by 1936 c. 35, s. 1, and reads as follows:—

> The parties to an action or proceeding instituted in consequence of adultery, and their husbands and wives, shall be competent, but not compellable to give evidence; but the husband or wife, if competent only under this Chapter, shall not be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same action or proceeding in disproof of his or her alleged adultery or unless permission to ask such question is given by the Presiding Judge.

It will be observed that this section in terms forbids the asking of any question tending to show that the witness has been guilty of adultery unless one of the prescribed conditions exists, while the Ontario section relieves the witness from liability to be asked such questions.

In my opinion the law of Ontario is correctly stated by Logie J. in *Elliott* v. *Elliott* (1), particularly at page 212 where he says:—

> Nevertheless the privilege is the privilege of the witness, and if not taken advantage of by him or her, the evidence both at the trial and upon examination is admissible.

This is supported by the unanimous decision of the Court of Appeal in England in *Allen* v. *Allen and Bell* (2), where Lindley L.J. says:—

> The evidence with regard to the adultery is not rendered inadmissible, but protection is afforded to the witness from being questioned on the subject if the witness claims protection; but it is for the witness, and the witness only, to make the claim.

I am in agreement with the statement of Logie J. in *Elliott* v. *Elliott* (*supra*) at page 211:—

> As a matter of practice, the Judge, before any evidence is given, should inform the witness of the privilege given to him or her by sec. 7, and it would be well for counsel to advise the witness before he or she goes into the box at the trial or before the party is sworn in an examination for discovery, that he or she is not liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery unless such witness falls within the exception provided by the section itself.

In the case at bar it was, I think, obvious that the wife had decided to give evidence as to her own adultery, and I regard the omission to call her attention to the terms of the statute as unimportant.

(1) [1933] O.R. 206, 2 D.L.R. 40.

(2) (1894) P. 248 at 255.

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As to ground number (viii), referred to above, I think it clear that evidence that the child resembled the defendant was admissible. In *Doe Marr* v. *Marr* (1), Macaulay C.J., with the concurrence of McLean and Sullivan JJ. stated that such evidence is admissible when relevant to the issue. In the case at bar it was clearly relevant. In Wigmore on Evidence, 3rd Edition, section 166, page 624, the learned author says:—

> The English practice seems always to have admitted this evidence without question.

Since, in my opinion, all the grounds of attack upon the trial judgment fail it becomes unnecessary to deal with the terms on which the Court of Appeal directed a new trial, but I think it proper to say that I have been unable to find in the record justification of the criticism of counsel who appeared for the plaintiff at the trial. Even had the order for a new trial been upheld, in my opinion, the terms imposed upon the plaintiff could not have been allowed to stand. There was no room for any suggestion that the action was frivolous or vexatious and I know of no precedent for the order made. Cases arise from time to time in which the Court of Appeal in ordering a new trial will order a party to pay the costs of the former trial and of the Appeal in any event, but to make payment of such costs a condition precedent of the plaintiff's right to have his action tried might well result in a denial of justice.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

KELLOCK J.:—The first ground upon which the Court of Appeal acted in setting aside the judgment at trial was misdirection in their view, on the part of the learned trial judge, in failing to direct the jury with respect to the presumption of legitimacy and that the burden resting upon the appellant, in order to the displacement of the presumption was to adduce evidence producing in the minds of the jury a moral certainty.

In order to establish adultery in fact on the part of his wife, the appellant adduced evidence as to the blood analysis of himself, his wife and the child, thus directly challenging the legitimacy of the child. On that issue the law is, I think, clear.

(1) (1853) 3 U.C.C.P. 36.

In *Morris* v. *Davies* (1), Lord Cottenham L.C., quoting the unanimous opinion of the judges in the *Banbury Peerage* case, said at p. 215:—

> That *in every case* where a child is born in lawful wedlock, the husband not being separated from his wife by a decree of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the *satisfaction* of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child.

Lord Cottenham went on to say:

> In the absence of all evidence, either on the one side or on the other, the law would presume that such sexual intercourse did take place.

After referring to the case of *Head* v. *Head* (2), he also said:

> * * * all that is said by the present Master of the Rolls is, that the Court which is to be satisfied that sexual intercourse did not take place, must be so satisfied, not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt, in the minds of the Court or jury to whom that question is submitted.

While it is now provided by R.S.O. 1950, c. 119, s. 6 that

> * * * a husband or a wife may in any action, give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage,

I find nothing in this legislation which destroys the existence of the presumption on the one hand, or lowers the standard of proof as laid down in the authorities referred to. In my view, a child born in lawful wedlock is still presumed to be a legitimate child, and the presumption is to be overborne only by evidence excluding reasonable doubt. All that the statute does is to admit certain evidence which was previously excluded. The presumption is based upon a rule of public policy and its application is not limited, as argued by the appellant, to cases involving status of the parties.

It is argued for the respondent that, unless non-access be proven, all evidence directed to establishing the illegitimacy is inadmissible, but I find no such implied condition in the statute. Moreover, the statute has nothing to say as to the admissibility or otherwise of the medical evidence

(1) 5 Cl. & F. 163.

(2) 1 Sim. & Stu. 150 and Turn. & R. 138.

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which was adduced on behalf of the appellant and in my opinion it is not to be excluded on the basis of the rule of the common law. That rule grew up because of the then state of scientific knowledge, in which condition of things, a jury would, as pointed out by Lord Dunedin in *Russell's* case (1) at pp. 726-7, be faced with an impossible task. For that reason the law refused to permit any entry upon such an inquiry. If such evidence had not been given in the case at bar, then the evidence with respect to the question of legitimacy, even taking into consideration the evidence of the spouses themselves, might very well not have been, in the opinion of the jury, sufficient to remove all reasonable doubt. But with the medical evidence, if accepted by the jury, there could be no question of reasonable doubt. The illustration put forward by Lord Sumner in his dissenting opinion in *Russell's* case at p. 741 is apt:—

> If, both spouses being white themselves and of indubitably white ancestry on both sides, the wife bears a mulatto child of marked negro paternity, I do not see what need there is of further testimony about access, and I suppose (at least I hope) that common sense would prevail over presumption.

In my opinion, the medical evidence in the case at bar, if accepted by the jury, was of equal cogency with that suggested by Lord Sumner, and the omission of a direction to the jury as to their being satisfied beyond a reasonable doubt does not call for a new trial. If the evidence was in fact not accepted by the jury, then the direction actually given by the learned trial judge was adequate with relation to the other evidence on the issue of adultery. The evidence as to the paternity of the child was, of course, negative evidence and did not go further than to make out adultery in fact on the part of the wife of the appellant. In my opinion, therefore, it is not shown that there was any substantial wrong or miscarriage occasioned by the misdirection complained of, such as is required by R.S.O. 1950, c. 190, s. 28(1) before a verdict may be set aside.

I do not think effect ought to be given to the objection as to lack of proof that the appellant, his wife and the child were the subject of the blood tests as to which the medical evidence was given. In view of the course of the

(1) [1924] A.C. 687.

trial where no such objection was there raised, I think it is to be taken that the question of identity was, by both parties, treated as established.

The Court of Appeal was further of the view that the trial judge erred in failing to tell the jury that the fact that the birth of the child was registered under *The Vital Statistics Act,* raised a presumption of legitimacy under s. 6, subsection (3) of R.S.O. 1937, c. 88.

In the first place, the statute referred to by the court below is not the relevant statute, but rather c. 97 of the statutes of 1948. By s. 38, subsection (1) of that statute, a birth certificate shall contain only (*a*) the name of the child, (*b*) the date of birth, (*c*) place of birth, (*d*) sex, (*e*) date of registration, and (*f*) registration number. The exhibit here in question contained no more. By s. 41 subsection (1), such a certificate is admissible as *prima facie* evidence "of the facts certified to be recorded." Such facts do not bear upon the parentage of the child, and moreover it is provided by subsection (4) of s. 41 that notwithstanding subsection (1), no birth certificate shall be admissible in evidence to affect a presumption of legitimacy.

The last ground on which the judgment below was placed was error in the admission of conversations between the appellant and his wife with respect to the latter's misconduct. This evidence, given by both the appellant and his wife when called as a witness for the appellant, was not objected to. Not only so, but the respondent cross-examined both witnesses with respect to this subject matter, and there is ground for the inference that the respondent did not fail to object through inadvertence. The respondent had obtained, on examination of the appellant for discovery, his evidence on this subject in which he had stated that he had been informed by his wife that the adultery had taken place in March. This part of the discovery was used in the cross-examination of the appellant for the purpose of discrediting the evidence adduced on behalf of the appellant to the effect that the adultery had taken place in February. In addition, counsel for the respondent at the trial expressly agreed with the learned trial judge that the evidence of the wife as to what the appellant had said to her after her disclosure was admissible although not in proof of the act of adultery itself. In

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these circumstances, without relying upon the rule applied in *James* v. *Audigier* (1), I think it is now too late to object to the admission of this evidence at a trial had before a jury.

I would allow the appeal with costs here and below.

Appeal allowed and judgment at trial restored.

Solicitor for the appellant: *Benjamin Laker.*

Solicitor for the respondent: *A. W. S. Greer.*

(1) (1932) 49 T.L.R. 36.