1955
*Oct. 12
*Dec. 22

JOSEPH LEWKOWICZ sometimes known as JOZEF LEWKOWICZ (*Plaintiff*) ..... APPELLANT;

AND

JOSEPH KORZEWICH (*Defendant*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and Wife—Evidence—Marriage—Foreign marriage certificate produced—Presumption as to validity placed in doubt by evidence of prior marriage—Criminal Conversation, Action for—Onus on plaintiff to establish strict proof of marriage relied on—Evidence Act (Imp.) 14-15 Vict. c. 99, R.S.O. 1897, Vol. 3, p. XXIII.

In an action in damages for alienation of affection and criminal conversation the defendant pleaded that the plaintiff's marriage was bigamous by reason of a prior subsisting marriage of the plaintiff's purported wife. At the trial the plaintiff produced a certificate of the marriage performed in England in 1949 in which his wife was described as a spinster. On cross-examination of the plaintiff and his alleged wife, called as a witness for the plaintiff, it appeared that she had in 1946 gone through a form of marriage with one M before a priest in Poland. Later they came to Germany where a prosecution was initiated against M for his subsequent marriage there. The "wife" had been informed by a letter written by a "Summary Court Officer" that the Intermediate Military Government had dropped the proceedings for lack of evidence and that according to the law the Polish marriage was not valid as no civil marriage was performed and the "wife" was entitled to consider herself not married.

Held (Cartwright J. dissenting): That while the certificate of the English marriage was admissible in Evidence (Imperial Evidence Act, 14-15 Vict. c. 99; R.S.O. 1897, Vol. 3, p. XXIII) it could have no more probative value that it would have in the English courts. Its production did not constitute "strict" proof but at most raised a presumption as to its validity and, the presumption having been placed in doubt, the burden resting upon a plaintiff in an action for criminal conversation to establish that the "real" relation of husband and wife existed fell upon the appellant which he failed to discharge. *Catherwood* v. *Caslon* 13 L.J. M.C. 334 at 335; *The King* v. *Bailey* 31 Can. S.C.R. 338; *In re Stollery* [1926] 1 Ch. 284; *Rex* v. *Naguib* [1917] 1 K.B. 359.

Per Cartwright J. (dissenting): The certificate of the English marriage was admissible in evidence and constituted *prima facie* evidence of the facts which it recorded. *Bogert* v. *Bogert and Finlay* [1955] O.W.N. 119, approved. The evidence of the appellant together with the English marriage certificate established a valid marriage unless at the time it was solemnized the "wife" was already married to M. *Burt* v. *Burt* 29 L.J. N.S. (P.M. & A.) 133 and *Catherwood* v. *Caslon* 13 M. & W. 261, distinguished. Whether the *prima facie* case for a valid marriage was displaced by the evidence of the marriage

*PRESENT: Kerwin C.J. and Kellock, Estey, Cartwright and Abbott JJ.
**Estey J. because of illness took no part in the judgment.

ceremony in Poland depended upon the evidence in the record as to that ceremony There being no proof therein that the latter constituted a valid marriage there was no evidence to rebut the *prima facie* case made by the appellant. *Rex* v. *Naguib* [1917] 1 K.B. 359 at 361, 362, followed. *Rex* v. *Wilson* 3 F. & F. 119 and *Re Peete* [1952] 2 All E.R. 599, distinguished. The evidence of the ceremony in Poland without any proof of its validity was not evidence to lead the court to doubt the validity of the English marriage. Evidence of the marriage Law of Poland was equally available to both parties and it would be an anomaly to hold that evidence as to an alleged foreign marriage (which marriage if valid would be a defence to the charge or action as the case may be) which would be insufficient to afford any defence to one accused of bigamy, would yet be sufficient to furnish a defence to one sued for damages for criminal conversation. *Rex* v. *Christie* [1914] A.C. 545 at 564. The trial judge was right in ruling, as a matter of law, that there was no evidence in the record on which the jury could find the appellant's marriage was invalid, and in directing them to proceed on the basis that such marriage was established.

Judgment of the Court of Appeal for Ontario [1954] O.W.N. 402, affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) setting aside the judgment of Wilson J. entered on the finding of a jury and awarding the plaintiff $2,800 damages in an action for criminal conversation and alienation of the affections of the plaintiff's wife.

S. L. Robins for the appellant.

C. D. Gibson for the respondent.

The judgment of Kerwin C.J. and of Kellock and Abbott JJ. was delivered by:—

KELLOCK J.:—The sole question in issue in this appeal is as to whether the appellant sufficiently established a valid marriage in England in 1949 to the other party to that ceremony, having regard to the burden of proof resting upon a plaintiff in an action for criminal conversation.

The law in such case was stated by Parke B. (delivering the judgment of the court consisting of himself, Pollock, C.B., Alderson B., and Rolfe B.) in *Catherwood* v. *Caslon* (2). The marriage there in question had taken place at the office of the British Consul in Beyrout, Syria. In the course of his judgment, Parke B., said, at p. 335:

. . . it was contended, that in an action for criminal conversation, being an action against a wrong-doer, it is quite sufficient to shew that the parties intended to celebrate, and in their minds did celebrate a lawful form of marriage; and that if they afterwards cohabited as man and

(1) [1954] O.W.N. 402.

(2) (1844) 13 L.J. M.C. 334.

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wife on the faith of this *bona fide* belief, it constituted *primâ facie* a sufficient marriage *de facto,* and was a good foundation for the plaintiff's maintaining an action against the defendant, at least until the defendant should affirmatively shew that the marriage was unlawfully contracted, . . .

In rejecting this contention, the learned judge said, at p. 336:

> The cases of *Morris* v. *Miller* (1) and *Birt* v. *Barlow* (2) *and uniform practice ever since their decision,* seem to have settled that in actions of this nature (as in indictments for bigamy), it is necessary for the plaintiff to shew what the Courts call a marriage *de facto,* which, we think, means an actual valid marriage, or one which is voidable only, and good until it is avoided; . . . and unless the plaintiff proves a marriage *whereby the real relation of husband and wife is created,* he cannot succeed . . . It must be proved to be really a contract sufficient according to the law, at least sufficient in the first instance.

With respect to the particular facts before the court, Parke B., had said, at p. 335:

> Upon the facts stated, we do not know what was the marriage law of Syria, where this took place, as to marriages of British subjects there residing, or whether British subjects might not marry by such a form of marriage in that country. We are left in complete uncertainty whether the marriage be unlawful, if it be necessary for the defendant to shew that to be the case. And the question then is, whether the plaintiff, in the first instance, must shew this marriage to be clearly legal, or whether he has done sufficient to cast the burthen of shewing the contrary on the defendant; and, we think, the burthen is on the plaintiff, and that he has not done sufficient to establish a *prima facie* case against the defendant.

The above states accurately the law of Ontario, as was decided by this court in *The King* v. *Bailey* (3). In delivering the judgment of the court, Gwynne J., said at p. 342:

> Evidence of an actual marriage, i.e., a marriage *de jure,* was undoubtedly necessary although there was no plea on the record denying the marriage and expressly putting it in issue.

The marriage there in question had been, as in the case at bar, performed in England. It may be observed that in the affidavit of the Superintendent Registrar at Nottingham a certificate of the marriage was produced and the witness deposed that according to the laws of England, the said marriage was a legal and valid marriage "providing there were no legal obstacles existing at the time the ceremony was performed". This is a correct statement of the law and it was supplemented by an affidavit of an English solicitor who deposed that a legal marriage had been con-

(1) 4 Burr. 2057. (2) 1 Doug. 171.
(3) (1901) 31 Can. S.C.R. 338.

summated between the parties mentioned in the certificate. There was no evidence in the record raising any doubt upon the matter.

The decision of the Appellate Division in *Mellen* v. *Dobenko* (1), is in accord. The judgment of Grant J., as he then was, at the trial (2), in which he did not strictly apply the rule recognized in *King* v. *Bailey, ubi cit,* was reached without reference to that decision, which was apparently not cited.

In the case at bar, the "wife", whose maiden name was Janina Wicherkiewicz, and who was called as a witness on the appellant's behalf, testified that before she had gone through the marriage to her "second" husband, the appellant, she had been previously married to one Bartolomie Majcher, in Poland. The appellant admitted that at the time of the marriage of 1949, he knew of this previous marriage, but said that "she had the papers she was divorced" and that it was "on the basis" of these papers that the marriage took place.

The "papers" referred to consisted of a marriage certificate signed by a parish priest in Poland of the marriage performed by him between Janina Wicherkiewicz and Bartolomie Majcher, both giving their religion as Roman Catholics, the date of the marriage being stated as the 22nd of April, 1946. There was also another marriage certificate produced relating to a subsequent marriage of Bartolomie Majcher to one Wanda Irene Krol on the 2nd of April, 1947. The alleged "divorce" was a carbon copy of a letter, dated the 5th of November, 1947, purporting to have been written by one Capt. W. J. Quick, described as "Summary Court Officer" to Janina, stating that

> The Intermediate Military Government Court has dropped the bigamy case of Bartolomie Majcher for lack of evidence. According to the law your marriage is not valid as no civil marriage was performed and you are therefore entitled (sic) to consider yourself not married.

Apart from the last mentioned document, which is, of course, of no evidentiary value, the position of the appellant and Janina was that the previous marriage of the latter was subsisting. It was evidently assumed that Majcher was still living and no effort was made to prove the contrary.

(1) (1927) 61 O.L.R. 340. (2) 60 O.L.R. 555.

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Dealing first with the marriage upon which the appellant relies, that of 1949 in England, it is, of course, a foreign marriage so far as the courts of Ontario are concerned, and while there is no doubt that the certificate of this marriage is admissible in evidence under the *Imperial Evidence Act*, 14-15 Victoria, c. 99, which is in force in Ontario; see R.S.O., 1897, Vol. 3, p. XXIII, it can have no more probative force that it would have in the English courts, either from the standpoint of the validity of the marriage to which it relates or to any of the statements which it contains, such as that Janina was a "spinster" at the time. The English authorities are quite clear.

In *in re Stollery* (1), the Court of Appeal had to consider the probative force of statements in certain birth and death certificates as to the marriage of the persons stated in the certificates to have been the parents of the persons whose births and deaths were in question. As in the case at bar, the "Act for Registering Births, Deaths and Marriages in England" (1836) 6 & 7, Wm. IV, c. 86, was the relevant statute. Pollock M.R., in the course of his judgment, at p. 311, said:

> It would appear, therefore, . . . that these certificates ought to be received in evidence, and that they would appear to be some evidence—I do not at all say conclusive evidence—of the facts and of the date of birth and of the date of death recorded in them;

At p. 314, Pollock M.R., continued:

> In my judgment these certificates are admissible in evidence upon the issue whether or not the parents of Cecilia Stollery were married. I do not say that they are *prima facie* evidence proving that marriage, in the sense that in the absence of a rebuttal they ought to be acted upon without more. I do not mean so to hold. In any case evidence of identification of the persons named in the certificates will be required. But it appears to me that these certificates are admissible in evidence in the inquiry.

At 323, Scrutton L.J., said:

> . . . it is quite clear, as I have said, that the statement in the certificate alone is not prima facie evidence, because on that statement alone you have no evidence of identification, and therefore it is quite obvious that it is not prima facie evidence by itself. It appears to me that the statement is admissible in evidence, and what its effect is must be determined in conjunction with the other evidence which is put before the Master at the inquiry.

In *Tweney* v. *Tweney* (2), a petition for divorce, the petitioner had been twice married and in the certificate

(1) [1926] 1 Ch. 284. (2) [1946] 1 All E.R. 564.

relating to the second marriage she was described as a "widow". She had given this information because she had not heard from her first husband for several years. At p. 565, the trial judge, Pilcher J., said:

> The way in which the matter should be regarded is in my view this: The petitioner's marriage to the respondent being unexceptionable in form and duly consummated remains a good marriage *until some evidence is adduced that the marriage was, in fact, a nullity.*

Again, in *Re Peete* (1), before Roxburgh J., the plaintiff claimed to be entitled under the *Inheritance (Family Provision) Act, 1938,* as the widow of the deceased. To prove this she produced a certificate of marriage with the deceased in which she was so described. She gave evidence that her first husband had died previously, but was unable to produce a certificate of his death. Roxburgh J., after pointing out that the registrar under the relevant legislation "is charged with no duty to require proof that the parties are capable of being married", or to satisfy himself that any information given him by the parties to any marriage is true (being merely empowered by s. 7 of *The Marriage Act* of 1836, s. 85, to ask the parties certain questions), held

> . . . if the production by the plaintiff of the certificate and the statement that her previous husband died in 1916 had stood alone, and no evidence had been called which led the court *to doubt* the fact of his death, it would have been right and proper to act on the certificate and to hold that she had been duly married to the testator, and, therefore, was now his widow. On the other hand, it seems to me that once the matter is put in issue by evidence which *suggests a doubt about it,* the certificate is of little value. Once the circumstances are investigated, the certificate carries the matter no further.

Again, in *Re Watkins* (2), also a case under the *Family Provision* legislation, Harman J. acted upon the same principle as had Pilcher J. and Roxburgh J. This view of the law has been recently acted upon in Ontario by Gale J. in *Bogert* v. *Bogert* (3).

These authorities, as well as others to which I shall have occasion to refer, clearly indicate that the mere production of the English marriage certificate in the case at bar did not constitute "strict" proof of the marriage to which it relates but, at the most, raised a presumption as to its validity and constituted "some" evidence of the statements it contains. Any expert evidence, had it been tendered, could not have

(1) [1946] 2 All E.R. 599. (2) [1953] 2 All E.R. 1113.
(3) [1955] O.W.N. 119.

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gone further than did the evidence in *King* v. *Bailey*, namely, that the marriage would have been valid barring any existing legal obstacle such as the fact of the "wife" having been previously married. Such evidence would not, of course, have proved the validity of the marriage at all.

Accordingly, the statement in the marriage certificate, originally emanating from Janina, that she was a "spinster", while no doubt some evidence, and doubtless sufficient evidence of that fact had it stood alone, does not stand alone but is contradicted by evidence, which also emanates from her, that she was already married. This status continued unless there had been a "divorce" or unless (as was really intended by the use of the word) the previous marriage was invalid, or unless her first husband was dead, as to which the appellant adduced no evidence.

As already pointed out, in an action of this character it is the marriage *upon which he relies* that a plaintiff must prove strictly. This requirement in no way interferes with but, on the contrary, requires that the operation of the presumption as to the validity of any other marriage established by such cases as *Rex* v. *Inhabitants of Brampton* (1), and *Spivak* v. *Spivak* (2), must be overcome. Even putting aside any such presumption, it was quite open to the appellant to admit the previous marriage as he in fact did. Such admissions are admissible without question, as was the case in *Baindail* v. *Baindail* (3), and *R.* v. *Dolman* (4). In these circumstances, therefore, it cannot be said in my opinion that the appellant has met the onus resting upon him.

The matter may be tested from the standpoint of a prosecution for bigamy. In such case it is the first marriage which it is incumbent upon the Crown to prove strictly and that the prisoner went through a subsequent form of marriage while his first wife was still alive. The second marriage need not be shown to have been such as to constitute a valid marriage but for the first; *Reg.* v. *Brierly* (5) at 537; *Reg.* v. *Allen* (6); *R.* v. *Robinson* (7). In *Reg.* v. *Orgill* (8), the *second* marriage was held sufficiently proved

(1) (1808) 10 East. 282.
(2) (1930) 142 L.T. N.S. 492 at 495.
(3) [1946] 1 All E.R. 342.
(4) (1949) 33 Cr. App. R. 128.
(5) 14 O.R. 525.
(6) L.R. 1 C.C.R. 367.
(7) (1938) 26 Cr. App. R. 129.
(8) 9 C. & P. 80.

by the evidence of the woman herself if the jury believed her. This is on the same footing as the proof of the earlier marriage given by Janina herself in the case at bar, it being the "last" marriage with respect to which, in cases of criminal conversation, it is incumbent upon a plaintiff to prove strictly.

In *Rex* v. *Naguib* (1), the Crown proved that the appellant had been married twice in England, once in 1903 and again in 1914. The appellant contended that the marriage of 1903 was invalid on the footing of his own evidence that he had been previously married in Egypt in 1898. This defence failed for the reason that as it was the appellant *who was relying upon the foreign marriage,* it was for him to establish its validity. Viscount Reading C.J., put the matter thus, as reported in the Law Times, at p. 641:

> There can be no doubt that *where the case for the prosecution is based upon* a foreign marriage, the Crown must prove everything which is essential to the validity of a marriage according to the law of the foreign country, and that law can only be proved by someone who knows the law . . . This court is clearly of opinion that *a claimant who relies* on a foreign marriage, or the Crown in a prosecution for bigamy, where an earlier marriage in a foreign country is alleged, must bring forward expert evidence in order that the validity of the marriage according to the law of the foreign country may be proved. There can be in our opinion no difference in the law as applied to the case of defendants.

In the Law Reports, at p. 361:

> There is no doubt that, *where the prosecution relies upon a foreign marriage,* it is incumbent upon the Crown to prove the essential requisites of a valid marriage according to the law of the foreign country, and that the foreign law can only be proved by someone conversant therewith. . . . Therefore we are clearly of opinion that a claimant relying on a foreign marriage, or the Crown in a prosecution for bigamy alleging an earlier marriage in a foreign country, must adduce expert evidence to prove the validity of the marriage according to the law of the foreign country. We see no difference in the law applicable to defendants.

In *Rex* v. *Shaw* (2), also decided by the Court of Criminal Appeal, the appellant had been married in England in 1942 and again in 1943. The first marriage was proved by the evidence of the wife and by the production of a certificate of the marriage. One of the witnesses for the Crown stated in cross-examination that the appellant had stated to him that at the time of the marriage of 1942, he had been previously married in Canada but the appellant himself gave no evidence. It was held by the Common

(1) [1917] 1 K.B. 359; 116 L.T. 640.

(2) (1943) 60 T.L.R. 344.

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Serjeant that the evidence given for the Crown, including the certificate of marriage, *created a presumption* that that marriage was a legal and effective marriage. There being no evidence to the contrary, the presumption remained. The conviction was affirmed.

Atkinson J., in delivering the judgment of the court, pointed out that even if the fact were as contained in the statement made by the appellant to the police, the only result would be that he had committed bigamy twice instead of once, and that following the earlier decision of the court in *Rex* v. *Morrison* (1), the presumption as to the validity of the first English marriage had not been displaced.

In *Morrison's* case, one "H" had been married in England and then went to live in this country with her husband, whom, however, she last saw here in 1928. On March 11, 1938, she was married to the appellant, describing herself as a "widow". Later, on the 16th of the same month, the appellant married "I" and was charged with bigamy. The jury were directed that the first marriage of March 11, being *prima facie* lawful, it was for them to consider whether the evidence was such as to make it unlawful, and that *if they had any doubt* about the legality of the first marriage, they must acquit the prisoner. It was held by the Court of Criminal Appeal that this was a proper direction.

In the case at bar, the evidence on behalf of the appellant never at any time advanced his case beyond a state of doubt. That being so, he has failed to discharge the burden of proof resting upon him to establish that the "real" relation of husband and wife existed between himself and the witness Janina.

I would dismiss the appeal with costs.

CARTWRIGHT J. (dissenting):—This action, for damages for alienation of affection and criminal conversation, was tried before Wilson J. and a jury and the appellant was awarded $2,800 damages. This judgment was set aside by the Court of Appeal on the ground that the plaintiff had not proved that he was validly married to the woman who is described in the statement of claim as his wife and to whom it will be convenient to refer as Janina Lewkowicz.

(1) (1938) 27 Cr. App. R. 1.

In view of their decision on this point the Court of Appeal did not find it necessary to deal with the other grounds set out in the notice of appeal.

The pleadings so far as they are relevant to this point are as follows. In the statement of claim the appellant alleges in paragraph 1 that he is the husband of Janina Lewkowicz. Paragraph 2 is as follows:—

> The plaintiff says that the plaintiff on or about the 15th day of January, 1949, was lawfully married to one Janina Lewkowicz, whose maiden name was Janina Wicherkiew, in Brighton, England, and the plaintiff and the plaintiff's spouse came to Canada and have been residing in Toronto, Canada, since 1951.

In paragraph 2 of the statement of defence the respondent pleads:—

> The defendant alleges that the purported marriage of the plaintiff alleged in the second paragraph of the Statement of Claim herein was bigamous, null and void *ab initio,* by reason of a prior subsisting marriage of Janina Lewkowicz, the purported wife of the plaintiff.

In his reply the appellant denies paragraph 2 of the statement of defence and joins issue.

At the trial there was filed as Exhibit 1, a certified copy of an entry of marriage, pursuant to the Marriage Acts, 1811 to 1939, in which is recorded a marriage solemnized by licence at the Register Office in the District of Hove on January 5, 1949, between the appellant and Janina Wicherkiewicz he being described as a bachelor and she as a spinster. It was proved that the parties named in this exhibit were the appellant and Janina Lewkowicz. Evidence was given that they had thereafter lived together and been known as man and wife.

For the reasons given by Gale J. in *Bogert* v. *Bogert and Finlay* (1), I agree with his conclusion that a certificate such as Exhibit 1 is admissible in evidence in the courts of Ontario and constitutes *prima facie* evidence of the facts which it records. It was not questioned that, provided the parties to it had the capacity to marry, the marriage recorded in Exhibit 1 was valid according to the law of England and of Ontario. No question was raised as to the capacity of the appellant but only as to that of Janina Lewkowicz. At the trial, it appeared from the cross-examination of the appellant and of Janina Lewkowicz that she had, on April 22, 1946, gone through a form of marriage

(1) [1955] O.W.N. 119.

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before a priest in Poland with one Bartlomie Majcher. While Janina Lewkowicz stated she had been divorced from him it is clear that what she meant was that, before marrying the appellant, she had been informed that her supposed marriage with Majcher was void as there had been no civil marriage. No evidence was given at the trial as to the law of Poland or to shew whether according to that law the supposed marriage between Janina Lewkowicz and Bartlomie Majcher had any legal validity. There was no evidence to suggest that Bartlomie Majcher was not still living at the date of the marriage between the appellant and Joseph Lewkowicz. The question is whether, on this record, the appellant had satisfied the onus of proving that Janina Lewkowicz was his wife.

In *Birt* v. *Barlow* (1), Lord Mansfield said:—

> An action for criminal conversation is the only *civil* case where it is necessary to prove an *actual* marriage. In other cases, cohabitation, reputation, etc. are equally sufficient since the marriage act as before. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by persons giving the name and character of *wife* to woman to whom they are not married, it struck me, in the case of *Morris* v. *Miller,* that in such an action, a marriage in fact must be proved.

The sense in which Lord Mansfield used the words "actual marriage" appears from his statement in *Morris* v. *Miller* (2):—

> Proof of *actual* marriage is always used and understood in opposition to proof by cohabitation reputation and other circumstances from which a marriage may be *inferred.*

It appears to me that the evidence of the appellant, together with Exhibit 1, established an actual marriage duly solemnized and valid in law, unless at the time it was solemnized Janina Lewkowicz was already married to Majcher. This, I think, distinguishes the case at bar from *Burt* v. *Burt* (3), in which there was no proof that the marriage of the defendant in Australia which was claimed to be bigamous would have been valid according to the law of that country if solemnized between persons with the capacity to marry, and from *Catherwood* v. *Caslon* (4) in which there was no proof that the marriage in Syria

(1) (1779) 1 Doug. 170 at 174.
(2) (1767) 4 Burr. 2057 at 2059.
(3) (1860) 29 L.J. N.S. (P.M. & A.) 133.
(4) 13 M. & W. 261.

between the plaintiff and the woman whom he claimed to be his wife was valid according to the marriage law of Syria.

Can it be said that the *prima facie* case for a valid marriage made by the appellant is displaced by the evidence of the marriage ceremony in Poland? The answer to this question appears to me to depend upon the evidence in the record as to that ceremony regardless of whether such evidence was elicited from the appellant and his witnesses or introduced through the witnesses called for the respondent. In my view there being no proof in the record that the ceremony performed in Poland constituted a valid marriage there is no evidence to rebut the *prima facie* case made by the appellant. The applicable law is, I think, accurately stated by Viscount Reading C.J. in delivering the judgment of the Court, the other members of which were Bray and Atkin J.J., in *Rex* v. *Naguib* (1), as follows:—

> There is no doubt that, where the prosecution relies upon a foreign marriage, it is incumbent upon the Crown to prove the essential requisites of a valid marriage according to the law of the foreign country, and that the foreign law can only be proved by some one conversant therewith.
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> * * *
>
> Therefore we are clearly of opinion that a claimant relying on a foreign marriage, or the Crown in a prosecution for bigamy alleging an earlier marriage in a foreign country, must adduce expert evidence to prove the validity of the marriage according to the law of the foreign country. We see no difference in the law applicable to defendants.

In *Naguib's* case the Crown proved that the accused went through a form of marriage according to English law in England in 1903 with one Annie Wheeler and that in 1914, Annie Wheeler being still alive he went through a form of marriage according to English law in England with Teresa Sullivan. The defence proved that in 1898 the accused went through a form of marriage with a woman in Egypt who was still living when he married Annie Wheeler and whom he had divorced in 1913. The accused, who was not a lawyer, deposed that the Egyptian marriage was valid according to the law of that country, but there was no competent evidence of the marriage law of Egypt. Avory J. at the trial ruled that the evidence of the Egyptian marriage was no defence to the charge and his ruling was affirmed by the Court of Criminal Appeal.

(1) [1917] 1 K.B. 359 at 361, 362.

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The analogy between *Naguib's* case and the case at bar appears to me to be very close. In *Naguib's* case the Crown made out a case of a marriage in England in 1903 valid unless the accused was then already married. In the case at bar the appellant made out a case of a marriage in England in 1949 valid unless Janina Lewkowicz was already married. In *Naguib's* case it was held that proof of a former marriage ceremony in a foreign country could not avail the defendant without proof of the marriage law of that country to establish the legal validity of the ceremony. I think the same holding should be made in the case at bar.

It is suggested that the decision in *Naguib's* case is at variance with that in *R.* v. *Wilson* (1), but it will be observed that in the last mentioned case, Crompton J. did not decide as a matter of law that a defence was made out without proof of the marriage law of Canada. He suggested to counsel for the prosecution that "although there might be some technical difficulty in proving the marriage in Canada" (which marriage if established furnished a defence to the indictment), he ought not to press the charge, and counsel fell in with this suggestion.

Re Peete (2), referred to by the Court of Appeal, appears to me to be correctly decided but to be distinguishable on the facts. In that case the marriage relied upon by the claimant was valid unless at the time it was solemnized her husband by a former marriage, admittedly valid, was alive. Roxburgh J. held that there was no admissible evidence to shew that the former husband was not still living at the date of the later marriage. At page 602 Roxburgh J. accepts what was said by Pilcher J. in *Tweney* v. *Tweney* (3):—

> This court ought to regard the petitioner, who comes before it and gives evidence of a validly contracted marriage, as a married woman, until some evidence is given which leads the court to doubt that fact.

Applying this to the case at bar, it is my view that evidence of the ceremony in Poland without any proof of its validity under Polish marriage law is not evidence to lead the court to doubt the validity of the 1949 marriage in England.

(1) (1862) 3 F. & F. 119. (2) [1952] 2 All E.R. 599.
(3) [1946] 1 All E.R. 564.

It was argued for the respondent that the onus of proving that the Polish ceremony was invalid was upon the appellant and reliance was placed on the words of Ferguson J.A. in *Pleet* v. *Canadian Northern Quebec R. W. Co.* (1):—

> Where the subject matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character.

But in the case at bar the subject matter as to which there is a complete lack of evidence is the marriage law of Poland and that does not lie particularly within the knowledge of either party. While the obtaining of such evidence might well be attended with both difficulty and expense it is equally available to both parties.

I have examined all the other cases cited to us but none of them appear to me to furnish sufficient grounds for rejecting the view of the law expressed in *Naguib's* case. If I am right in my view that *Naguib's* case was correctly decided, it would be an anomaly to hold that evidence as to an alleged foreign marriage (which marriage if valid would be a defence to the charge or action as the case may be) which would be insufficient to afford any defence to one accused of bigamy would yet be sufficient to furnish a defence to one sued for damages for criminal conversation. While Lord Mansfield assimilated an action for criminal conversation to a criminal prosecution he did not suggest that the party sued should be in a better position in relation to the rules of evidence than the party indicted. To so hold would be contrary to the general rule which was stated in the following words by Lord Reading in *Rex* v. *Christie* (2):—

> The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action.

I conclude that the learned trial judge was right in ruling, as a matter of law, that there was no evidence in the record on which the jury could find that the appellant's marriage to Janina Lewkowicz was invalid, and in directing them to proceed on the basis that such marriage was established. It follows that the appellant is entitled to succeed so far as this point is concerned.

(1) (1921) 50 O.L.R. 223 at 227. (2) [1914] A.C. 545 at 564.

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Cartwright J.

It remains to consider the other grounds relied on by the respondent and with which the Court of Appeal found it unnecessary to deal. These are set out in the respondent's factum as follows:—

1. That the facts disclosed that the plaintiff's alleged wife left the plaintiff in January 1952, after a quarrel. Under those circumstances there was no alienation of affection.

2. The learned trial judge allowed evidence of adultery to be given by Janina Lewkowicz in Reply. He commented unfavourably at the trial on this evidence, but the harm had been done, and even though the learned trial judge told the jury to disregard such evidence, the evidence was very prejudicial to the defendant and amounted to a substantial wrong or miscarriage of justice. In effect the plaintiff split his case by giving evidence of adultery in chief and in reply.

3. Such evidence was given without any warning as is required by Section 8 of the *Evidence Act,* R.S.O. (1950) chapter 119.

4. The learned trial judge told the jury that damages could be awarded in respect of each act of adultery. It is respectfully submitted that His Lordship erred in so charging the jury and in doing so, he failed to give a proper charge to the jury as to the principle of awarding damages in an action for criminal conversation.

5. The learned trial judge failed to charge the jury that the onus was on the plaintiff to prove adultery beyond a reasonable doubt.

As to ground 2 above, it is clear that the appellant having called evidence of adultery as part of the case opened by him was not entitled to divide his case and call further evidence in support of that charge in reply; but it appears from the record that counsel for the appellant had no such intention and that the witness Janina Lewkowicz volunteered the evidence as to adultery in an answer which was not strictly responsive to the question put to her. The learned trial judge warned the jury to disregard this evidence, and counsel for the respondent did not ask that the jury be discharged and the case tried again before a different jury. There may well be cases where, a piece of inadmissible evidence having been heard by the jury, no warning from the judge can remedy the harm which has been done; but this is not such a case. The evidence was not inadmissible *per se* but only because it was heard at the wrong stage in the proceedings and there was ample other evidence in the record to support the jury's finding on the issue of adultery.

Ground 3 above is disposed of adversely to the appellant by the decision of this Court in *Welstead* v. *Brown* (1). In

(1) [1952] 1 S.C.R. 3 at 22, 23.

that case the following passages from the judgment of Logie J. in *Elliott* v. *Elliott* (1) were cited with approval:—

> 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.
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> * * *
>
> 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.

In the case at bar it cannot be suggested that the learned trial judge should have informed the witness of her privilege as he had no reason to anticipate that she was about to volunteer evidence that she had been guilty of adultery; and the failure to give such information, even in a case in which it should be given, does not, in Ontario, render the evidence inadmissible.

Ground 5 above is disposed of by the judgment in *Smith* v. *Smith and Smedman* (2); in my view, the charge of the learned trial judge as to the onus lying on the plaintiff was adequate and in accordance with the principle of the decision in that case.

Grounds 1 and 4 above may be dealt with together. The charge to the jury must of course be read as a whole and in the light of the evidence; and, when this is done, it appears to me that the learned judge instructed the jury fully and accurately as to the law in regard to damages for alienation of affection and for criminal conversation, giving due weight to all matters in the evidence which told in favour of the respondent, including specifically the fact that the appellant was separated from his wife when the respondent commenced paying attention to her. I am unable to find any misdirection.

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

Appeal dismissed with costs.

Solicitor for the appellant: *B. J. S. Pitt.*

Solicitors for the respondent: *Hazel & Gibson.*

(1) [1933] O.R. 206 at 211, 212. (2) [1952] 2 S.C.R. 312.