His Honour re-asserted the opinion he expressed in *R. v. Bonnor*[17] that the general tendency of the modern criminal law is towards the principle that the onus should be on the Crown to prove all the elements of the crime.[18]

Acknowledging the possibility that his ruling may encourage attempts to raise unmeritorious or dishonest defences, His Honour conceded that if such practices do arise, legislation altering the onus of proof may be justified. To forestall such attempts, His Honour advocated legislation to the effect that, when the defence intends to rely on any matter involving the accused's mental state or capacity, notice should be given to the Crown before the trial, with an opportunity for examination of the accused by experts on behalf of the Crown, on pain of the exclusion of evidence as to the accused's mental state.[19]

The third matter on which Sholl J. ruled was a contention by the Crown Prosecutor that post-traumatic automatism cannot amount to a defence to the charge of dangerous driving, because that offence does not involve *mens rea*.[20] His Honour felt no difficulty in rejecting this argument; the fact that a guilty mind is not an element of the offence is quite distinct from the proposition that a complete lack of volition to perform the acts involved in the offence means that no offence is committed. A man cannot be criminally responsible for acts of which he is not conscious.[21]

Almost all the cases affecting the defence of automatism have arisen in the last decade. The instant case appears to be the first in Victoria in which the implications of this defence have been considered; it is submitted with respect that the decision of Sholl J., which covers two basic and controversial features of the defence, establishes a firm foundation for the administration of this novel aspect of the criminal law.

A. D. HAMBLY

MILDER v. MILDER[1]

Divorce—Private International Law—Formal validity of marriage—Failure to comply with law of place of celebration—Whether subjective test of intention displaces local law

The parties to this action went through a marriage ceremony in Breslau

[17] [1957] V.R. 222, 260 ff.; [1957] Argus L.R. 187, 220 ff. Noted, (1957) 1 *M.U.L.R.* 111. D. J. MacDougall, 'The Burden of Proof in Bigamy' (1958) 21 *Modern Law Review* 510, favours the dissenting opinions of Barry and Sholl JJ. in *R. v. Bonnor*, and strongly criticizes the decision of the majority (Herring C.J., Gavan Duffy and O'Bryan JJ.).

[18] [1959] V.R. 105, 112; [1959] Argus L.R. 335, 342. His Honour regards the onus of proof thrown on the accused who sets up insanity as a defence as 'contrary to the tradition and genius of the common law, urgently requiring legislative consideration': *ibid.*, 110-111. However, Devlin J. doubts whether an alteration in the law would make much practical difference: 'Criminal Responsibility and Punishment: Functions of Judge and Jury' [1954] *Criminal Law Review* 661, 675.

[19] [1959] V.R. 105, 112; [1959] Argus L.R. 335, 342.

[20] *R. v. Coventry* (1938) 59 C.L.R. 633; [1938] Argus L.R. 420; *Hill v. Baxter* [1958] 1 All E.R. 193.

[21] [1959] V.R. 105, 112-113; [1959] Argus L.R. 335, 342-343; *Hill v. Baxter* [1958] 1 All E.R. 193; J. Ll. J. Edwards, 'Automatism and Criminal Responsibility' (1958) 21 *Modern Law Review* 375, 381-382.

[1] [1959] V.R. 95; [1959] Argus L.R. 325. Supreme Court of Victoria; Smith J.

in 1945. Both were adherants to the Jewish faith and, though the marriage was invalid in point of form by German law which was in force in Breslau at the time, it was valid by the law of their religion. The defect in form was that no civil ceremony before a registrar was carried out. Later both parties came to Victoria where the wife petitioned for a divorce on the ground of repeated acts of adultery. To succeed in this action she had to prove the validity of the marriage in Breslau.

Smith J. began by finding that the requirements of Jewish religious law had been met and noted that such a marriage was valid at common law. He pointed out that this would not be of assistance to the petitioner because common law was not applicable to determine the validity of the marriage. The law of the place of celebration of the marriage was to be applied, and Smith J. was in no doubt that its requirements as to form had not been satisfied. However, it had been argued for the petitioner that the parties to the marriage were not bound by the general rule of the applicability of the local law since in this case it was impossible to comply with it, and in any event the parties did not *intend* to comply with it. Smith J. found that the impossibility of compliance was not proved as a fact, and that the subjective intent of the parties as to compliance with local law did not displace the general rule that the law of the place of celebration governs the formal validity of a marriage. The importance and effect of the latter decision will be the central issue in this note. At the conclusion of his judgment, Smith J. refused to hold that the marriage had been retrospectively validated by later Polish legislation, since at the time the government was accorded only *de facto* recognition as the administrative controller of Breslau, and because the law in terms applied only to Polish citizens, upon which point the petitioner could not furnish convincing evidence.

The petitioner's argument that the intention of the parties to exclude local law was sufficient to exclude it was based on the ancient cases of *Scrimshire v. Scrimshire*[2] and *Ruding v. Smith.*[3] More recent cases also cited were *Taczanowska (orse. Roth) v. Taczanowski*[4] and *Kochanski v. Kochanska.*[5] In brief, the argument runs this way. Although *Berthiaume v. Dastous*[6] laid down the rule that in connection with the formal validity of marriage the maxim *locus regit actum* applies, it is not applicable in all circumstances whatever. The rule was first brought into English law by Sir Edward Simpson in *Scrimshire v. Scrimshire,*[7] but as formulated by him it was not of automatic application, since he mentioned a presumption that the parties intended to submit to local law, raised by the fact that they chose that place to enter into marriage.[8] Moreover, this presumption is rebuttable by looking at the circumstances of each case. In *Ruding v. Smith,*[9] for example, it was held that local law did not apply to the marriage of a British officer who was a member of conquering forces in a foreign land where it was not possible to satisfy the requirements as to formalities. The exception was recognized in

[2] [1752] 2 Hag. Con. 395.
[3] [1821] 2 Hag. Con. 371.
[4] [1957] 3 W.L.R. 141.
[5] [1957] 3 W.L.R. 619.
[6] [1930] A.C. 79.
[7] [1752] 2 Hag. Con. 395.
[8] *Ibid.*, 412.
[9] [1821] 2 Hag. Con. 371.

Berthiaume v. Dastous,[10] and was taken a step further in *Taczanowska (orse. Roth) v. Taczanowski.*[11] In the latter case, the marriage of parties of Polish nationality, one of whom was attached to occupying forces in Italy, was recognized as valid although Italian law was not complied with and no suggestion of impossibility was made. A further link in the chain was forged in *Kochanski v. Kochanska,*[12] in which it was held that parties of Polish nationality, living in a camp for displaced persons in Germany, were validly married, although no attempt had been made to comply with the requirements of German law. It was argued that in all these cases the rule *locus regit actum* had been displaced since the parties had gone through the ceremony without any intention of complying with local law. The presumption spoken of in *Scrimshire v. Scrimshire*[13] and the other cases was rebutted by the expression of a contrary intention by the parties deducible from their conduct at the time. Likewise, it was urged before Smith J., these parties evinced a contrary intention and therefore ought not to be judged according to the law of the place of celebration.

This argument did not convince Smith J., who found in the four abovementioned cases the unifying element that at least one of the parties to the marriage was a member of a hostile group within the borders of a foreign country whose laws governed formal validity of marriages in the area. In none of these cases could it be said that the parties were subject to local laws, because the isolated communities in which they were living held themselves aloof from it, but this could not be said of individuals in a foreign country. *Kochanski v. Kochanska,*[14] said Smith J., left open the question as to the individual's ability to contract a valid marriage without complying with local law by expression of a contrary intention, and to succeed, the petitioner must have the point decided in her favour. This, His Honour said, he could not do, as it would involve a most drastic change in the law. It is respectfully submitted that this conclusion is correct but it is also submitted that it is quite close to a contradiction of *Kochanski v. Kochanska*[15] and at least marks out for Victorian courts an approach to this question distinctly different from that recently adopted in England.

It should be noted at this stage that in (i) *Ruding v. Smith,* (ii) *Taczanowska (orse. Roth) v. Taczanowski,* and (iii) *Kochanski v. Kochanska,*[16] English courts extended step by step the category of cases in which they would disregard local law, and yet in all cases continued to refer upon its exclusion to the criteria of English common law. At first it was British citizens overseas in belligerent occupying forces, then aliens in foreign countries in occupying forces, and finally aliens in a foreign country living in a separate community, who were brought into classes of those who could disregard the *lex loci.* The words of Sir Edward Simpson in *Scrimshire v. Scrimshire*[17] were taken to have a continually

[10] [1930] A.C. 79.
[11] [1957] 3 W.L.R. 141.
[12] [1957] 3 W.L.R. 619.
[13] [1752] 2 Hag. Con. 395, 412.
[14] [1957] 3 W.L.R. 619.
[15] *Ibid.*
[16] [1821] 2 Hag. Con. 371; [1957] 3 W.L.R. 141; [1957] 3 W.L.R. 619.
[17] [1752] 2 Hag. Con. 395.

widening meaning until in *Kochanski v. Kochanska*[18] Sachs J. said: 'First the validity of a foreign marriage is as a general rule governed by the law of the country in which it is celebrated. Secondly, the above presumption is rebuttable.'[19] His Honour went on to say that the onus was on the person who asserted it to rebut the presumption, and if that was done then the common law was to be applied. Sachs J. admitted that the only occasions on which the alleged presumption had been rebutted up till that time had been in cases concerning persons in belligerent occupation of a foreign land, or physical impossibility, but he said that once the presumptive nature of the rule was seen, categorization of cases lost its importance.[20] Although Sachs J. later disclaimed any intention to deal with the position of a person acting in isolation, it is difficult to see how this enunciation of the rules can be reconciled with the assertion of Smith J. that to hold that a person can be married without satisfying the *lex loci* by expression of a contrary intention would work a drastic change in the law. This statement amounts at least to a denial of the presumptive nature of the rule *locus regit actum*. It is submitted, with respect, that the decision of Smith J. on this point is not only more closely akin to the spirit of the judgment of Sir Edward Simpson but is also a more accurate interpretation of the words he used. It becomes clear on an examination of *Scrimshire v. Scrimshire*[21] that the words concerning presumption of subjection to jurisdiction are only supplementary to the statement that the parties have subjected themselves to the law of the place by going through the ceremony there. Before closing the discussion of this point it is interesting to note that the English decisions cite in support of their substitution of common law for the displaced *lex loci* (rather than the law of the domicile of the parties) the decision in *Savenis v. Savenis and Szmeck*.[22] In both the recent English cases the courts, having read the words of Mayo J., overlooked the fact that he only resorted to use of common law in that case because it was a physical impossibility to comply with the *lex loci*, and because the domicile was in chaos by reason of war and occupation by an alien power at the time of the marriage, thus making it out of the question for the parties to ascertain the current requirements of their domicile. This second limb of the reasoning of Mayo J. was, it is submitted, also overlooked in *Maksymec v. Maksymec*[23] by Myers J. when he decided to refer to the law of the domicile, having held that it was impossible to comply with local law. Had Smith J. reached a different conclusion on the evidence about the impossibility of compliance with local law, his observations on this unfortunate dilemma would have been most instructive.

Smith J. refused to hold that the marriage had been retrospectively validated by Polish legislation in 1946. There were two grounds for this refusal, one of which was that the law was expressed to apply to Polish citizens, and the evidence failed to show that the parties were within

[18] [1957] 3 W.L.R. 619.
[19] *Ibid.*, 622.
[20] *Ibid.*, 623.
[21] [1752] 2 Hag. Con. 395.
[22] [1950] S.A.S.R. 309.
[23] (1954) 72 W.N. (N.S.W.) 522.

this genus. The other reason was less convincing. A letter of advice from the executive obtained by Smith J. stated that in 1946 the Australian government recognized the Polish government as exercising *de facto* administrative control over Breslau but not as possessing *de jure* sovereignty. On this ground it was held that the Polish government had no power recognizable in our courts to change the marriage laws of the area. It is not clear how this reasoning can be reconciled with the case of *The Arantzazu Mendi*[24] where it was held on the highest authority that the laws of a government recognized *de facto* by the British government took precedence in British courts over the laws of the *de jure* sovereign authority. If the *de facto* recognition mentioned by Smith J. means the same thing as it did in the *Arantzazu Mendi* case (any other view appears to be difficult to support), it would appear that the two results are diametrically opposed to one another. In view of this, it is submitted that this reason for refusing to recognize the retrospective validation is not supported by authority and in fact is opposed to authority, though it is readily admitted that the refusal was correct on the other ground.

A halt has been called to the advance of the idea that the rule *locus regit actum* is a presumption. Smith J. has clearly marked the way for Victorian courts along the path of a stricter view of *Scrimshire v. Scrimshire,*[25] and the allowable exceptions to the rule it founded in English law, than is envisaged by *Kochanski v. Kochanska.*[26] If this decision is accorded the same consideration as *Savenis v. Savenis and Szmeck*[27] received, it might well recall English courts to the formulation of the rule expressed in *Berthiaume v. Dastous.*[28] It is only to be regretted that His Honour's view of the facts prevented him from considering *Savenis v. Savenis and Szmeck*[29] and the English interpretation of it. All extensions of existing rules need not, of necessity, work justice, and in at least refusing to extend the idea of *locus regit actum* as a presumption, and, it is suggested, setting it back one step, Smith J. in this case has struck a blow for the complete restoration in its pristine state of a rule which is an outstanding example of one which works substantial justice and provides complete certainty and consistency.

J. R. HANLON

R. v. CRIMMINS[1]

Criminal Law—Misprision of felony—Not obsolete—Elements of offence—Sufficient concealment

C, after treatment at a hospital for a gun-shot wound, stated to police officers that he had been deliberately shot, but he refused to disclose the name of the person who shot him or the whereabouts of the house where he had been shot. He admitted that he knew both these facts. C was convicted by a jury before O'Bryan J. of misprision of felony,

[24] [1939] A.C. 256. [25] [1752] 2 Hag. Con. 395. [26] [1957] 3 W.L.R. 619.
[27] [1950] S.A.S.R. 309. [28] [1930] A.C. 79. [29] [1950] S.A.S.R. 309.
[1] [1959] V.R. 270; [1959] Argus L.R. 674. Supreme Court of Victoria; Herring C.J., O'Bryan and Dean JJ.