states hold that the trial court must use its discretion in allowing permanent alimony, taking into consideration the husband's ability to pay, wife's condition and means and the conduct of the parties.[32]

One authority[33] in the field found that nine of the forty-seven statutes allowing the trial court to award alimony in absolute divorce cases provide that the court "must" or "shall" allow alimony in proper cases. In the other states the courts "may" do so or "have the power to decree" alimony. He concluded that since the statutes place the whole matter in the discretion of the court, these differences are probably not significant.

From the standpoint of policy and in the light of the decisions, both in Ohio and other states having similar mandatory statutes, the rule of construction allowing the courts to exercise a wide latitude of judicial discretion in the determination of the amount of alimony commends itself as an application of good sense and inherent justice. Measuring the statute under consideration by the yardstick of what is consonant with reason and good discretion, one cannot conclude that the General Assembly intended to preclude the courts from giving consideration to the facts and circumstances of each case.

Sed quaere whether, under the statute, the court *must* grant a decree for *some* amount, even though nominal, where it appears that the husband is virtually indigent and the wife has sufficient wealth of her own to support herself? L.S.F.

Legitimizing Illegitimates — Effect of Statutes and of Presumptions

In *Garner* v. *Goodrich*,[1] a child conceived before, but born posthumously after a bigamous marriage, asserted a claim for a death award under the Workmen's Compensation Act[2], because of the accidental death of his father. In order to recover, the child's legitimacy had to be proved[3]. The Ohio Supreme Court, under the following statute, held that he was legitimate and entitled to recover: "When by a woman

[32] Shirey v. Shirey, 87 Ark. 175, at 184, 111 S.W. 369 (1908); Johnson v. Johnson, 165 Ark. 195, at 203, 263 S.W. 379 (1924); Baker v. Baker, 94 Fla. 1001, 114 So. 661 (1927); Dissette v. Dissette, 208 Ind. 567, 661, 196 N.E. 684 (1935); Glick v. Glick, 86 Ind. App. 593, 159 N.E. 33 (1927); Mann v. Mann, 136 Kan. 331, 15 Pac. (2d) 478 (1932); Lassen v. Lassen, 134 Kan. 436, 7 Pac. (2d) 120 (1932); Sango v. Sango, 105 Okla. 166, 232 Pac. 49 (1924); Derritt v. Derritt, 66 Okla. 124, 168 Pac. 455 (1917); Myers v. Myers, 83 Va. 806, at 815, 6 S.E. 630 (1887).

[33] 2 Vernier, American Family Laws, sec. 105, p. 266.

[1] 136 Ohio St. 397, 26 N.E. (2d) 203, 16 Ohio Op. 568 (1940).

[2] Ohio G. C. sec. 1465-82.

[3] Staker v. Industrial Commission, 127 Ohio St. 13, 186 N.E. 616 (1933).

a man has one or more children, and afterwards intermarries with her, such issue, if acknowledged by him as his child or children will be legitimate. The issue of parents whose marriage is null in law, shall nevertheless be legitimate."[4]

Since the marriage was void because the mother was a bigamist, the child would be illegitimate at common law.[5] Under the last part of the statute, however, such issue is legitimized, the statute having been construed to apply to a child conceived in adultery[6], and born of a bigamous marriage.[7] The court might have rested its case on this point alone, but there was a physical possibility that the child was the issue of the mother's previous marriage. No evidence to that effect was presented. The court, relying upon the first part of the statute, reached the conclusion that since the second husband before his death openly and notoriously acknowledged the unborn infant, it would be regarded as the issue of the void marriage. The language of the statute seems to indicate that acknowledgment is necessary only when parents marry after the birth of a child, but in the principal case, and also in a case[8] where the child was born in lawful wedlock, the first part of the statute was cited. What the court is actually doing in both of these cases is using the acknowledgment as a step in proving paternity, when either the last part of the statute or the presumption of legitimacy would have sufficed.

The courts of Ohio, in considering doubtful cases of legitimacy, have always favored the child whenever possible. A child born in wedlock is presumed to be legitimate.[9] This presumption also applies when the child was conceived during wedlock but was born after the divorce of its parents.[10] In *Miller* v. *Anderson*,[11] the Ohio Supreme Court held that when a man married an expectant mother, with full knowledge of her pregnancy, he was *conclusively* presumed to be the father of a child subsequently born. The case, however, was one where the mother, now a widow, was attempting to hold another for the support of the child. As dictum the court said that this rule does not apply in cases involving heirship or inheritance.[12] Does this mean that *no* presumption

[4] Ohio G. C. sec. 10503-15.

[5] Blackburn v. Crawford, 70 U.S. (3 Wall.) 175, 18 L.Ed. 186 (1865).

[6] Ives v. Mc Nicoll, 59 Ohio St. 402, 53 N.E. 60, 43 L.R.A. 778, 69 Am. St. Rep. 780 (1898).

[7] Wright v. Lore, 12 Ohio St. 619 (1862).

[8] La Roche v. La Roche, 10 Ohio App. 289, 29 Ohio C. A. 113, 30 Ohio C. D. 519 (1917).

[9] Powell v. State, 84 Ohio St. 165, 95 N.E. 660, 36 L.R.A. (NS), 255 (1911).

[10] Wilson v. Wilson, 8 Ohio App. 258, 28 Ohio C. C. (NS) 312, 29 Ohio C. D. 396 (1917). In Lyn v. State, 47 Ohio App. 158, 191 N.E. 100 (1936), the child was held legitimate in spite of the fact that the mother was guilty of infidelity during the marriage.

[11] 43 Ohio St. 473, 3 N.E. 605, 54 Am. Rep. 823 (1885).

[12] *Id.* page 480.

arises, in such cases, or merely that the presumption is there, but not conclusive? The interpretation given by the appellate courts of Ohio would seem to indicate that the presumption is still there but that it is rebuttable.[13]

That the presumption is conclusive in any type of case is questionable. The special facts present in the above case perhaps justify the holding. While there are no cases in Ohio expressly overruling it, there are decisions which in effect seem to hold that the presumption is no longer as strong as there set out.[14] This would be in line with the great weight of authority in the United States.[15] Add to this the fact that Ohio now has a statute authorizing the use of the Landsteiner-Bernstein blood grouping test as evidence of non-paternity in both civil and criminal cases,[16] and the necessary implication is that the broad rule stated in *Miller* v. *Anderson* is no longer law. From the wording of the statute, it is conceivable that the blood grouping tests may even be used to disprove paternity, in cases where a child is conceived and born in wedlock, and where there was possibility of access, or even access.

In the absence of a statute children born and conceived out of wedlock are illegitimate.[17] Under the statute in Ohio, however, they may be legitimated if the mother and father later marry and the father acknowledges the child as his own.[18] It has been stated, however, that whoever married the mother of the child, and acknowledged it, under the statute, was the father of the child.[19] Acknowledgment, for the purposes of legitimation, may be by express statements or may be implied from the father's action.[20] In most states the recognition may come before or after the wedding.[21] In Ohio the question has never definitely arisen. As dictum, however, it has been mentioned that acknowledg-

[13] *Supra,* note 8, where the presumption was given weight, but further proof of paternity required; *supra,* note 10, where the presumption was sufficient in the absence of evidence to the contrary.

[14] Craner v. State, 21 Ohio L. Abs. 261 (1936). The court says in this case that the presumption is "almost" irrebuttable. State v. Oldaker, 28 Ohio L. Abs. 495 (1938), holds that the presumption is not conclusive, but rather than overrule *Miller* v. *Anderson,* they say that according to the facts of the case the child was not truly born or conceived in wedlock.

[15] *In re* Jones Estate, 8 A. (2d) 631 (Vt. 1939); Mitchell v. Mitchell, 11 A. (2d) 898 (Me. 1940).

[16] Ohio G. C. sections 12122-1, 12122-2. See also: Note in 6 Ohio St. L. J. 200.

[17] Ng. Suey Hi v. Weedin, 21 F. (2d) 801 (1927).

[18] *Supra,* note 4.

[19] State v. Hayes, 62 Ohio App. 289, 23 N.E. (2d) 959, 28 Ohio L. Abs. 154, 16 Ohio Op. 10 (1939). See also: Note in 6 Ohio St. L. J. 198, where the writer questions the validity of this statement.

[20] Eichorn v. Zedaker, 109 Ohio St. 609, 144 N.E. 249 (1924).

[21] Haddon v. Crawford, 49 Ind. App. 55, 97 N.E. 871 (1912). McBride v. Sullivan, 155 Ala. 174, 45 So. 902 (1908).

ment before marriage may be sufficient, even if no acknowledgment after marriage can be shown.[22]

While in Ohio legitimation is only possible under the aforementioned statute, other states have legislation broader in scope. Michigan and California have statutes which legitimate bastards, even though there has been no marriage of any kind between the parents. In Michigan, a formal written acknowledgment by the father filed with the probate judge is all that is needed.[23] In California, the father need only publicly recognize the child as his own, receive it into his home, and treat it as legitimate.[24] Arizona has taken the most liberal attitude in its statute, which provides that every child is the legitimate issue of its natural parents.[25]

A difficult problem is legitimation concerns the status of a child conceived during the mother's first marriage, but born during her second. Two presumptions conflict; one, that since the child is conceived during the first marriage, he is an issue of it; the other, that a child born in wedlock is an issue of that marriage. Under such circumstances it has been held that the presumptions are of no avail, and that paternity must be proved.[26]

R. C. C.

EVIDENCE

Scope of the Cross-Examination in Ohio

The plaintiff entered a hospital for an operation at the suggestion of the defendant. The defendant prescribed a local anaesthetic consisting of novocaine and adrenalin which was prepared by an employee of the hospital in the absence of the defendant. The plaintiff alleged that the defendant injected the fluid without an independent investigation, that the fluid contained alcohol and that the plaintiff suffered severely as a result. A hospital nurse testified for the defendant and the plaintiff attempted to cross-examine her as to questions asked her by the defendant as to the possibility of alcohol having been furnished to him instead of the anaesthetic he had prescribed. The trial court held that the plaintiff could not cross-examine as to matters not gone into on the direct. On appeal, held error.[1]

[22] Stradling v. Printz, 10 Ohio L. Abs. 134, 136 (1931).

[23] *In re* Harper's Estate, 272 Mich. 476, 262 N.W. 289 (1935).

[24] *In re* Flood's Estate, 217 Cal. 763, 21 P. (2d) 579 (1933).

[25] Ariz. Rev. Code, sections 273-285 (1938); *In re* Silva's Estate, 32 Ariz. 573, 261 P. 40 (1927).

[26] Vulgamore v. Unknown Heirs of Vulgamore, 7 Ohio App. 374, 27 Ohio C. C. (NS) 445, 29 Ohio C. D. 134, 14 Ohio L. Rep. 511, 38 A.L.R. 1367 (1918).

[1] Abercrombe v. Roof, 64 Ohio App. 365, 17 Ohio Op. 219 (1940),