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]

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[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),

The majority rule in this country, usually referred to as the federal rule, permits cross-examination only on those facts and circumstances brought out on the examination in chief.[2] If a party wishes to examine on other matters, he must make the witness his own and call him later in the trial when he is making out his own case. The reasons given for this rule are that it eliminates confusion and prevents one side from taking an unfair advantage of the other. The orthodox or English rule is that the opposing party is not confined in the cross-examination to the matters which were testified to on the direct but may extend it to every issue of the case.[3] In defense of such wide latitude it is said that this rule is easy to apply, presents no technical difficulties and tends to elicit the truth. In some states, including Ohio, the rule seems to be somewhere between these two doctrines.

The leading case in Ohio is *Legg* v. *Drake*.[4] The action was for false warranty and deceit in the sale of a horse. The plaintiff called the defendant as a witness, and on the direct examintion asked him merely to verify the time and place the conversations leading to the sale occurred. On the cross-examination the defendant's attorney was allowed to bring out the terms of the trade and the particulars of the conversation at the time of the trade. In upholding the trial court, the rule for Ohio was stated to be, that the cross-examintion "is not . . . limited by the particular facts disclosed in the examination in chief, but may be extended to whatever the party calling the witness is required to establish to make out and sustain his cause of action or his defense. Thus a witness of the plaintiff may be cross-examined by the defendant, touching all matters which it is competent for the plaintiff to prove under the issue, in order to entitle him to recover."[5] There is a limitation, however, that matters of affirmative defense may not be shown by cross-examination.

This rule was expressly approved in the recent Supreme Court case of *Smith* v. *State*,[6] but there the court held that the cross-examiner should not have been allowed to impeach the witness by a disparaging course of cross-examination on matters not material to the issue. In an action charging an employer with negligence, although nothing was said on the direct concerning custom and usage, the plaintiff was permitted to show on the cross-examination what custom and usage in that business were on the ground that the defendant might have shown it as a part of his

[2] Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 448, 10 L.Ed. 535 (1840). Hales v. Mich. Cent. R. Co., 200 Fed. 533 (1912).

[3] Moody v. Rowell, 17 Pick. 490, 499 (1835); Beal v. Nichols, 2 Gray 262 (1854).

[4] 1 Ohio St. 286 (1853).

[5] *Id.* at 292.

[6] 125 Ohio St. 137 (1932).

case.[7] Where a doctor was put on the stand to testify as an expert on X-ray, the court by inference would allow him to testify, from his observation of the plaintiff, what his condition was, ruling out the question only because it was worded incorrectly.[8]

The chief limitation in *Legg* v. *Drake* is that matters of affirmative defense or avoidance may not be introduced for the first time by cross-examination of the plaintiff's witnesses.[9] In *Scott* v. *Wingenberg*[10] in an action charging the defendant with negligence in killing the child of the plaintiff, it was improper to cross-examine the plaintiff's witness on the plaintiff's contributory negligence. In *Phillips* v. *Ohio Farmer's Insurance Co.*[11] the action was to recover on a fire insurance policy, and the plaintiff's wife was put on the stand to testify as to the contents and occupancy of the buildings which had been burned. It was held improper to allow cross-examination tending to prove that the witness was the owner of the buildings and that she either burned them or procured their burning, on the ground that it was an affirmative defense. The courts appear to be very zealous in enforcing this limitation of the rule. Thus, in an action charging negligence, questions put to the plaintiff's witness on the cross-examination and answered without objection, tending to show the plaintiff's contributory negligence, were later removed from the record on motion of the plaintiff.[12] In an action on a contract, the court of appeals reversed the trial court which permitted a showing of accord and satisfaction by cross-examination of the plaintiff's witness, although there was not even a general objection to the questions at the trial.[13]

Another feature of the cross-examination in Ohio is that it is permissible to bring out matters which will modify or explain the statements made on the direct. Thus, where a witness testified that the defendant ran a grocery store, it could be shown on the cross-examination that he also sold whiskey.[14] In *Legg* v. *Drake*, it will be recalled, where the witness testified concerning certain conversations leading to a horse trade, it was held proper to bring out the particulars of the conversations and the terms of the trade. Where a witness testified that he deposited money in the bank in the name of his son, it was proper to allow a

[7] The Ohio and Western Pa. Dock Co. v. Trapnell, 23 Ohio C. C. (N.S.) 408 (1912).
[8] Equitable Life Insurance Socety v. Burton, 53 Ohio App. 241, 7 Ohio Op. 66 (1935).
[9] *Supra*, note 4, page 292.
[10] 39 Ohio C. C. 479 (1916).
[11] 13 Ohio C. C. 679 (1894).
[12] Circleville v. Sohn, 11 Ohio C. D. 193 (1900).
[13] Warner Elev. Mfg. Co. v. Higbee, 53 Ohio App. 546 (1935).
[14] Bean v. Green, 33 Ohio St. 444 (1878).

showing of what he said at the time of depositing the money.[15] In this respect Ohio is in accord, not only with the orthodox rule, but also with those states which profess a liberal interpretation of the federal rule, which, while confining the cross-examination to matters brought out on the direct, will, nevertheless, allow questions which modify or explain away what was said on the direct.

Occasionally a case will be found which is difficult to reconcile with the broad rule laid down in *Legg* v. *Drake*. For example, in an action on a contract for delivery of coal, the defense being that to deliver would violate a rule of the United States Fuel Administrator, it was permissible to bring out this avoidance by cross-examination of the plaintiff's witness.[16] Such cases may be explained by the fact that in the application of any rule of evidence, much latitude must be given to the trial court to exercise its discretion where there is controversy or doubt, and in most instances the decision of the trial court will be reversed only where there has been an abuse of that discretion. It has been stated that the practice in the trial courts of this state in regard to the cross-examination differs in the various districts, some following the federal rule while others follow the Ohio rule.[17] In the appellate courts the doctrine of *Legg* v. *Drake* is generally reiterated but it is sometimes more liberally construed than at others.

D. R. T.

Waiver of Doctor-Patient Privilege

Beatrice Parisky, who had been suffering from an ulcerated colitis, was ordered by her physician to a hospital for observation. While en route in an ambulance driven by defendant's employe, she was thrown from her cot to the floor as a result of a collision between the ambulance and another automobile. She died in the hospital twelve days later. In an action by the administration of decedent's estate, the only evidence upon the issue of the cause of death was that offered by decedent's physician. Held: the testimony of the doctor could not be introduced, as the right of the patient to waive the protection given him under Ohio G.C. sec. 11494 does not survive to his administrator.[1]

The common law recognized no doctor-patient privilege, but statutes in about three-fourths of the states have created one.[2] The privilege is

[15] Martin v. Elden, 32 Ohio St. 282 (1877).
[16] McBard Coal Co. v. Wyatt Coal Co., 17 Ohio App. 38 (1922).
[17] Phillips v. Ohio Farmer's Insurance Co., 13 Ohio C. C. 679, 687 (1894); Bennett v. State, 4 Ohio C.D. 129, 130 (1894).

[1] Parisky Admr. v. Perstorff, 63 Ohio App. 503, 27 N.E. (2nd) 254 (1939).
[2] Annotation, 31 A.L.R. 167.