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.

for the benefit of the patient and may be waived by him.[3] Whether the statute expressly mentions waiver or not, the patient has the privilege. There is no agreement as to the right of the administrator to do so.

Ohio G.C. sec. 11494 provides that:

"The following persons shall not testify in certain respects . . . :

(1) . . . a physician concerning a communication made to him by his patient in that relation or his advice to his patient. But the . . . physician may testify by express consent of the patient or if the patient voluntarily testifies the physician may be compelled to testify on the same subject."

As stated, this is more in the nature of a disqualification than a privilege. The concept of a privilege involves the power to accept an alternative. "The following persons shall not testify in certain respects," is the wording of a mandatory prohibition or denial, not of a power to choose. Yet the courts speak of it as a privilege.

The Ohio courts have usually construed the provisions literally. Thus, in *Swetland* v. *Miles*,[4] the court held that there were but two ways to waive the privilege: (1) by express consent of the client; (2) by the voluntary testifying of the client. Subsequent cases have supported the conclusion.

In recent years the court have permitted surviving dependents to waive the privilege in workmen's compensation cases.[5] It was argued in the majority opinion of *Indus. Comm.* v. *Warnke*, that since the Industrial Commission statutes were more recent than the statute creating the doctor-patient privilege, they changed the rule of *Swetland* v. *Miles*. But the statutes creating the Industrial Commission do not purport to alter rules. It was further contended that the statute in making provisions for waiver assumed the patient was living and hence did not purport to exclude the patient's representatives after his death. But the language in the statute is express; and, as pointed out in 3 Ohio St.L.J. 79, the type of reasoning seems strained.

On principle there seems little reason for waiving the privilege in Industrial Commission cases and not in other types of actions. The principal case in returning to the doctrine of *Swetland* v. *Miles* indicates a more accurate adherence to the letter of the statute although it may be further removed from the spirit of that act.

E. G.

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[3] Ex'rs. v. Holzback, 89 Ohio St. 381, 106 N.E. 41 (1934); Indus. Comm. v. Belay, 127 Ohio St. 584, 190 N.E. 456 (1934); Haley v. Dempsey, 14 Ohio App. 326 (1921).

[4] 101 Ohio St. 501, 130 N.E. 22 (1920); Ausdenmoore v. Holzback, 89 Ohio St. 381, 106 N.E. 41 (1934); Indus. Comm. v. Belay, *supra*, n. 3.

[5] Indus. Comm. v. Willoughby, 21 Ohio L. Abs. 588 (1936); Indus. Comm. v. Warnke, 131 Ohio St. 140, 2 N.E. (2d) 248 (1936).