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willful absence of the wife. The wife countered with the contention that the husband was not entitled to sue because he was guilty of unclean hands in that he had left the home first. The evidence showed that the husband had left the home for a few days in order to allow the wife to collect her thoughts regarding their marital difficulties and that he intended to return. The court held that the husband was not guilty of unclean hands.

EDGAR I. KING

EVIDENCE

During the year 1958, there was a sizeable number of Ohio cases which involved important rules of evidence, but most of them dealt with questions about which there is little controversy. A few cases, however, merit comment.

Scientific Evidence: Radar

In *City of East Cleveland v. Ferrell*,[1] defendant was convicted of operating a motor vehicle at a speed of forty-two miles an hour in a congested district in violation of an ordinance of the city. He offered no evidence in his behalf. The sole question presented to the Supreme Court was: May a defendant be convicted of speeding solely upon evidence obtained from a radar speed meter, in the absence of expert testimony with respect to the construction of the meter and its method of operation? The Court answered: Yes.

Although the question was one of first impression in Ohio, there is no lack of authority in other jurisdictions.[2] At first the courts refused to admit radar readings into evidence unless accompanied by expert testimony. Later cases, however, hold that the accuracy of radar is well-proven and may no longer be questioned; that the courts, therefore, are fully justified in taking judicial notice thereof. One court has said:[3]

1. 168 Ohio St. 298, 154 N.E.2d 630 (1958).

2. In an article, Langschmidt, *Radar Traffic Controls* 23 TENN. L. REV. 784 (1955), it was said that radar speed meters were being used in forty-three states, the District of Columbia, and Hawaii. See also Carosell & Coombs, *Radar Evidence in the Courts* 32 DICTA 323 (1955); Symposium: Kopper, *Radar Speedmeters*, 33 N.C.L. REV. 343 (1955); Woodbridge, *Radar in the Courts*, 40 VA. L. REV. 809 (1954); Schmidt, *Radar and Marine Collisions Today*, 10 HASTINGS L. J. 71 (1958).

3. People v. Magri, 3 N.Y.2d 562, 147 N.E.2d 728 (1958).

> We think the time has come when we may recognize the general reliability of the radar speedmeter as a device for measuring the speed of a moving vehicle, and that it will no longer be necessary to require expert testimony in each case as to the nature, function or scientific principles underlying it.[4]

In the Ohio case, undisputed evidence was offered by the city showing that the radar device had been adequately checked, calibrated, and tested on the morning of the violation, and that it was found to be working properly in all respects. There was also evidence to the effect that the officer in charge of the radar car had had five years of experience in the use of radar and was, therefore, eminently qualified to read the dial on the meter.

Witness Impeached by Prior Statement: Rehabilitation

In *Shellock v. Klempay Brothers*,[5] the court reaffirmed a long established rule in Ohio but pointed out that it should not be considered as a blanket rule or one which is absolute. Ordinarily, where, upon the trial of a case, a witness is shown to have made statements of fact contradictory to those made by him on the trial, it is error to permit an attempt to rehabilitate the impeached witness by proving that he had made prior statements similar to those made on the trial.[6] In the instant case, however, the court held that where, on cross-examination, a witness is impeached by a showing of prior statements made by him in a written instrument and apparently inconsistent with his statements on direct examination, reference to other statements in the *same* document used to impeach him is proper for the purpose of rehabilitation, where such other statements are consistent with those made on direct examination or are in explanation of such apparent inconsistency and do not serve to inject new issues into the case.

The Physician-Patient Privilege: Waiver by Patient

In re Roberto[7] involved the highly controversial privilege accorded the physician-patient relationship. This was an original proceeding by a physician to release him from technical arrest on a mittimus issued for

4. See also State v. Moffitt, 48 Del. 210, 100 A.2d 778 (1953); Peterson v. State, 163 Neb. 669, 80 N.W.2d 688 (1957); Dietze v. State, 162 Neb. 80, 75 N.W.2d 95 (1956); State v. Dantonio, 18 N.J. 570, 115 A.2d 35, (1955); Dooley v. Commonwealth, 198 Va. 32, 92 S.E.2d 348 (1956); State v. Ryan, 48 Wash. 2d 304, 292 P.2d 399 (1956).

5. 167 Ohio St. 279, 148 N.E.2d 57 (1958).

6. Cincinnati Traction Co. v. Stephens, 75 Ohio St. 171, 79 N.E. 235 (1906).

7. 151 N.E.2d 37 (Ohio Ct. App. 1958).

contempt of a notary public because of his refusal to answer certain questions propounded to him during the course of a hearing by way of deposition in two cases involving personal injuries alleged to have been sustained by the physician's patient. His refusal to answer was based entirely upon his claim of privilege due to the physician-patient relationship.[8] It appears that prior to the taking of the physician's deposition, the patient herself, for the purpose of perpetuating her testimony by way of deposition, *voluntarily* testified in great detail as to her injuries, symptoms, and complaints and to the physician's examination and treatment of her. Upon the taking of his deposition, the physician, although testifying concerning communications made to him by his patient, refused to state his findings and to relate his diagnosis. He took the position that he could not testify to anything more than what his patient had testified to in her deposition.

The primary question, therefore, was whether or not the patient, by testifying in great detail as to her injuries, her general condition, and to communications between herself and her physician, waived the benefits of the statutory privilege. In an able and well-considered opinion by Judge Hurd, the court held that if a patient, as part of her case, voluntarily testifies to what was said or done by her physician in the examination and treatment of her injury, she waives the privilege and exempts the evidence of the physician relative to such matters from the operation of the statute. The writ of habeas corpus, therefore, was denied.

It is both logical and just that when the patient voluntarily makes public the intimate details of his affliction, or gives his version of what the physician said or did, he should not be permitted to insist that the protection and benefits of the statute continue to exist as to his physician. When a patient chooses to make public that which could have been kept secret, the privilege no longer exists and the physician may testify fully *on the same subject.*[9] The Ohio statute plainly so states.[10] The adverse party may also introduce in evidence portions of the patient's hospital record not otherwise inadmissible.[11]

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8. As to right of physician himself to interpose objection, see DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT, §§ 16, 89 (1958).

9. Lane v. Boicourt, 128 Ind. 420, 27 N.E. 1111 (1891); Hethier v. Johns, 233 N.Y. 370, 135 N.E. 603 (1922); Capron v. Douglass, 193 N.Y. 11, 85 N.E. 827 (1908). For a general discussion of the subject, see DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT, §§ 133, 134, 135 (1958).

10. OHIO REV. CODE § 2317.02.

11. Munzer v. Swedish American Line, 35 F. Supp. 493 (S.D.N.Y. 1940); Maas v. Midway Chevrolet Co., 219 Minn. 461, 18 N.W.2d 233, (1945); Galli v. Wells, 209 Mo. App. 460, 239 S.W. 894 (1922); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).