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Evidence

Clinton DeWitt

In *Beach v. Beach*,[8] upon failure of a husband to pay temporary alimony pursuant to court order, a contempt charge was brought against him by the wife. The wife then filed her motion for an order requiring the husband to pay the exepnses of the contempt litigation. It was held that such contempt proceedings were civil and not criminal in nature; that the wife was the aggrieved party and the real party in interest, not the court; and that the counsel was acting for the wife and not the court. Consequently, it was proper to require the husband to pay the costs of the contempt litigation pursuant to Ohio Revised Code section 3105.14.

In *Fletcher v. Coney Island, Inc.*[9] a Negro sought to enjoin the operator of an amusement park from denying its facilities to the Negro. The Civil Rights Act, Ohio Revised Code sections 2901.25 *et seq.*, provided penalties and damages when a person was so denied unless for reasons "applicable alike to all citizens and regardless of color or race." The court held that this statute created a new right and provided exclusive remedies and that in the absence of a statute enlarging equitable jurisdiction, injunctive relief was beyond the power of court. "If the General Assembly has provided a remedy for the enforcement of a specific new right a court may not on its own initiative apply another remedy it deems appropriate."[10]

EDGAR I. KING

EVIDENCE

Application of Rule Forbidding the Basing of One Inference Upon Another

Hurt v Charles J. Rogers Transp. Co.,[1] was a motorist's action for injuries sustained when a forging allegedly dropped from a tractor-trailer outfit which he was following on the highway and crashed through his windshield. There was no direct testimony as to where the forging came from. The plaintiff, therefore, was obliged to rely upon some facts and inferences which he claimed were sufficient to present a jury question as to the negligence of the defendant.[2] The plaintiff recovered a verdict. The court of appeals affirmed,[3] and the cause came before the Supreme Court upon defendant's motion to certify the record. The sole question presented was whether, as a matter of law, Rogers was entitled to final judgment.

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[8] 99 Ohio App. 428, 134 N.E.2d 162 (1955)

[9] 165 Ohio St. 150, 134 N.E.2d 371 (1956).

[10] *Id.* at 154, 134 N.E.2d at 375.

The court conceded that any liability of Rogers must be based on inferences and that if those inferences were based entirely upon other inferences unsupported by fact, no basis for liability was shown. The court pointed out, however, that the traditional rule that an inference upon an inference will not be permitted, is frequently misinterpreted and misapplied; that an inference which is based in part upon another inference and in part upon factual support is universally approved, provided it is a reasonable conclusion for the jury to deduce. The weight of an inference as well as the weight of an explanation offered to meet the inference are usually matters for the determination of the jury and, in this case, the court declined to rule, as a matter of law, that the plaintiff's evidence was insufficient to support the jury's verdict. The judgment of the court of appeals was affirmed.

Privileged Communications Between Physician And Patient

In *Matter of Loewenthal's Petition*,[4] the relator, a practicing physician, invoked the original jurisdiction of the court of appeals for the purpose of obtaining a writ of habeas corpus to release him from arrest on a mittimus issued for contempt of a notary public, because of his refusal to answer certain questions put to him during the course of a deposition in a personal injury case then pending in the court of common pleas. In that case, the plaintiff, for the purpose of perpetuating his own testimony, gave his testimony, by deposition, on direct examination. In so doing, he made public the nature and extent of his injuries, related what he told his physician, Dr. Loewenthal, in regard thereto, and described the treatment the physician administered. Thereafter, the defendant subpoenaed Dr. Loewenthal, intending to interrogate him as her witness by way of deposition regarding plaintiff's injuries and his treatment thereof; the purpose being to perpetuate the testimony of the physician. On objection by counsel for plaintiff, the physician declined to testify on the ground that his testimony would reveal confidential information and that he did not have his patient's consent so to do. The witness was thereupon placed under arrest for contempt in refusing to answer questions. The court properly held that the plaintiff had waived the protection afforded by the physician-patient privilege statute[5] by voluntarily disclosing confi-

[1] 164 Ohio St. 329, 130 N.E.2d 820 (1956).

[2] To relate the evidence offered and the inferences relied upon would unduly extend the length of this comment.

[3] 123 N.E.2d 39 (Ohio App. 1954).

[4] 134 N.E.2d 158 (Ohio App. 1956).

[5] OHIO REV. CODE § 2317.02.

dential information which he might have kept secret. Therefore, the application of the relator for a writ of habeaus corpus was denied and the physician compelled to testify upon deposition at the instance of the defendant.

The decision on this point is both logical and just. When the patient himself makes public the details of his affliction, or gives his version of what the physician said or did, he should not be permitted to insist that the prohibition of the statute continues to exist as to his physician. The privilege cannot be waived in part and retained in part. The patient cannot remove the seal of secrecy from so much of the privileged matters as militates for his advantage, and insist that it shall not be removed from that which operates to the advantage of his adversary.

It should be noted, however, that the court carefully limited its decision only to the right of the defendant to take the deposition of the physician. It felt that it was not called upon to determine what effects, if any, the waiver would have if the testimony of the physician was sought or offered by the defendant at the trial.[6] It may be said in passing, however, that the general rule is that once the privilege is waived, it is waived for all purposes throughout the trial.[7] If, therefore, the patient causes his own deposition to be taken and reveals therein matters plainly within the protection of the privilege, he thereby waives the privilege. In fact, it ceases to exist, and this is true whether the deposition is, or is not, introduced in evidence at the trial.[8] Moreover, if the patient, in her answers to interrogatories, voluntarily discloses her mental condition, she waives the privilege.[9] And where the plaintiff, in a personal injury action, takes the deposition of his physician or elicits his testimony by interrogatories but does not introduce the same in evidence at the trial, he has waived his privilege and the defendant may himself introduce the deposition or answers of the physician as evidence in his behalf.[10] The

[6] The case was settled before trial.

[7] The examination of witnesses by deposition is itself a portion of the trial. Murray v. Physical Culture Hotel, Inc., 258 App. Div. 334, 16 N.Y.S. 2d 978, *aff'd*, 17 N.Y.S. 2d 862 (4th Dep't 1939). See also Clifford v. Denver & Rio Grande R.R., 188 N.Y. 349, 80 N.E. 1094 (1907)

[8] Blish v. Greer, 74 Ind. App. 469, 120 N.E. 606 (1918); Green v. M. Nirenberg Sons, Inc., 166 Misc. 652, 3 N.Y.S. 2d 81 (Sup. Ct. 1938).

[9] Munzer v. Swedish American Line, 35 F. Supp. 493 (S.D. N.Y. 1940).

[10] Clifford v. Denver & Rio Grande R.R., 188 N.Y. 349, 80 N.E. 1094 (1907)

The same rule has been applied to the attorney-client privilege. The deposition of the attorney was taken but not used. Watson v. Watson, 104 Kan. 578, 180 Pac. 242 (1919)

Likewise, the incompetency of a witness under the Dead Man Statute was waived by the adverse party s taking his deposition, whether it was used or not. Baker v. Baker, 363 Mo. 318, 251 S.W 2d 31, 33 A.L.R. 2d 1431 (1952). See also McClenahan v. Keyes, 188 Cal. 574, 206 Pac. 454 (1922)