struct the jury to bring in a verdict for the defendant. By stating that you cannot build an inference on an inference the court has a ready formula to reach the same result.

But if the court thinks the evidence is strong enough it will frequently say that on the whole case the evidence is sufficient to make out a *prima facie* case and should go to the jury. In the principal case the supreme court so held, and the result seems justified, although it might plausibly be argued that this involved the building of an inference on an inference. In the *Lubric Oil* case, *supra*, the evidence was obviously not so strong.

The maxim that you cannot build an inference on an inference furnishes a test, the application of which may appear to be more definite or certain than the broad and often difficult issue of whether there is enough evidence to go to the jury. But it is submitted that this apparent definiteness or certainty in the maxim is illusory.

HOBERT H. BUSH

WAIVER OF PHYSICIAN-PATIENT PRIVILEGE UNDER SECTION 11494 OF THE OHIO GENERAL CODE

Plaintiff sued for damages for personal injuries. At the trial, on direct examination, he testified that his general physical condition had been good previous to the accident in which the injuries were allegedly sustained. It was held that this voluntary testimony did not constitute a waiver of the physician-patient privilege given in Ohio Gen. Code, sec. 11494. Consequently, a physician who had been called to controvert the fact put in issue by plaintiff concerning plaintiff's physical condition before the accident was not permitted to testify. It was also held that testimony given by plaintiff on cross-examination in response to questions was not voluntary within the meaning of the statute and so did not constitute a waiver although the doctor and the treatment received had been mentioned. *Harpman* v. *Devine*, 133 Ohio St. 1 (1937).

To effect a satisfactory disposition of cases according to their merit it may be assumed that all relevant evidence should be admissible. In addition, if this were the only objective or consideration, all persons should be under a duty to disclose all relevant facts. However, when the benefits derived by society through enforcing this duty and permitting testimony concerning all relevant facts are outweighed by the harmful effects such testimony may have, then the evidence may be excluded.

The old common law excluded much evidence, otherwise relevant,

on such grounds as incompetency or privilege of witnesses, prejudice of the defendant, confusion of the jury, or untrustworthiness of the testimony. In the last fifty years it has been increasingly apparent that the harm caused by the admission of this testimony is not as real as was originally supposed. Consequently there has been a growing tendency to construe these exclusionary rules strictly and thus to let in more and more relevant evidence.

One of these exclusionary rules, that of privileges, was designed to foster freedom of disclosure in certain relationships such as lawyer and client. The common law has always recognized a privilege in the lawyer-client relationship. Skilled men are necessary in lawsuits and must be fully informed if they are to adequately represent their clients. A client might not talk freely to his lawyer if he thought the latter could be compelled to disclose in a court of law those facts that had been communicated to him. With this in mind the apprehension of the client is removed by the lawyer-client privilege.

Although this same reasoning is advanced in favor of the physician-patient privilege yet the influencing factors are not so apparent. It is somewhat difficult to imagine an individual in a diseased or injured condition and at the same time refraining from seeking medical attention for fear of later disclosure in a court of law of the information he would have to divulge to his physician. Consultation with a physician is far far removed, in most cases, from a court of law. On the other hand, it is equally difficult to perceive a situation where an individual in consultation with an attorney is not, in some degree, thinking in terms of a court room and hence conscious, at that time, of what might there be revealed. Accordingly, in that aspect at least, the benefit to society gained by the exclusion of the physician's testimony is less apparent than the benefit derived by excluding the testimony of the lawyer.

The common law recognized no doctor-patient privilege. *Myers* v. *State*, 192 Ind. 492, 137 N.E. 547, 24 A.L.R. 1196 (1922); *People* v. *Austin*, 199 N.Y. 446, 93 N.E. 57 (1910). In the absence of statute there is no such privilege today. *Louisville & N. R. Co.* v. *Crockett's* Admx. 232 Ky. 726, 24 S.W. (2d) 580 (1930); *Remington* v. *R. I. Co.*, 37 R. I. 393, 93 Atl. 33 (1915); *Rex* v. *Gibbons*, 1 C. & P. 97, 171 Eng. Rep. 1117 (1923). This privilege is given by statute in Ohio today, as well as in a majority of other jurisdictions. 28 R.C.L. 532, Section 11494 of the Ohio Gen. Code provides: "The following persons shall not testify in certain respects—an attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician concerning a communication made

to him by his patient in that relation, or his advice to his patient. But the attorney or the physician may testify by express consent of the client or patient; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject."

In the instant case the plaintiff testified voluntarily and declared that his health had been good previous to the accident in which the injuries were allegedly sustained. Did he by this testimony waive his privilege? The statute says that if the patient voluntarily testifies the doctor may be compelled to testify on the same subject. Is the subject the health of the plaintiff or is it the communications between the doctor and patient?

In the two cases of *King* v. *Barrett*, 11 Ohio St. 261 (1860) and *Spitzer* v. *Stillings*, 109 Ohio St. 297, 142 N.E. 365 (1924) the court, dealing with the lawyer-client privilege under the statute in question held that voluntary general testimony by the client in the case was sufficient to constitute a waiver of the privilege. As a result the attorney was allowed to be examined touching such admissions as were pertinent to the issue. And this was held to be the result even though the client had made no reference to any communications that had passed between him and the lawyer.

The majority opinion in the principal case dismisses the mention of these two cases with the statement that they "are distinguishable from the case at bar." The only apparent distinction seems to be that they deal with the privilege of lawyer-client while the instant case involves the privilege of physician-patient. In view of the fact that the former privilege existed before the statute and because there is obviously more justification for it than for the latter, a distinction might be drawn construing the privilege of doctor-patient more narrowly. But surely there is no reason for construing it more broadly.

With the construction of the statutory lawyer-client privilege given in *King* v. *Barrett, supra*, before it in 1878, the Ohio General Assembly re-enacted the statute in substantially the same terms and at that time the physician-patient privilege was included. An often quoted rule of statutory construction would favor the supposition that the legislature meant to adopt this interpretation. 59 C. J. 1063. Many cases support this view although only a few are here listed. *Ledingham* v. *City of Blaine*, 105 Wash. 253, 177 Pac. 783 (1919); *Bell* v. *Bell*, 287 Pa. 269, 135 Atl. 219 (1926); *Peo.* v. *Twp. of Munising*, 213 Mich. 629, 182 N.W. 118 (1921); *Kendall* v. *Garneau*, 55 Neb. 403, 75 N.W. 852 (1898); *Spitzer* v. *Stillings, supra*.

The privilege when granted should be a shield and not a sword. A patient may not want his bodily condition known to the world. But

here the plaintiff is willing to disclose it. He calls a doctor to testify concerning his injuries and that the injuries were caused by the accident. However, he objects to the defendant calling a doctor to show that plaintiff's physical condition previous to the accident was not good. It is indeed harsh to permit other people to show that his health was good and to allow the plaintiff to testify to such fact himself and then on the basis of the privilege to prevent the defendant from showing that it was not.

The conclusion is submitted that the statute was susceptible of two constructions. But arguments of precedent and policy both favored admissibility. *King* v. *Barrett, supra,* and *Spitzer* v. *Stillings, supra,* although dealing with the lawyer-client relationship, seemed to cover the same point and in both cases it was held that the privilege had been waived. On questions of policy the argument seems equally strong. The decision would seem to represent a step backward from Ohio's previous advanced position in regard to the construction of privileges.

PHILIP J. WOLF

FUTURE INTERESTS

RECOGNITION OF DETERMINABLE FEE WHERE THERE IS NO EXPRESS RESERVATION OF POSSIBILITY OF REVERTER

Appellant Board of Education filed an action to quiet title to a lot which had been conveyed to its predecessor by a deed containing the following recitals: "said lands to be occupied for the purposes of a school house and for no other use or purposes whatsoever," and, in the *habendum* clause, "to have and to hold . . . so long as the same shall be used as a site for a school house and no longer." Use of the lot for school purposes had been discontinued by appellant four years before the filing of this action. Appellee denied title of appellant and alleged that he had acquired title from the heirs of one of the original grantors. Appellant claimed that the deed gave its predecessor an unrestricted fee. Appellee contended that appellant had only the right to occupy the lot as long as it was used for school purposes, and that appellant had forfeited its interest in discontinuing such use. Held, that the language used clearly expressed an intention on the part of the original grantor to provide for a reverter and forfeiture and conveyed a tenure limited to the continued use for school purposes, *Board of Education* v. *Hollinesworth et al.,* 56 Ohio App. 95 (1936).

The general rule in the construction of deeds, that the intention is controlling, obtains in the construction of conditions; the language of a