Indiana Law Journal

Volume 8 | Issue 3 Article 12

12-1932

Evidence-Inferance Upon Inferance

EVIDENCE—INFERENCE UPON INFERENCE—Plaintiff charged defendant with negligence whereby decedent received a fatal shock of electricity. Instruction No. 5 was as follows: "hence under the law of this state an inference cannot be raised from or based upon an inference. You

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[6] *Commercial & Savings Bank v. Jenks Lumber Co.* (1911), 194 Fed. 739.

[7] *Adams v. Vancouver Nat. Bank, et al.* (Wash. 1931), 2 Pac. (2d) 684.

[8] 221 N. Y. 92, 116 N. E. 787 (1917).

[9] Cardozo, J., in *McGrath v. Carnegie Trust Co.* (1917), 221 N. Y. 92, 116 N. E. 787.

* * * cannot under the law infer that decedent was at the time of his death in such a position as to make or form a grounded circuit thru his body in the event his hand should come in contact with an electrical current, and upon or from that inference infer that deceased at such time came in contact with an electrical current which passed thru his body and resulted in his death." *Held,* this instruction was not erroneous.[1]

The principal case lays down the rule that an inference cannot be based on an inference. Wigmore[2] strongly attacks such a rule. An inference is a matter of logic; it is an act of reasoning; a fact is inferred from the existence of other facts that are known; much of human knowledge on all subjects is derived from this source.[3] Wigmore says there is no such rule prohibiting the basing of inference on inference, nor can there be any such rule. "For example," he says, "on a charge of murder, defendant's gun is found discharged; from this we infer that he discharged it, and from this we infer that it was his bullet which struck and killed decedent. Or, defendant is shown to have been sharpening a knife; from this we argue that he had a design to use it on deceased, and from this we argue that the fatal stab was the result of this design. From these and innumerable daily instances we build up inference on inference, and yet no court ever thought of forbidding it. All departments of reasoning, all scientific work, every day life and every days trials, proceed upon such data."

In *Ohio Building Safety Vault Co. v. Industrial Board,*[4] the court points out that "certain well recognized authorities insist that the rule that a presumption can never be based on a presumption or an inference on an inference is never strictly followed." It has been stated that the rule that an inference can never be based on an inference, if strictly enforced, would never permit a criminal case to be adequately prosecuted.[5]

Wills on Circumstantial Evidence,[6] suggests a solution of the problem. Stated briefly, Wills suggests this rule: *an inference in the chain of inferences is based on a fact proved by direct evidence.* While this rule is acceptable, it is stretching the meaning of words to say that Wills' suggestion is the meaning of the rule that an inference cannot be based on an inference. Several cases have adopted the rule suggested by Wills.

Before going into Indiana cases on the question, the very recent case of *Gears v. State*[7] should be noted. The Supreme Court in an opinion by Treanor, J. gives an excellent discussion of circumstantial evidence and the working of the mind. It may be argued that this case lends support to the view that there is no rule against basing inference on inference. In this case it was contended by defendant that to reach a certain conclusion it would be necessary to base an inference on an infer-

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[1] *Altman v. Indianapolis Union Ry. Co.,* Appellate Court of Indiana, December 11, 1931, 178 N. E. 691.

[2] Wigmore, Evidence (2nd), Vol. 1, Ch. 4, Sec. 41, p. 258 (1923).

[3] *McCarty v. State* (1904), 162 Ind. 218; *Rex v. Burdette* (1820), 4 Barn. & Ald. 95, 161, 106 Engl. Repr. 873.

[4] 277 Ill. 96, 111, 115 N. E. 149 (1917).

[5] *Rex v. Burdette* (1820), 4 Barn. & Ald. 95, 161, 106 Engl. Repr. 873; Wigmore, Evidence (2nd), Vol. 1, Ch. 4, Sec. 41, p. 258 (1923).

[6] Am. Ed. 189 (1905).

[7] 180 N. E. 585 (1932).

ence, which could not be done. In discussing this the court said that the particular conclusion could not be reached for the reason that it would be an *unreasonable inference.* The court said, "It is necessary that we leave to the sound judgment of the jury, some margin for logical grouping of facts for the purpose of drawing inferences of fact, *and for the utilizations of these inferences of fact with other facts as the basis of further inference of fact.* After all the 'logic' or 'reason' which we should expect of the jury is largely a common sense evaluation of the probative force of all the evidence in the light of everyday experience and observation." Here, it seems, is a statement that inferences may be used in raising inferences.

As stated previously, however, there is no lack of authority to support the rule under discussion.[8]

Some other Indiana cases may be considered as of questionable authority. *U. S. Cement Co. v. Whitted*[9] and *Warner v. Marshall*[10] may be harmonized with the view that all reasonable inferences may be drawn, because an analysis of these cases reveals that the inferences sought to be raised were unreasonable. *Warner v. Marshall* also made a doubtful application of the rule against inference on inference. It applied this rule in order to keep from basing an inference on an inference which a witness had drawn. It may be contended that this is an improper application. The inference drawn by a witness from certain facts is not the inference of the court or jury. So long as the inference remains that of the witness, there is no inference of fact in the case for the simple reason that the witness is not the tribunal which finds facts and draws inferences. When the proper tribunal draws an inference, then there is an inference which may be subjected to the limitation of being incapable of supporting another inference. But until then, there is no inference in the factual set-up; such as the finding of fact by a witness is not a fact in the case for the simple reason that the court or jury finds the facts.

Though Indiana does not lack authority in support, there is some authority which would seem to repudiate the rule. These cases hold in more or less definite language that an inference may be based on an

[8] Indiana cases which have stated that an inference cannot be based on an inference are: *Morgan Construction Co. v. Dulin* (1916), 184 Ind. 652, 109 N. E. 960; *Alexander v. Capitol Lumber Co.* (1914), 181 Ind. 527, 105 N. E. 45; *Dowell v. State* (1914), 181 Ind. 68, 101 N. E. 815 (the only real doubt here was whether the witness told the truth); *Warner v. Marshall* (1900), 166 Ind. 88, 117-18, 75 N. E. 582; *Young v. Montgomery* (1903), 161 Ind. 68, 67 N. E. 684; *Binns v. State* (1879), 66 Ind. 428; *U. S. Cement Co. v. Whitted* (1900), 46 Ind. App. 105, 90 N. E. 481; *Pittsburg, C. C. & St. L. R. Co. v. Vance* (1915), 58 Ind. App. 1, 108 N. E. 158. Some other cases which have stated the same rule are: *U. S. v. Ross* (1875), 92 U. S. 281; *Manning v. Ins. Co.* (1879), 100 U. S. 693; *State v. Kelly* (1904), 77 Conn. 266, 58 Atl. 705; *Kevern v. People* (1906), 224 Ill. 170, 79 N. E. 574; *Philip v. Travelers Ins. Co.* (1921), 288 Mo. 175, 231 S. W. 947; *People v. Razezicz* (1912), 206 N. Y. 249, 99 N. E. 557; *Fadden v. McKinney* (1914), 87 Vt. 316, 89 Atl. 351. See also Jones, Evidence in Civil Cases (3rd), Sec. 104, p. 135 (1924); Chamberlain, Modern Law of Evidence, Vol 2, Sec. 1029, p. 1228 (1911); 10 R. C. L. 870, Sec. 13; 10 Ann. Cas. 1094.

[9] 46 Ind. App. 105, 90 N. E. 481 (1910).

[10] 166 Ind. 88, 117-18, 76 N. E. 582 (1906).

inference. While *Hinshaw v. State*[11] states as a general rule that an inference cannot be based on an inference, it states as an exception to the general rule that an inference may be the basis of another inference provided the first inference has the basis of a proved fact. With such an exception, little, if anything, is left of the rule; this is Wigmore's view, also. He states that this case has repudiated the rule. An analysis of the exception would seem to bear this out. According to the exception whenever direct evidence of some fact is brought into the case the inferences therefrom may become the basis of other inferences. In the absence of any facts there is no source from which to infer. In requiring the existence of a proved fact before inferences may be built on inferences the exception follows logically. The first fact will always have to be proved by direct evidence, because, until then, there is nothing from which inferences may be drawn.

The recent Pennsylvania case of *Commonwealth v. Santos*[12] is a case deserving of attention. This was a homicide case. Defendant contended that deceased committed suicide, and offered evidence that shortly before the day of her death deceased declared her intention of shooting accused and then herself. The higher court held this evidence admissible, saying "* * * the evidence in question is admissible because suicidal intent, like any other purpose, is a mental condition, which can manifest itself, primarily, only thru some act or word of the person in question; *hence relevant acts or words may be proved as the basis of an inference that the state of mind, or intention, in question did in fact exist, from which fact, and others in the case,*[13] *the conclusion may be drawn that the design contended for had been carried into execution.*" Briefly, the court holds mental state might be inferred, and that another fact might be inferred therefrom.

The rule deducible from the latter group of Indiana cases discussed,[14] is that an inference properly drawn may become the basis of other inferences. Stated thus, it would seem that this rule should be embraced within the rule that all reasonable inferences from the evidence may be drawn. Therefore, no special rule on the basing of an inference on an inference is needed. The broader rule of "all reasonable inferences" should include the basing of inference on inference when reasonable.

A proper interpretation to be put on the cases which have stated as law that an inference cannot be raised from an inference would seem to be that suggested by Wigmore: "the judicial utterances that sanction the fallacious and impractical limitation, ordinarily put forward without authority, must be taken as valid only for the particular evidentiary facts therein relied upon."

S. K.

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[11] 147 Ind. 334, 363, 47 N. E. 157 (1896). See also to the same effect, *Cleveland, C., C & St. L. R. Co. v. Starks* (1915), 58 Ind. App. 341, 361, 106 N. E. 646; *Indiana Creek Coal Co. v. Calvert* (1918), 68 Ind. App. 474, 120 N. E. 709; *Public Savings Ins. Co. v. Greenwald* (1918), 68 Ind. App. 609, 624, 121 N. E. 47; *Scottish Insurance Co. v. Linkenhelt* (1919), 70 Ind. App. 324, 121 N. E. 373.

[12] 275 Pa. 515, 119 Atl. 596 (1923).

[13] Wigmore, Evidence, (2nd) Vol. 3, Ch. 56, Sec. 1726, p. 700 (1923).

[14] *Supra*, note 11.