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to set its investigative[25] and disciplinary[26] processes in motion. With respect to forwarding fees, a more aggressive procedure would seem appropriate in order to preserve the high professional standards intended to be fostered by the Canons of Professional Ethics.[27]

R. R. C.

[25] Va. Code of 1950 § 54-48.

[26] Rules for Integration of the Bar, as amended, IV § 5, 194 Va. clxix (1953).

[27] See preamble to the Canons for a definitive statement of the intent and scope of the Canons.

EVIDENCE—INTRODUCTION OF CIRCUMSTANTIAL EVIDENCE BASED ON AN INFERENCE ON AN INFERENCE ALLOWED

In a recent California case the appellate court affirmed a conviction of kidnapping, asserting:

> We can not say as a matter of law that there was no evidence to support the inference of asportation by the defendant in this case.[1]

The defense was based on the principle that an inference cannot be based upon an inference.

The only evidence tending to prove the guilt of the accused was that he was discovered with the child shortly after her disappearance. To support the inference of kindnapping evidence was introduced that; (1) the defendant had been in the victim's home on a previous occasion and (2) the child was asleep in her second story bedroom forty-five minutes before the alleged crime took place.

The court ruled that the principle of the inadmissibility of an inference based on an inference has been discarded by many courts and asserted that:

[1] People v. Phillips, 343 P2d 270, 273 (1959).

> The true rule is and should be that an inference cannot be based on an inference which is too remote or conjectural.[2]

Weakening the inference is the fact that the child had once previously walked in her sleep and her father, "inferring" that she had done so again, began to search for her and subsequently discovered the defendant with the child in the backyard.

If the rule as set forth by this court is correct then it is within the province of the jury to choose the inference which indicates that the accused is guilty.

Wigmore endorses this rule:

> It was once suggested that an inference on an inference will not be permitted . . . There is no such rule.[3]

This so called "true rule" depends upon the validity of each inference. As was stated in *Vaccarezza* v. *Sanguinetti:*

> An inference cannot be based on an inference that is too remote or conjectural, but in a *civil case* where the first inference is a reasonably probable one, it may be used as a basis for a succeeding inference.[4] (Emphasis added)

The danger involved in such a rule is the possibility that the inferences may be mere suppositions vitiating the entire hypothesis.

> "Inference" in legal parlance as respects evidence is a very different thing from "supposition" . . . Courts and juries in dealing with the inquiry whether a party has discharged his burden of proof, can not pronounce on mere supposition that the burden has been met, but can only establish the ultimate fact from others justifying such inference.[5]

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[2] People v. Chessman, 38 Cal. 2d 166, 238 P2d 1001, 1014 (1951).

[3] Wigmore, *Evidence* I (3rd 1940) p41.

[4] 71 Cal. A. 687, 163 P2d 470 (1945) To the extent it may have been relied upon in the principle case, it is possibly an invalid reference inasmuch as it is restricted to civil cases.

[5] Words and Phrases, vol. 4, p. 3579; vol. 8, p 6807, as cited in Miller-Brent Lumber Co. v. Douglas, 167 Ala. 286, 52 So. 414 (1910).

> Of course, an inference from an inference, and then a third and fourth, may under certain circumstances be admissible . . . but the more remote the inference the more enfeebled its probative force. [6]

Some courts have adopted this reasoning to determine whether the introduction of evidence by this method satisfies the burden of proof. In a *Missouri case* it was stated:

> The case was one of circumstantial evidence and the state's case depended upon the jury's finding and believing that the facts and circumstances in the evidence pointed so strongly to the defendant's guilt as to exclude *any other reasonable hypothesis.* Only by reasoning from other facts was it at all possible to infer the fact that the hogs the defendant sold . . . were the hogs stolen. [7]

Similarly a Virginia case holds:

> Generally speaking, in cases where the conviction of the accused must rest upon circumstantial evidence much weight is given to contradictory statements of material facts by the accused, but such statements are not conclusive of his guilt. They should be considered along with the other facts and circumstances shown in evidence to determine whether, upon the whole case, the evidence excludes every reasonable hypothesis consistent with his innocence. *It is not sufficient that the facts and circumstances be consistent with his guilt. They must be inconsistent with his innocence.* [8] (Emphasis added)

Appreciation of this principal is lacking in the *Phillips* case. Two inferences were apparent. The deadly one, of asportation, was adopted; while the saving one, that the child was sleep-

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[6] Sturm v. Employers' Liability Assur. Corp., 212 Ill. App. 354 (1918).

[7] State v. Lackland, 136 Mo. 26, 37 S.W. 812, 814 (1896) this court supports the view that an inference which supports another inference should be established by direct evidence.

[8] Massie v. Commonwealth, 140 Va. 557, 125 S.E. 146 (1924) this court reversed a conviction of assisting an escape. The accused often visited the jail to see a friend. On the day of the escape the accused was seen handing foodstuffs to the prisoners who subsequently escaped. He had also purchased hacksaw blades similar to the ones found in the jail. He contended that he had found a note asking him to deliver the blades under a bridge and that he had done so.

walking, was discarded. This, in spite of the fact that a hypothesis which lent credence to his innocence was also reasonable. The court in its decision describes the saving inference as an "element of opposite import."[9] It was also conceded that the basis for the inference of guilt is "exceedingly slender and tenuous."[10]

The Virginia courts are indisposed to allow proof of a fact by an inference upon an inference:

> It is important that crime be punished. It is even more important that the one punished should first be proved guilty by the evidence. In order for inferences to amount to evidence they must be inferences based on facts that are proved and not inferences based on other inferences.[11]

The California rule that: "an inference cannot be based on an inferences that is too remote or conjectural," presents a problem when more than one reasonable inference springs from the same facts. Criminal courts should be ever vigilant to protect the accused from an extention of this rule.

From the facts presented in the *Phillips* case it would appear that the jury arbitrarily adopted the inference which convicted the accused. It appears that the assault, from which the appellate court implied Phillips' guilt, was a strong factor influencing the jury. In doing so the jury built an inference on an inference—a construction most delicately balanced. Is it not the court's duty to prevent the inherent weakness of such tenuous evidence from working an undue hardship on the accused? Fortunately some courts have:

> . . . it becomes the duty of the court to consider whether or not the evidence is sufficient to sustain the verdict. But the rule (it is heard as upon a demurrer to the evidence) does not leave the jury at liberty to guess, and

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[9] People v. Phillips, 343 P2d 270, 272, (1959).

[10] Ibid.

[11] Smith v. Commonwealth, 185 Va. 800, 40 S.E. 2d 273 (1946).

> where a fact is equally susceptible of two interpretations one of which is consistent with the innocence of the accused, they can not arbitrarily adopt that interpretation which incriminates him.[12]

Where the prosecution's case lies somewhere in a muddle of hypotheses, justice can hardly be served when absolute guilt is extracted where they are strong importations of innocence. Such a verdict can not be called, "beyond a reasonable doubt."

S. G.

[12] Burton and Conquest v. Commonwealth, 108 Va. 892, 899, 62 S.E. 2d 376 (1908).

SALES, IMPLIED WARRANTY—MANUFACTURER'S LIABILITY TO ULTIMATE CONSUMERS ON THEORY OF PUBLIC POLICY

The manufacturer of food for human consumption, who packages such food in sealed containers, will be liable to the ultimate consumer where the consumer has suffered damages as a consequence of impurities therein on the theory of implied warranty, irrespective of a lack of privity of contract between the manufacturer and the ultimate consumer.[1] The Supreme Court of Virginia supports this theory on the basis of public policy, where a smoked pork shoulder wrapped in cellophane and labeled by the processor was purchased from a supermarket and the purchaser's wife became ill from eating the pork due to impurities in it prior to the time it left the processor's plant.[2]

Heretofore, Virginia has followed the common law doctrine that one who sells foodstuffs for human consumption impliedly warrants its' fitness and wholesomeness for such purpose and is liable not only for the result of any neglient act involved in failing to use reasonable care in the preparation and handling of his product, but is liable on implied warranty where there is

[1] Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d. 828, 142 A.L.R. 1479, (1940).

[2] Swift v. Wells, 201 Va.—, 110 S.E. 2d. 203 (1959).