reference either to adopted children or to designated heirs. Reference is only to children and lineal descendants. This is true in most jurisdictions. The court concluded that adopted children and designated heirs are meant to be included in the statute through the use of the doctrine of *pari materia*. Laws *pari materia*, or concerning the same subject matter, are to be construed in reference to each other—Bouvier's *Law Dictionary*, p. 2454. The court cited *Cochrel* v. *Robinson*, *supra*, as authority for interpreting the statute of descent and distribution and the statute of designation of heir as being *pari materia*. The use of this doctrine is well established. *Porter* v. *Rohrer*, 95 Ohio St. 90, 115 N.E. 616 (1916); *The Ohio River Power Co.* v. *City of Steubenville*, 99 Ohio St. 421, 124 N.E. 246 (1919); *Maxfield, Treas.* v. *Brooks*, 110 Ohio St. 566, 144 N.E. 725 (1924); *Chapek* v. *City of Lakewood*, 11 Ohio App. 203, 30 Ohio C.A. 541 (1919). Most jurisdictions interpret the words children and issue as Ohio does. *In the Matter of the Estate of Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887 (1888); *Power* v. *Hafley*, *supra*; *In re Cadwell's estate*, *supra*; *In re Walworth's Estate*, 85 Vt. 322, 82 Atl. 7 (1912). But the holdings are not entirely uniform. *Jenkins* v. *Jenkins*, 64 N.H. 407, 14 Atl. 557 (1888); *Stanley* v. *Chandler et al*, 53 Vt. 619 (1881); *New York Life Ins. and Trust Co.* v. *Viele*, 161 N.Y. 11, 55 N.E. 311 (1899). The objection that inheritance is diverted into a foreign line, which is made against inheriting through a declarant, cannot be made here. There is ample authority to justify the court's *dictum*. *Kroff* v. *Amrhein et al*, 94 Ohio St. 282, 114 N.E. 267 (1916); *Gray et al* v. *Holmes et al*, 57 Kan. 217, 45 Pac. 596 (1896); *Fiske* v. *Lawton*, 124 Minn. 85, 144 N.W. 455 (1913); *Bernero* v. *Goodwin et al*, 267 Mo. 427, 184 S.W. 74 (1916); *In re Webb's Estate*, 250 Pa. 179, 95 Atl. 419 (1915). Both the holding as to inheritance through the declarant and the *dictum* as to inheritance from him are well supported in principle and by the decisions in comparable adoption cases.

JEROME H. BROOKS

EVIDENCE

INFERENCE ON AN INFERENCE

One Hozian, the plaintiff, an employee of the Cleveland Window Cleaning Company, was injured by a crane while cleaning windows in the defendant's factory. At the trial the plaintiff testified that he had noticed a person who he thought was a foreman giving instructions to the workmen in the factory. The plaintiff's counsel asked Hozian

to relate what the alleged foreman had said in his presence to Hozian's foreman concerning the washing of windows. The defendant objected on the ground that the foreman had not been sufficiently identified as a person of authority in the defendant's employ, and, if he did possess some authority, its nature and extent had not been shown. The object of the plaintiff was to testify that the alleged foreman had said it would be all right to go ahead with the window cleaning and the cranes would not be operated. The trial court sustained the defendant's objection and directed a verdict in its favor. Held: Such testimony would *prima facie* establish a master-servant relationship and the acts done by the servant may be found to be within the scope of employment. *Hozian* v. *Crucible Steel Casting Co.*, 132 Ohio St. 453, 9 N.E. (2d) 413, 9 Ohio Op. 375 (1937).

The plaintiff's testimony was apparently excluded in the trial court because even with his statement it would require an inference by the jury that the man was a foreman or a person with authority, and, even if that inference were made, it would require a further inference that this man had at least apparent authority to authorize the work that was done. So stated, it would run counter to the often stated maxim that you can not build an inference on an inference or a presumption on a presumption.

The maxim is often stated in Ohio and in some other states. See, note, 95 A.L.R. 167 (1935). Of course an increase in the number of steps involved in reaching a conclusion from a certain statement lessens our belief in the soundness of that conclusion. To use a popular illustration, if the chances are two out of three that it will rain tonight, and also two out of three that if it does rain the roof will leak, the chances are nevertheless less than half that the water will get through the roof tonight.

In *Sobolovitz* v. *The Lubric Oil Co.*, 107 Ohio St. 204, 140 N.E. 634 (1923), a witness testified that he saw the words "The Lubric" on a truck that injured the plaintiff. The court held that it might be reasonable to infer that the defendant owned the truck, but the jury should not be permitted to make the further inference that it was being operated in furtherance of the defendant's business. See also, *Lashure* v. *East Ohio Gas Co.*, 31 Ohio App. 161, 165 N.E. 305, 27 Ohio L. R. 577 (1928). In *Mills Restaurant Co.* v. *Clark*, 45 Ohio App. 25, 185 N.E. 470, 38 Ohio L. R. 113, 13 Ohio Abs. 698 (1933), the court held that from the mere showing that the plaintiff had eaten sea food in the defendant's restaurant the jury might infer that such food had caused her illness but refused to allow them to draw the further infer-

ence that the food was unwholesome when sold to her. See, *Fenger* v. *Fenger*, 8 Ohio D. R. 407, 7 Bull. 304 (1882).

In *Rowe* v. *Alabama Power Co.*, 232 Ala. 257, 167 So. 324 (1936), the plaintiff fell from the steps of a street car. The court held that there was sufficient evidence from which the jury might infer that a banana peel was on the steps of the car when the plaintiff got off but refused to allow the jury to draw the further inference that the peel had been there long enough to give notice to the operator of the car. See, *Fisher Bros. Co.* v. *Deluca*, 10 Ohio Abs. 488 (1931). In *Wellman* v. *Wales*, 97 Vt. 437, 129 Atl. 317 (1925) it was held that an inference that the defendant's car had struck the deceased did not warrant the further inference that he had been negligent in doing so. In *Cardinale* v. *Kump*, 309 Mo. 241, 274 S.W. 437 (1925), it was held that the plaintiff could not establish negligence by proving a scar in his eyeball which might have been caused by a cut or an infection from bacteria and then ask a jury to infer that the scar was produced by a cut, that the defendant caused the cut and that the cut caused the loss of the eye.

Yet many things that we do every day are based on a chain of inferences. If we notice that a traffic light is green we infer that drivers traveling in the other direction will see a red light and that having seen it, they will stop at the intersection. Hence we feel we are acting with due regard for our safety in crossing the street. From the fact that a person has lived in a certain environment we infer that he has acquired certain traits and having acquired these traits we infer that he will react to certain stimuli. We infer that persons using certain terms know their meaning and from their use of the term we infer they intended the term to carry that meaning.

Wigmore vigorously attacks the maxim that an inference can not be built on an inference saying, "There is no such rule; nor can be. If there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder, the 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 the deceased. Or, the defendant is shown to have been sharpening a knife; from this we argue that he had a design to use it upon the deceased; and from this we argue that the fatal stab was the result of this design. In these and in innumerable daily instances we build up inference upon inference and yet no court ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials, proceed upon such data. The judicial utterances that sanction the fallacious and imprac-

ticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein relied upon." 1 Wigmore on Evidence, sec. 41, p. 258 (1923).

Wigmore's views have been approved in many recent cases. In *Madden* v. *A. & P. Tea Co.*, 106 Pa. Super. Ct. 474, 162 Atl. 687 (1932), a dead mouse was found in a storage can where the plaintiff kept the tea that she had purchased from the defendant the day before. From this fact the jury was allowed to infer that the mouse was in the tea when delivered to the plaintiff and then make the further inference that the mouse so affected the tea which the plaintiff drank that it nauseated her and also that the tea rather than other food had caused her illness. In *Welsch* v. *Frusch Light and Power Co.*, 197 Iowa 1012, 193 N.W. 427 (1923), the deceased was found dead near her washing machine. The court held that there was sufficient evidence to go to the jury from which it might be inferred that the deceased had received an electrical shock and that such a shock had caused her death and further that the wires were dangerously overcharged at the time.

Frequently statements that will require a combined inference are admitted without any consideration of the maxim or any thought that it is being violated. Thus a statement of intent to commit suicide has been admitted. The jury is allowed to infer from those words that he had the intent, and, if he is now dead, to infer that he carried it out and killed himself. See, *Commonwealth* v. *Santos*, 275 Pa. 515, 119 Atl. 596 (1923). Statements of intent have been admitted to show combined actions of the actor and another person. *Mutual Life Ins. Co.* v. *Hillman*, 145 U. S. 285, 36 L. Ed. 706, 12 Sup. Ct. 909 (1892); *State* v. *Farnam*, 82 Ore. 241, 161 Pac. 417 (1916).

Some courts which make use of the maxim attempt to solve the difficult cases by declaring that the evidence supporting the first inference may be of such a character as to justify a finding of fact from which the second inference may be drawn. See, Jones on Evidence (2nd ed.) sec. 363-364 (1926); *Adamant Stone & Roofing Co.* v. *Vaughn*, 7 Tenn. App. 170 (1928); and *C. & O. R. Co.* v. *Ware*, 122 Va. 246, 95 S.E. 183 (1918); *cf. East Ohio Gas Co.* v. *Van Orman*, 41 Ohio App. 56, 179 N.E. 147, 35 Ohio L. R. 629, 11 Ohio Abs. 391 (1931). But calling an inference a fact does not really change the result. The court is permitting one inference to be drawn from another.

In the last analysis the ultimate question is whether there is enough evidence to go to the jury. The more inferences that are involved in the chain, the weaker the argument that the case should go to the jury. If the court does not think the evidence is sufficient, the court will in-

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,