Michigan Law Review

Volume 18 | Issue 8

1920

Note and Comment

Edwin C. Goddard
University of Michigan Law School

Victor H. Lane
University of Michigan Law School

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT

PUBLIC UTILITY VALUATION—COST-OF-REPRODUCTION THEORY AND THE WORLD WAR.—The very grave objections to the cost-of-reproduction theory of valuation of public utilities was pointed out at large in 15 MICH. L. REV. 205. The violent price changes following the World War have greatly increased the weight of these objections to calling anything a base which rests on such uncertainties and fluctuations as cost-of-reproduction. A base should be stable, but this has the stability of a flying machine. There had been a rising curve of costs from 1893 to 1916, but since that date the rise has been almost vertical. The public utilities by the thousands desire to take advantage of it. They are as fond of cost-of-reproduction now as they were of original cost in 1893, while for the public the transfer of affections has been reversed. Cost-of-reproduction has not proved a friend that either party can trust, and if the present flight of prices comes back to earth the utilities will have a revulsion of feeling to the efficient investment theory of valuation for which the public just now exhibits a touching fondness. "The amusing, although regrettable," changes in attitude toward the cost-of-reproduction rule have been stated with great clearness by the Indiana Commission in *Re Indianapolis Water Co.*, P. U. R. 1919 A 448, 464. In general, it may be said that the Commissions, being in more constant and

intimate touch with conditions, are much more impressed by this than are most of the courts.

Two recent decisions in this field have attracted wide attention and excited great interest. In *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U. S. 256 (June, 1919), Mr. Justice Pitney said the company should be allowed another application for relief, if it can show "upon evidence respecting values, costs of operation and the current rates of return upon capital as they stand at the time of bringing suit and are likely to continue thereafter, that the rate is confiscatory in its effect under the new conditions. It is matter of common knowledge that, owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced. * * * And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future." The complications of determining cost-of-reproduction, and rates based thereon, may be seen from the fact that in considering the problem for this lighting plant in a comparatively small city the Master had "an enormous mass of evidence produced before him, and analyzed in his report. In abridged form, it occupies nearly 2,000 pages of printed transcript in this court, besides numerous tabular exhibits." Its bulk is not at all unusual in valuations by the cost-of-reproduction method.

Fluctuations in wages, cost of materials, and money rates are inevitable, but the amount of such fluctuations, and their effect upon a utility, are easily capable of simple determination. It is only when the value of the whole plant is thrown into this sea of uncertainty that the Master finds swimming difficult and safe landing impossible. If, owing to the World War, the value of the utility has greatly advanced, then there is no firm base, no sure adjustment even for a day.

If value has greatly advanced, the next query is, has it kept pace with the increase in prices of materials? Shall the utility be allowed added value for materials actually put into the plant, and also for materials, composing most of the plant, and which were purchased at the far lower prices prevailing when the plant was built or enlarged? In other words, shall rates be based on the efficient investment representing the capital devoted to the public use, with a rate of return equal to that prevailing today, or shall they be based on the cost-of-reproduction today, at present prices of materials? There is no doubt as to how the public will respond when asked to pay rates on possibly double the capital actually invested simply because if the plant were to be built today, which it is not, it would cost twice as much as it did. Still, if it be an unchangeable rule of property that the owner of a public utility is entitled to such appreciations of value, then the feeling of the public has nothing to do with the question of right, and cost-of-reproduction should be rigidly applied. On the other hand, if there is here a question of policy and police power, and not a fixed rule of property, then each case may be considered by itself, to be decided on reason and judgment and all the circumstances of the case, past as well as present.

That is what Charles E. Hughes, the Referee, concluded in a recent and very much quoted opinion by him. This opinion, of course, derives great force from the fact that Hughes as Justice of the Supreme Court of the United States rendered the opinion in the *Minnesota Rate Cases*, 230 U. S. 352. In *Brooklyn Borough Gas Co.* v. *Public Service Com.*, P. U. R. 1918 F 335 (July, 1918), Referee Hughes said: "While it is important to consider the cost of reproduction in determining the fair value of a plant for rate-making purposes, it cannot be said that there is a constitutional right to have the rates of a public service corporation based upon the estimated cost of the reproduction of its property at a particular time, regardless of circumstances. To base rates upon a plant valuation simply representing a hypothetical cost of reproduction at a time of abnormally high prices due to exceptional conditions would be manifestly unfair to the public, and likewise to base rates upon an estimated cost of reproduction far lower than the actual bona fide and prudent investment because of abnormally low prices would be unfair to the company." This is not to be confused with recognition of actual costs of operation, even though abnormal.

If the quotation justifies the conclusion that fairness to the utility and to the public must be a determining factor in rate making, and that there is no constitutional property right to prevent, then there seems no serious obstacle to the contention that efficient investment and not cost of reproduction may be made the base, if not by judicial, then by legislative act. Many commissions, at all events, seem minded to come to that basis. In the *Brooklyn Borough Gas Case* itself the New York Commission in 1914, by computing the cost of reproduction as of that date, arrived at a base figure "covering the amount at which every unit of property stands in the capital account. This inventory or appraisal can easily be kept up to date, so that an investigation as to the rates or prices charged for gas can be made very expeditiously. The company on its part will be able to present to banking houses and investors a balance sheet virtually approved by the Public Service Commission." In other words, the commission seems to have approved the efficient investment theory. The amount of such investment up to 1914 was incapable of ascertainment from the books, and so a basing value was necessarily secured in another way. But this once agreed upon, and a system of accounting adopted, the value at any future date could be taken from the books. (See also to this point, *Biddeford & Saw Water Co.* v. *Itself*, P. U. R. 1920 B 580, 592.) The value at any day will be this 1914 base, plus capital investment added since. This is the method urged in 15 MICH. L. REV. 205. The board of directors, refusing to "admit the right of the Commission to impose the conditions above mentioned," "as matter of policy" accepted them and for the time acted upon them.

The merry tangle of learned referees, learned justices and commissioners, of legislature, commissions and courts, of Special Term, Appellate Division, First Department and Second Department, as the litigants vainly scurried through the labyrinth of the New York courts and commissions, may be followed by the curious reader in 171 N. Y. S. 937, 175 N. Y. S. 28, 176, 918, 178 N. Y. S. 94, 179 N. Y. S. 912, 180 N. Y. S. 48. But the parties are not

yet out. The rate to be charged for gas has not been finally passed on even by the Supreme Court, which in New York is not supreme, and the Court of Appeals has not yet had a chance at the case, not to speak of the possibilities if the parties should start traveling through the Federal Courts. Meantime the "learned Referee," ex-Justice Hughes, notwithstanding some injuries suffered at the hands of at least one "learned justice," is still in fair condition, though it does not yet appear with certainty how his opinion will look when the courts get all done with it. Meantime it has been so much quoted elsewhere as almost to attain the influence of an authority.

Re Capital Traction Co., P. U. R. 1919 F 779, 898, in an elaborate opinion of 160 pages, adopts the 1914 before the war value, plus added costs at the higher prices paid since that date. The D. C. Commission declined "to hold that the users of the service of a public utility at the very time when called upon to make great sacrifices because of a world-wide war should also be required to pay higher rates merely to enable such a utility, without the corresponding expenditure of a single dollar by way of increase of its pre-war investment, to reap a profit from the high level of prices which the very conflict has brought about." Is not this statement of conditions in time of war equally applicable to conditions at any time? The Minnesota Commission, in *Re Tri-State Tel. & Tel. Co.*, P. U. R. 1919 C 5, in passing on a petition for emergency relief, held that corporations, as well as individuals, must bear their share of the burdens of the war and sustain some loss of income without flinching. That a company or its employees should be asked "to make sacrifices that car riders may get service at less than cost" did not impress the court in *Doherty* v. *Toledo Railways & L. Co.*, 254 Fed. 597.

A very interesting statement of present situations is made by the Indiana Commission in *Re Indianapolis Water Co.*, P. U. R. 1919 A 448, 464. Admitting cost-of-reproduction-less-depreciation "is now the prevailing method of evaluation in Indiana," it adds that "a continued disposition toward this method would rapidly lead into unfathomable depths of speculative regulation, and create a thoroughly artificial and unjust basis for property values," unfair in these times to the public, in times of depression to the utilities. "There can be no better guide to or basis for rate making valuations than honest and prudent investment." Cost-of-reproduction is too well intrenched to permit a sudden and violent change, but there should be a gradual turning toward prudent investment as the controlling factor. The commission flatly refused to arbitrarily add an appreciation of $1,500,000 due to the rising prices of real estate. See also *Re St. Joseph Ry. L. H. & P. Co.*, P. U. R. 1920 A 542, 546. The Michigan Commission well expressed the same in *Holland* v. *McGuire*, P. U. R. 1920 B 149, 164, quoting at length from Referee Hughes's opinion, *supra*. The Commission admitted great changes caused by war prices, but did not think it "logical that the customers of a public utility should be required to pay higher rates merely to enable a utility, without the corresponding expenditure of a single dollar towards an increase in its capital investment, to profit from a higher level of prices."

That present-day, or war, prices cannot be taken as a proper basis for valuation has been held by many commissions and some courts. See, for examples, *District of Columbia,—Re Capital Traction Co.*, P. U. R. 1919 F 799, 901, quoting "a most eminent jurist, ex-Justice Hughes, as referee"; *Illinois,—Re Springfield Gas & E. Co.*, P. U. R. 1920 A 446, 455, *Re Freeport Gas Co.*, P. U. R. 1920, B 726, 741, *Re Champaign & Urbana Water Co.*, P. U. R. 1919 E 798, 817, all quoting from the opinion of Referee Hughes; *Massachusetts,—Re Boston Consolidated Gas Co.*, P. U. R. 1919 A 699, 702; *Michigan,—Holland* v. *McGuire*, P. U. R. 1920 B 149, 164; *Missouri,—Re St. Joseph Ry. L. H. & P. Co.*, P. U. R. 1920 A 542, 546; *Nebraska,—Re Omaha & C. B. St. R. Co.*, P. U. R. 1919 A 845, 849; *New York,—N. Y. I. Water Co.* v. *Mt. Vernon*, 180 N. Y. S. 304; *Utah,—Re Utah Light & T. Co.*, P. U. R. 1920 B 262, 270; *Vermont,—Re Colonial P. & L. Co.*, P. U. R. 1920 A 215, 218; *Wisconsin,—Racine Water Co.* v. *R. Com.*, P. U. R. 1919 A 913, 926.

Such decisions are far from showing an adoption of the efficient or prudent investment theory, but they insist cost of reproduction must have relation to reasonably permanent cost prices. Often they base value on costs on averages for a five-year or a ten-year period. *Racine Water Co.* v. *Railroad Commission, supra,* while in other cases the price curve is "smoothed out" by taking 1912 or 1914 valuations as a base and adding betterments since that date at actual cost. *Re Wisconsin Traction, L. & H. P. Co.*, P. U. R. 1919 B 224, 229, and *Milwaukee* v. *Wisconsin R. Com.*, P. U. R. 1920 B 976, 991, expressing a preference for investment cost as a basis when there are adequate and reliable records, Cf. *Re Bloomer Electric L. & P. Co.*, P. U. R. 1919 B 481, 483; *Brooklyn Borough Gas Case*, P. U. R. 1919 F 335, per Hughes, Referee, quoted with approval in *N. Y. I. Water Co.* v. *City of Mt. Vernon*, 180 N. Y. S. 304; *Re Kansas City Gas Co.*, P. U. R. 1920 C 41, 50; *Re Capital Traction Co.*, P. U. R. 1919 F 779, 899.

The recent cases in the courts, as contrasted with some by the commissions, in general continue to insist that neither cost-of-reproduction nor original cost can be taken as the only basis for valuation, but every element must be considered, with sound business judgment, to determine what is fair and just to consumer and utility. However, chief emphasis is given to cost-of-reproduction in most courts. *State Pub. Utilities Com.* v. *Springfield Gas & Elec. Co.* (Ill., Dec. 1919), 125 N E. 891; *Ben Avon* v. *Ohio Valley Water Co.*, 260 Pa. St. 289; *Detroit* v. *Michigan R. Com.* (Mich., April, 1920), 177 N. W. 306. See *Re Iroquois Natural Gas Co.*, P. U. R. 1919 D 76, 85, in which the utility vainly sought to submit only reproduction costs, and *Milwaukee* v. *Wisconsin Railroad Com.* (Wis., Jan. 1920), P. U. R. 1920 B 976, 990, expressing a strong preference for considering "investment prudently made," especially at a time of very widely fluctuated costs and abnormal conditions. With this may be contrasted the opinion of Booth, J., in the U. S. Dist. Ct., March 4, 1920, in *Winona* v. *Wisconsin-Minnesota L. & P. Co.* The opinion objects to the use of the words "normal," "abnormal," and seems to rely wholly on cost-of-reproduction at the time the value is

being fixed, with rates based thereon, "even though this adjustment may fit a comparatively short period of years." There seems to be no other decision going this length, unless it be the opinion on which Judge Booth relies, that before referred to, of Justice Pitney in the *Lincoln Gas Case*, 250 U. S. 256. Whether the language of that case will bear this interpretation is open to doubt.

The opinion written by White, C. J., in *U. S. ex rel. Kansas City So. Ry. Co.* v. *Interstate Com. Com.* (U. S. Sup. Ct., Mar. 8, 1920), has been thought to show an inclination of the court to disapprove the *Minnesota Rate Cases* in so far as they refused to base land values on the "present cost of condemnation and damages or of purchase in excess of such original cost or present value." The point involved was this: Congress in 1913 ordered the Interstate Commerce Commission "to investigate, ascertain and report the value of all property owned or used by every common carrier subject to the provisions of this act." The Commission was directed to ascertain, among other things, the cost of reproduction, with the original cost of all lands, rights of way, etc., "and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value." Following the *Minnesota Rate Cases*, the Commission held that because of the impossibility of making the self-contradictory assumptions such a theory requires, this could not be done. Mandamus was asked to compel the Commission to make such valuations. The trial court and Court of Appeals denied relief. But the Supreme Court reversed this on the ground that the only question involved was "the non-action of the Commission in a matter purely ministerial." There was the direct and express command of Congress and the unequivocal refusal of the Commission to obey. The court found it impossible to conceive how the *Minnesota Rate* ruling could furnish ground for such refusal. This does not show that the *Minnesota Rate Cases* are in any point overruled, but it may mean that the court does not understand them as they have been understood by the Commission, and possibly by the public. What this means as to the cost-of-reproduction theory does not yet appear. In any event, the Commission's answer "Impossible" to a command of Congress does not pass.

On the whole, it can hardly be said that the present high prices have induced the courts to turn from the "fair value" theory of *Smyth* v. *Ames*, 169 U. S. 466, with all its speculative uncertainties, but many of the commissions have flatly expressed a preference for "prudent investment" as a basis for valuation, and more and more the courts are recognizing that the legislatures have endeavored to make utility commissions to which these problems can safely be trusted for final settlement in all but a few exceptional cases calling for judicial interference. The office of commissioner is "an office of dignity and great responsibility," and the courts should regard his work as that of an expert that should not be "closely restricted by the courts." *Pub. Utilities Com.* v. *Springfield Gas & E. Co.* (Ill., 1919), 125 N. E. 891, 895; *Detroit* v. *Mich. R. Com.* (Mich., 1920), 177 N. W. 306, 318.

E. C. G.

EVIDENCE—DISPUTABLE PRESUMPTIONS; CAN THEY BE WEIGHED?—The evidential force of presumptions under the California Civil Code, 1961, was considered and the statute construed in *Everett* v. *Standard Accident Insurance Co.*, —— Cal. ——, 187 Pac. 996.

The defense to an action on an insurance policy, by one claiming to be the wife of the insured, was that she did not have that relationship because the marriage ceremony under which she claimed occurred while the insured had another wife then living. The question arose as to the effect upon the determination of this question of fact of the presumption that the deceased did not commit a crime in consummating the second marriage. The code provision is as follows: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect, but unless so controverted the jury are bound to find according to the presumption." The code defines a presumption as, "A deduction which the law expressly directs to be made from particular facts." It is to be noted that these two provisions were really intended as but statutory declarations of the general rule of law then existing.

The court construed this statute as requiring the presumption to be weighed as evidence; that the words of the code, "other evidence," meant evidence to be weighed against the presumption as evidence. To use the language of the court in illustrating the principle to be applied, "Thus the presumption of innocence of crime will support a verdict of acquittal in a criminal case, though no evidence is offered to controvert the case of the prosecution."

Professor Greenleaf started us on a legal heresy when he made the statement that "This presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled." GREENLEAF ON EVIDENCE, § 34. If a court were to instruct a jury to weigh the presumption of innocence in the defendant's favor, where there was evidence tending to show guilt, what could it possibly mean to a jury or anyone else? Can the presumption of innocence have one measure of probative value in one case and a different one in some other case? Has it specific or variable weight? If a variable weight, what are its variable factors? To weigh it is to determine its weight, which means that it is likely to have different measures of probative value in different cases. If a juror, on getting an instruction to weigh the presumption, should request the court to explain what it meant by the instruction, what consideration should determine its weight, is there any possible thing the court can say in answer? One can attach one measure of probative value or another to a particular fact, but is it thinkable that this can be done to the presumption of innocence?

The language of the court quoted above that the presumption of innocence will support an acquittal without evidence to controvert that of the prosecution means, and only can mean, that unless the prosecution in such a case has produced evidence of sufficient probative value to enable the jury to find guilt beyond a reasonable doubt, the defendant must be acquitted. The presumption of innocence has nothing to do with that conclusion save to make

it necessary for the prosecution to produce evidence for the jury to weigh if it would make a case for their consideration at all.

The rule of the presumption under consideration operates only in the absence of evidence opposed to the required conclusion. Where there is such opposing evidence the law ceases to demand the conclusion. The presumption must then disappear and the contested fact must be determined upon the evidence submitted. *State* v. *Quigley,* 26 R. I. 263.

Though the presumption under such circumstances disappears, the *facts* to which the presumption attaches still remain in the case. Their natural probative value is to be considered. Usually that probative value will be considerable, else the law would not have raised the presumption.

The fallacy of the line of reasoning adopted in the case under discussion was so clearly pointed out by the late Professor Thayer in his address before the Yale Law School, with the case of *Coffin* v. *United States,* 156 U. S. 432, as a text, that little can be added. See THAYER'S PRELIMINARY EVIDENCE AT THE COMMON LAW, 551. It is interesting to compare *Holt* v. *United States,* 218 U. S. 245, 253, with the opinion in the *Coffin* case. The court still seems to be of the same opinion as to what is the law, but thinks it law the jury will not be likely to understand and that it is better not to let them try. See also in this same connection the earlier opinion in *Agnew* v. *United States,* 165 U. S. 36, rendered shortly after the publication of the address of Professor Thayer above referred to. Citation to some of the later cases follows.

In accord with the case under discussion, *Grantham* v. *Ordway,* —— Cal. ——, 182 Pac. 73; *Cowdry's Will,* 77 Vt. 359. *Contra, Duggan* v. *Bay State Ry.,* 230 Mass. 370 ("The presumption of due care is not itself evidence. It is a simple rule to which resort is had when there is a failure of evidence; it is not evidence, but a rule about evidence"); *Frank* v. *Wright,* 140 Tenn. 535; *Keliher* v. *United States,* 193 Fed. 8, 23. A unique doctrine is that announced in the opinion in *Kauffman* v. *Logan,* —— Iowa, ——, 174 N. W. 366, where the court says that where there is a conflict in the evidence over the existence of a particular fact, such as that it is equally balanced between the parties, that the jury should find the fact established in accordance with the presumption, if one has been operative in the case. In other words, assuming that the burden of proof upon the question of whether the fact exists is upon the party in whose favor the presumption exists, then the jury should be told that they must find for him, even though it cannot say that the preponderance of the evidence is with him. A statement which seems to refute itself.

V. H. L.

PRIVILEGED COMMUNICATION BETWEEN ATTORNEY AND CLIENT—QUESTION OF WHETHER THE RELATION EXISTS LEFT TO JURY—PARTY ALLOWED TO ASSIGN ERROR ON RULING VIOLATING THE PRIVILEGE.—This procedure was justified in the opinion in *State* v. *Snook* (Court of Errors and Appeals of N. J., 1920), 109 Atl. 289. Snook was on trial for manslaughter charged as having been committed by the reckless driving of an automobile. After the act, Mimmick,

one of the persons in the automobile, and afterward a witness for the defense, went to an attorney and had some conversation with him, the substance of which, as testified to by the attorney, was a recital by M. of what had occurred and an inquiry by him of the attorney as to what he should do. In answer, he was advised to go to the police station and tell a truthful story, and told that he did not need an attorney. M. offered to pay him, but was told that there was no charge. The attorney further testified that he did not consider himself as retained.

The trial court held that the relation of attorney and client did not exist, and that even if it did M. was the only person who could assert the privilege growing out of it. The Supreme Court, where the case was next heard, held that the question of whether the relation existed was one of fact and for the jury. The Court of Errors and Appeal held that whether it was a pure question of fact or a mixed question of law and fact, it was the sole province of the court, as distinguished from the jury, finally to decide it. This court further held that the undisputed evidence showed the relation to exist.

There is no doubt but that at one time it was the uniformly recognized rule that all questions of admissibility were for the court finally to determine. Nor did it matter that such questions must be determined upon contested facts. *Bartlett* v. *Smith,* 11 M. & W. 483; *Burton* v. *State,* 107 Ala. 108; *People* v. *Kraft,* 148 N. Y. 631; *Com.* v. *Robinson,* 146 Mass. 571; *Donnelly* v. *State,* 26 N. J. L. 463, are illustrative cases.

On the other hand, there is abundance of authority now for the practice which allows the trial court to pass tentatively upon the evidence bearing upon whether the relation does exist which would make the communication confidential, allowing the evidence of the existence of the relationship, and that of what the communication was, to go to the jury for their finding, the communication to be considered if the jury finds the relationship did not exist, and to be disregarded if it is found to have existed. The following cases are examples of the application of this growing modern practice: *Hartford Fire Ins. Co.* v. *Reynolds,* 36 Mich. 502; *Robinson* v. *State,* 130 Ga. 361; *State* v. *Phillips,* 118 Ia. 660; *State* v. *Doris,* 51 Ore. 136.

The other important question discussed by the court was that of whether the party against whom such a communication is erroneously admitted can raise the question of privilege and assign error on the ruling of the court admitting it.

In the case under discussion the question was raised under these circumstances: M., the client (as claimed by the defendant), was being examined by the State's attorney. He had stated that he had a conversation with the person claimed by the defendant to have been his attorney, and the objection was interposed by defendant that the matter was privileged. Further examination was had to determine whether the relation of attorney and client existed, after which the court held that it did not exist, "and even if it existed M. was the only person who could claim the privilege." The defendant was allowed an exception to the ruling. Later the State called the attorney to contradict M. in respect to some portions of his testimony as to what was

said in the conversation with him, the attorney. Objection was made to this testimony by the defendant upon the ground that it was violating the privilege of M. to allow it. This was again overruled and an exception allowed.

The theory of the defendant's position was that the rule of privilege for communications between attorney and client was founded in public policy, and the maintenance of that public policy required the recognition of the right in the *party* to take advantage of an erroneous ruling admitting the communication.

The Court of Errors holds that, because it is a rule of public policy, its violation is not to be disregarded, regardless of whether such violation is prejudicial to the *party* making the objection. That a contrary rule would result in the legal protection, which the law assumes to give to confidential communications, being of no practical effect.

It may be said, as indeed it has been more than once, that the privileged witness may refuse to answer, and thus compel a respecting of his privilege. He may refuse to answer, but to do so is to assume a large measure of responsibility for a layman, particularly if, as held in *Doe* v. *Egremont*, 2 Moo. & Rob. 386, he is not entitled to the assistance of counsel in presenting his claim. Certainly, if there is any other way of securing respect for his privilege which does not involve defiance of the order of the court, it is much better that it be followed.

But another fact is not to be overlooked. In many cases where the question of privilege arises, the person entitled is not before the court, but its violation is attempted through another, whereas in others the person entitled must be the witness, as in cases involving the matter of self-crimination. The claim of privilege for communications between attorney and client is an illustration of the former. Much legal discussion fails to differentiate these cases. So clear a thinker as Professor Wigmore has not too well pointed this distinction. In his general discussion of the question of who may claim the privilege, he tells us of the proper procedure where the client is the witness, but does not help us much where the attorney is the witness. He says: "The only interest injured is that of the witness himself, who has been forced to comply with a supposed duty which, as between himself and the State, did not exist; his remedy was to refuse to obey and appeal for vindication if the court had attempted improperly to use compulsory process of contempt. But the opposite view naturally possesses attraction for those courts—and they are in the majority—who cannot evade the Anglo-Norman instinct to look upon litigation as a legalized sport, of orthodox respectability, with high stakes, the game to be conducted according to strict rules, under judicial supervision, and to be won or lost according as these rules are observed or disregarded." WIGMORE ON EVIDENCE, § 2196. Assuming that the attorney with whom the client had his relation as such is the witness, and the client is not before the court, is Professor Wigmore's suggested procedure practical? As would be his duty, the attorney objects to the request to disclose, but his claim of privilege for the communication is overruled. Is there not danger that some poorly nourished, anemic attorney may look upon the

vicarious sacrifice of his liberty in the interest of a client, now dead or lost, or both, it may be, and to whom he may have contributed his fee, as a bit too serious, and permit the court to coerce the disclosure, rather than to be forced to contemplate his high-mindedness in such narrow isolation as would probably await him if he did otherwise? Is he not quite likely to be of the opinion that the better way is to permit the party to pursue his "legalized sport" and have his exception?

The cases upon the general question are very well gathered in the notes to § 2196 of WIGMORE ON EVIDENCE, above noticed, and to the other sections there referred to. Space forbids extended analysis of the cases, but it may be noted that those cited by Professor Wigmore, with few exceptions, present the question where the person whose privilege is involved is the witness, or where there was held to be a waiver of the privilege shown by the testimony.

With regard to such cases, it will be borne in mind that the law has no prohibition against asking a witness for a disclosure of that which he is privileged as well to make as to withhold. It follows that, though a party may be entitled to take advantage of an erroneous ruling compelling disclosure, he has no right to object to the request for disclosure.

To summarize: (a) Under no circumstances should there be recognized a claimed right in a party to assign error on a ruling permitting a party to request the disclosure of a confidential communication between attorney and client. (b) Though the client-witness whose privilege is involved may know that he has a right to defy the court, go to jail, and, it may be, so effectuate his privilege, it is more often the case that he does not appreciate that he has such a right, and in any event the ruling of the court directing disclosure is really coercive, and he will usually disclose rather than be ordered to jail. The privilege under such circumstances is of no real value. (c) To attempt so to coerce a disclosure from the attorney is much more unreasonable. His interest is purely professional, and can scarcely be said to be unprofessional if he obeys the order of the court to disclose. (d) The only other practical way of protecting the privilege is that which puts the party who insists upon disclosure in the position where he imperils his case if he does so without legal right.

It will not be overlooked that the question is radically different where the court erroneously recognizes a privilege and excludes evidence admissible because there is none in law. In such case the party has been deprived of evidence to which the law entitled him, while in the other case evidence has been received against a party the admissibility of which depended upon the will of another over whom the party had no control.

In accord with the case under discussion may be cited: *State* v. *Barrows*, 52 Conn. 323; *Bacon* v. *Frisbie*, 80 N. Y. 394; *Stinson* v. *State*, —— Fla. ——, 80 So. 506. *Contra*: *Dowie's Estate*, 135 Pa. St. 210; *Matthews* v. *McNeill*, 98 Kan. 5; *Hauk* v. *State*, 148 Ind. 238, 260. V. H. L.

CONSTRUCTION OF DEEDS CONTAINING REPUGNANT PROVISIONS.—The history of a recent Hawaiian case presents both sides of a controversy of long standing as to the construction of inconsistent portions of a deed. The grantor, in consideration of love and affection, and one dollar, conveyed by deed a piece of land to her nephew, his heirs and assigns forever. Following the granting clause were two others, one of which provided that all previous instruments should be of no effect, the other that the deed should take effect only after the death of the grantor and that if the grantee died first the land should revert to the grantor and the instrument should be of no effect. The grantor survived and the grantee's heir-at-law brought ejectment. The trial court held that the deed conveyed to the grantee only an estate *in futuro* in fee, contingent upon his surviving the grantor. Upon appeal, the Supreme Court of Hawaii reversed the lower court and held that the subsequent clauses were repugnant to the granting clause and therefore should be rejected and the first clause sustained, and that the deed in question conveyed to the grantee an estate in fee simple. *Kahaulelio* v. *Ihihi*, 24 Haw. 292. The Supreme Court in turn was reversed by the United States Circuit Court of Appeals for the Ninth Circuit (April 5, 1920), 263 Fed. 817, which held that the instrument was of a testamentary character and not a deed (in this connection see 18 MICH. L. REV. 470), but that the same conclusion would be reached by holding it to be a deed. In the course of the opinion, the last court said: "Taking into consideration all of its provisions and endeavoring to give every part of it meaning and effect, it is obvious that the intention was to vest the title in the grantee in case he survived the grantor. That purpose being clear, there is no room for the application of the common law doctrine of repugnancy."

The common law dealt with conflicts of this sort in extremely rigid fashion, holding that the *habendum* could never divest or infringe an estate already vested by the granting clause and was void for repugnancy if it purported to do so. 4 KENT COMM. 524 [8th Ed.]; 2 Black. 298; BREWSTER, LAW OF CONVEYANCING, § 129; *Eldridge* v. *See Yup Co.*, 17 Cal. 44; *Riggin* v. *Love*, 72 Ill. 553; *Robinson* v. *Payne*, 58 Miss. 690; *Ratliffe* v. *Mars*, 87 Ky. 262. The application of this rule must have often resulted in defeating the actual and express intent of the grantor. In recognition of this fact, Kentucky cases of a comparatively early date are to be found which hold that in case of conflict the subsequent clause should control on the theory that it is the last expression of intention on the part of the grantor. *Bodine* v. *Arthur*, 91 Ky. 53; *Baskett* v. *Sellars*, 93 Ky. 2. These decisions were directly influenced by a statute providing that the grantee might take a fee by deed without the word "heirs" being used in the granting clause, unless a contrary intent was expressed in a subsequent portion of the instrument. This construction has been generally adopted under statutes of a similar nature. *Montgomery* v. *Sturtevant*, 41 Cal. 290; *Welch* v. *Welch*, 183 Ill. 237; *Miller* v. *Dunn*, 184 Mo. 318.

These statutes were the result of a protest against the formalism of the common law which soon began to manifest itself in numerous cases which

were not decided under the influence of a statute. It is said in *Brown* v. *Brown,* 168 N. C. 4: "We have well-nigh discarded the technical rule of the common law by which a deed was construed, under which undue prominence and effect were given to formal parts and their position in the instrument, to the sacrifice of the real intent of the grantor. We have gradually enlarged our view and liberalized our methods, which were narrow, and now seek after the intention by putting a construction on the deed as a whole and not paying too much attention to technical forms of expression which tend to conceal the true meaning. All parts of a deed are to be given due force and effect. The old rule is still of value where the intent cannot be determined." *Triplett* v. *Williams,* 149 N. C. 394; *Koehne* v. *Beattie,* 36 R. I. 316; and *Hughes* v. *Hammond,* 136 Ky. 394, are to the same effect.

The language of many of these cases would seem to indicate that the doctrine of repugnancy as a rule of law is practically a thing of the past. This is scarcely the case. It may safely be said that among the recent cases there is a great deal of language tending to support the decision of the trial court and the Court of Appeals in *Kahaulelio* v. *Ihihi, supra.* Nevertheless, there are still cases which cling steadfastly to the old rule.

In *Carllee* v. *Ellsberry,* 82 Ark. 209, the *habendum* contained a proviso to the effect that should the grantee die before her husband without issue the estate should revert to him. It was held that the proviso was repugnant to the granting clause and void. In 6 MICH. L. REV. 283 this case was said to be in accord with the great weight of authority in the United States. So numerous are the cases upon this point, however, that in the course of the same year (1907) a writer for the ILLINOIS LAW REVIEW found an abundance of cases to support his contention that the weight of authority was rapidly becoming settled to the contrary. 2 ILL. L. REV. 192. See also 12 L. R. A. (N. S.) 956. During the past year at least one case has been decided which is in accord with *Carllee* v. *Ellsberry, supra,* and the holding of the Supreme Court of Hawaii in *Kahaulelio* v. *Ihihi, supra.* This case held that the *habendum* and subsequent covenants may modify, limit and explain the grant, but cannot defeat it when it is expressed in clear, unambiguous language. The granting clause conveyed a fee and a subsequent clause contained a condition that the grantee should provide the grantor and his wife with a good home until their death, and that the title should vest in the grantee only on the death of both. It was held that a fee passed by the conveyance. *Bennett* v. *Bennett* (Vt.), 107 Atl. 304.

In spite of a few scattered cases to the same effect, it may safely be said that so far as language is concerned, the doctrine of repugnancy has been made at most a rule of construction in the majority of recent decisions upon the point. It is by no means clear, however, that all or even a majority of these would support the decision of the Court of Appeals in the principal case other than by *dicta.* Most of these cases say that when the intention can be discovered it will be followed. They also say that where the clauses cannot be reconciled the old rule will be applied. The question as to reconcilability covers a multitude of sins; and there seems to be a line of demar-

cation fully as real, if not as distinct, as that which featured the older conflict. The following cases illustrate the modern form of the controversy.

In *Saull* v. *Vagine,* 15 Ark. 695, a deed contained a proviso to the effect that in the event of the grantee's death during minority or before the birth of issue the property should revert to the grantors. The proviso was held void for repugnancy on the ground that it could not be reconciled with the granting clause and that the case was therefore a proper one for the application of the old rule. In *Ray* v. *Spears,* 23 Ky. L. Rep. 814, an attempt to limit an absolute estate by a proviso that if the grantee should die without children the property should revert to the grantor was held null and void, following the reasoning in the preceding case.

On the other hand, in *Theurmond* v. *Thurmond,* 88 Ga. 182, the granting clause vested an estate in two grantees, their heirs and assigns. A subsequent clause provided that at the death of one grantee his interest should go to certain other persons who were named. It was held that the intention was clearly shown to grant a life estate only to this grantee and the remainder was given effect.

In *Bassett* v. *Budlong,* 77 Mich. 338, there was a deed from a husband to his wife granting certain property to her, heir heirs and assigns forever, with restrictions as to conveying or mortgaging said property during the lifetime of the grantor without his consent, and in case of the death of the grantee prior to the grantor's decease the land was to revert to him and his heirs. The court held that the intention was clear that the grantee should receive only a life estate with a remainder contingent upon surviving the grantor, and gave it effect accordingly.

All of the preceding cases subscribe verbally to the modern doctrine of effectuating the intention of the parties. Each contains words which would not be out of place in the most liberal of the recent cases, yet their decisions cannot be reconciled. The influence of the old rule would seem to be responsible for the many cases where courts cannot reconcile clauses and are obliged to apply the common law doctrine, while other courts are able to discover and give effect to intentions of grantors on similar states of facts.

The Court of Appeals in *Kahaulelio* v. *Ihihi, supra,* went farther than many courts which have displayed on equal amount of verbal liberality would be willing to go. The effect of that decision is to hold that, despite the clear and unambiguous language of the granting clause, nothing whatever vested by the deed. Many courts would have evaded such a holding by seeking the easy refuge of irreconcilability and applying the old rule. The Supreme Court of Hawaii in the second trial of the same case rendered lip-service to the doctrine of intention, but added that positive rules of law govern the search, which is to say that the court is not in the least concerned with discovering or carrying out the real intent of the parties.

Considering the situation as a whole, it seems obvious that the problem is by no means settled, though loose language on the part of the courts has been responsible for many positive statements to the effect that the doctrine of repugnancy will now be applied only as a last resort. There is so much

difference of opinion as to what constitutes a "last resort" that the rule thus stated is little more than a nullity. Undoubtedly there has been a distinct change in the attitude of the courts during the past twenty years. Formerly, conflicts were settled with a casual reference to Blackstone or Kent for an expression of the old rule. Recent cases are few and far between which do not at least contain language to the effect that the intention of the parties will be effectuated if discoverable. A. W. B.

MORTGAGES UPON STOCK IN TRADE CONSISTING OF AUTOMOBILES.—The practice is very common among automobile dealers, upon the receipt of a shipment of automobiles, to procure loans from banking institutions in order to pay the drafts attached to the bills of lading, and to secure the loans by the execution of deeds of trust or chattel mortgages thereon. It has apparently been assumed that such a deed of trust or chattel mortgage, when properly executed and recorded, is valid against the claims of all persons whomsoever. This assumption has undoubtedly been predicated upon the well-established rule that priority of time gives priority of right, as between two equities, where all the statutory requirements of execution and recordation have been complied with. However, according to the generally accepted doctrine, when the mortgagor of a stock in trade is permitted by the mortgagee to remain in possession and to make sales therefrom in the ordinary course of business, applying the proceeds to his own use if he sees fit, the transaction is held to be fraudulent and void as to creditors. See 11 C. J. 573 for collection of authorities.

Although this rule has been repeatedly applied by the Virginia courts, chattel mortgages and deeds of trust placed upon automobiles by dealers were very common in that state. It has obviously been assumed that automobiles, because of their size, value and susceptibility of accurate description, did not come within the purview of this rule. This assumption was discovered to be erroneous when the Supreme Court of Virginia, in the case of *Boyce* v. *Finance and Guaranty Company,* in March, 1920, enunciated the rule that such deeds of trust or chattel mortgages, though properly executed and recorded, are void as to purchasers without notice. The rule would undoubtedly also be applied as to creditors. In that case the court said:

"Property bought for the express purpose of daily indiscriminate sale to the general public, exposed for such sale at the place of business of a licensed dealer, and over which the dealer is permitted to exercise the dominion of owner, cannot be made the subject of a valid chattel mortgage, regardless of its size, value, or capacity for identification. The powers which the dealer is permitted to exercise over the property in such care are inconsistent with a mortgage thereon.

"To require an examination of the records for liens in such cases would break up the business, and indeed be an embargo on legitimate trade. Capital must seek a more substantial security for its protection. Otherwise it were better that the few should suffer than the general public who have been

lured into purchasing from a dealer who has been entrusted with the indicia of ownership. A purchaser in such case is not bound to see the application of the purchase money.

"It is true, as a rule, the seller of personal chattels cannot confer upon a purchaser any better title than he himself has, but if the owner stands by and permits a seller who is a licensed dealer in such goods to hold himself out to the world as the owner, to treat the goods as his own, place them with other similar goods of his own in a public show room, and offer the same indiscriminately with his own to the public, he will be estopped by his conduct from asserting his ownership against a purchaser for value without notice of his title. The constructive notice furnished by a recorded mortgage or deed of trust in such cases is not sufficient. The act of knowingly permitting the goods to be so handled and used by the seller in the ordinary and usual conduct of his business is just as destructive of the rights of the creditor as if such permission had been expressly granted in the mortgage or deed of trust."

The Supreme Court of Washington has accepted a conflicting view of the proper doctrine to be applied to such deeds of trust or chattel mortgages. See *Ephraim* v. *Kelleher*, 4 Wash. 243, 249, and *State Bank* v. *Johnson*, 177 Pac. 340. See also *Levi* v. *Booth*, 58 Md. 305, where the court said that "the bare possession of goods, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were the owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner." But see the later case of *Dias* v. *Chickering*, 64 Md. 348.

According to the instant case, it is not only immaterial that the mortgage did not give a power of sale, but even that the mortgage provided against sale, secretion, conversion, and removal.

The principles enunciated in the principal case certainly seem sound, and they unquestionably respond to the dictates of public policy and commercial convenience. C. L. K.

Norfolk, Va.

ERRATA.—Through an error, for which the author was in no sense responsible, a number of unfortunate mistakes were made in the printing of the notes to the article of Mr. Thomas F. Carroll, appearing in the May number of the REVIEW.

In note 6, the reference to Mr. Harper's speech should be ANNALS, 5TH CONG. I, 141. Note 10, reference to MADISON'S WRITINGS, should be Vol. VI instead of VII. Note 12, the reference should be to ANNALS, 5TH CONG. II, 2142. Note 23, reference to MADISON'S WRITINGS, should be Vol. VI instead of IV. In note 29, citation should be ANNALS, 5TH CONG. III, 2990. In note 30, last reference should be to Mr. Macon's speech. Note 31, last line should read, "ANNALS, 5TH CONG. III, 2989." In note 67 the reference to the writings of Jefferson should be Vol. VIII, p. 218. Note 68 should read, "MADISON'S WRITINGS, VI, 334-335, etc. In note 70, the reference should be to J. S. BASSETT, THE FEDERALIST SYSTEM, instead of to FISKE, CRITICAL PERIOD.