CURRENT LEGAL PERIODICALS

Accidental Means in New York: A Rational Approach. George S. Van Schaick. 32 Cornell Law Quarterly: 378-395.

Burr v. *Commercial Traders Mutual Accident Association of America*, 295 N.Y. 294, 67 NE. (2d) 248, was decided by the New York Court of Appeals in 1946. Mr. Van Schaick considers this and earlier cases on "the distinction between accidental result and accidental means". He says that the New York cases on this point fall into two groups, those of the "traditional view" and of the "new theory", with the latter supplemented by a third, the "pre-existing disease" group.

The traditional view was that the cause or means producing a result, as well as the result itself, must be accidental. Cases where that view prevailed in New York State having involved injuries from lifting heavy weights, undergoing anaesthetics, moving ash cans, taking exercises and "inhaling tartar while teeth were being cleaned". A new line of cases was started in 1914 when sunstroke was held to be an accident, on the theory that "accidental means are those which produce effects which are not their natural and probable consequence". In other "new theory" cases the following were held to be the result of accidents: infection caused by the pricking of a pimple, a haemorrhage resulting from the picking of scar tissue, a rupture of the intestine caused by a self-administered enema, death from an overdose of veronol for earache and death because of rare hypersensitivity to a drug. The question of pre-existing disease has been considered in a number of cases cited here. In one, the insured, who had a small ulcer, slipped while lifting a can of milk. The can struck him on the abdomen. The ulcer was held to be a "mere predisposing tendency". In another, where an assured suffered a thrombosis after a fall on the ice, the question was whether there must not have been arterial sclerosis before the fall and whether it was pre-existing disease or predisposing tendency.

In the *Burr* case the assured's car was struck and pushed into deep snow by another. He walked through the storm to a farmhouse for a shovel, tried to dig the car out, seemed to fall on the shovel and died. In the case which followed, the jury was instructed that it might find "accidental means" from "either over-exposure, overexertion or the fall through slipping" if it found, further, that "he could not have been reasonably expected to anticipate such results from his action". The judge said there

was no longer "any distinction made between accidental death and death by accidental means nor between accidental means and accidental results". Further, he said that insurance policies should be written in English that could be understood by the average man, who would certainly not see this distinction.

It is submitted in this article that the *Burr* case does not hold, as it may seem to do, that proof of accidental result is now all that is necessary, but that "an accidental result may be examined to see if it does not itself characterize the means which brought it about". A judge in another case has recently said that the test is "whether the average man, under the existing facts and circumstances, would regard the loss so unforseen, unexpected and extraordinary that he would say it was an accident."

The Happy Hunting Ground of the Infernal Revenue Bureau. James F. Thornburg. 22 Notre Dame Lawyer: 237-250.

In the study of taxation statutes it must be remembered, first, that you cannot trust their literal language, as "legislative words are not inert but derive vitality from the obvious purposes at which they are aimed"; secondly, that "a page of history is worth a volume of logic", although you cannot be sure that the courts will approve "a given device" a second time; finally, it is as important to know how the judge "got there" as to know "how he said he 'got there' ".

Having made these preliminary remarks Mr. Thornburg goes on to tell what the United States government is doing "to help private property lose its privacy". The estate tax in 1916, its first year of operation, drew some $6,000,000 from the "American cornucopia". The yield rose to $154,000,000 in 1921, dropped to $34,000,000 in 1933 and has risen to about $643,000,000 for the year ending in 1945. "The bitter purgative of taxation has done it work on the horn of plenty".

The federal tax structure is said to be "unbelievably complicated". There is first a "basic" tax of from 1% to 20% on the net estate less $100,000, with a credit allowed up to 80% for amounts paid as death taxes to state Governments. Then there is the "additional" tax of 3% to 77% of the net estate after deductiong $60,000. After that, the gross "basic" tax must be deducted from the "additional" tax and to the result is added the difference between the actual credit allowed for state taxes and the gross "basic" tax. Formerly a lawyer "merely filed a return" but now he "returns a complete file". The result is that from the estate

of a taxpayer in Indiana who leaves $300,000 his widow, if she can pass the "liquidity hurdle" successfully, without shrinkage due to forced sales, has left $232,255 after estate taxes are paid. If she then passes away, more than five years after her husband's death, her children will have $186,425 left. A testator might, of course, make certain gifts and create certain trusts which would reduce the shrinkage from 38% to 16% of his estate.

Estate taxes collected amount to less than 1½% of the total government revenue while costs of administration, auditing, valuation and litigation are so high that it is doubted that there is any net realization. It would seem, therefore, that this taxation is not for revenue but is an "instrument of social adjustment"; wealth is considered in itself "a vicious thing". But it should not be presumed "that the Government will necessarily make a better and more productive use of these funds in the social good than would the family or beneficiaries of the deceased."

Following this article is the 19-page will of one, Ulysses S. Taxpayer, many clauses of which might well be used as models. The executor, by the way, is the "We Do Not Draw Wills or Give Tax Advice Bank and Trust Company of Tax on Taxville".

The Role of Smyth v. Ames in Federal Rule Regulation. Frederick F. Blatchly. 33 Virginia Law Review: 141-177.

The United States Supreme Court decided in 1877 that regulation by the states of rates of property "affected with a public interest" was not subject to judicial review. Eleven years later, however, in a case involving a state statute fixing railroad rates, a claim was made that the statute might be unconstitutional; as depriving a company of its property "without due process of law", if its revenue would be too small to enable it to carry on operations. By 1894 the Supreme Court had affirmed the right of judicial review and actually rejected a set of rates fixed by a railroad commission in a decision which left the court "the final arbiter of the reasonableness of rates". Finally in the *Smyth* v. *Ames* case, 169 U.S. 466 (1898), it was decided that "due process of law" applied to the substance of a Government's action as well as to procedure and regulation of rates was "assimilated to the taking of property by expropriation". A company was held to be entitled to receive a reasonable return on the value of its property.

It was not until 1906 that rate making by federal government agents began. This was made subject to appeal by act of Congress

but the courts have applied the principles developed in state regulation in considering rates set by the Interstate Commerce Commission and other federal agencies. Mr. Blatchly holds that these doctrines are "obsolete or inapplicable" and that the theory of *Smyth* v. *Ames* is wrong. The rise of competition in the transportation and communications fields, the establishment of contractual relations between the government and companies, the giving of subsidies, as in air mail rates, and the setting by Congress itself of a rate basis have made it unnecessary and impracticable to use "the present day fair value of the property" as a base. The other doctrine underlying the *Smyth* v. *Ames* case, namely, that "due process of law applies to the economic effects of rate regulation" remains.

So long as this is the case, the court must go over again the whole ground covered by the administrative authority in order to decide as to the "justice and reasonableness" of the rates being considered. To avoid this situation, it is suggested, the court should go back to its original position and hold that "due process" applies only to procedure so that, if the procedure followed in fixing rates is correct, their economic effects should not be considered. Utilities could be protected from confiscation by having carefully chosen, ratemaking authorities with expert staffs, "placed beyond political pressures" and with wide discretion as to measures to be adopted. If necessary, the legislature could take action or the Government could take over an enterprise which could not carry on successfully but seemed "socially necessary".

Rates are now merely one factor of a "complex political, social and economic situation" and adjustments must be made as between different utilities. Rate fixing should therefore not be, in substance, subject to judicial control.

Expert Evidence. H. A. Hammelman. 10 Modern Law Review: 32-39.

The ever-widening range of scientific and technical knowledge makes available to our courts new and improved means for investigating the truth, and this article deprecates the fact that our laws of evidence regarding expert evidence do not permit courts to take full advantage of this increased knowledge.

The English Law of Evidence recognizes that in certain cases involving scientific or technical questions, the court may require the assistance of persons who, on account of special study

or experience, have a knowledge or skill beyond the range of the court. But English law considers and treats experts as witnesses and the author of this article feels that "the customary safeguards calculated to ensure the credibility and veracity of testimonial evidence of a witness are in the case of experts in some respects unnecessary and unsuitable, in others insufficient".

English law expects the expert to place before the court the basic facts and to explain and assist the court in understanding the material. This can well become a hopeless endeavour where complicated principles are involved. Further, experts tend to be biased in favour of the side that calls them and is paying their expenses. The result is that in many a case involving complicated technical details the court is unable to overcome the confusion created by contrasting expert evidence, with the result that "the point is not proven and the loss falls on the party which bears the burden of proof on that issue".

The writer contrasts the English position in this regard with the Continental system. Most Continental systems of law have recognized that courts are frequently obliged to act upon the opinions of experts and have taken safeguards to ensure that expert evidence be objective and valuable. The French system provides that the courts may charge scientists or professional men with the task of furnishing an expert written report. The number of experts is usually three and the choosing of the experts rests in the first place with the parties to the action. The court is bound by the parties' choice if they agree and, if they do not, the court makes the selection. The report contains a statement of the research and investigations which have been carried out and the conclusions drawn by the experts, and is often accompanied by elaborate plans and drawings. The expert report does not bind the court but is intended to assist the judge in forming a reasoned opinion. By the ruling that the experts should provide the court with one report, the danger of contradictory expert evidence has been avoided. If a court feels that a report is insufficient to enable it to proceed satisfactorily, it can appoint new experts to provide a new report.

As a result of the French system, experts enjoy considerable reputation in French courts. This is in sharp contrast to our English system where expert testimony, usually biased to support the side that calls it, enjoys little credit. The danger of the Continental system is that courts may be inclined to throw responsibility too often and unnecessarily upon experts. "Between the two extremes of utter scepticism of and undue reliance on expert

evidence the Courts must steer their course warily, and the law ought to be so framed as to assist them in this task."

Community Property Status of Income from Business Involving Personal Services and Separate Capital. F. A. Le Sourd. 22 Washington Law Review: 19-34.

John Jones, owner of a grocery store in Washington State, marries. He thereby acquires "a community property and income tax headache". Originally in the states which adopted the civil law community property system, rents, issues and profits of separate property belonged to the community but in five of these states, including Washington, statutes were passed to make them separate property. What is the status of income from services?

Early cases held that income arising from services of husband or wife "in a business based on separate capital" was separate property. However, in 1909 in a California case where a husband operated a saloon business in which he had supplied the capital, it was decided that the income should be apportioned; the husband should have separate property "at least to the extent of interest on a well secured loan" and the balance would be community property. In Arizona the question is whether the principal factor in producing the income is service or separate capital. In Washington the courts now hold that unless the spouses themselves segregate it, income arising from personal services in a business involving separate property is community property unless the services are "inconsiderable in comparison with the separate property", in which case the income is all separate. Thus it may happen that a spouse gets nothing for his separate property or that no community property is collected.

This question becomes of great importance in connection with federal estate and income tax, because husband and wife wish to split an income or an estate to achieve lower tax brackets. Rulings of the Bureau of Internal Revenue have varied. The policy of the Tax Court seems now to be to hold that if the income was "essentially attributable to the separate property" it was separate, if to services of one of the spouses, it was community property, while if both were essential factors, it should be apportioned according to what each contributed to the success of the enterprise. The Washington law, which would favour the community and thus lessen the taxes, is ignored. The Commissioner claims that such a law is merely procedural and does not decide ownership and he puts on the taxpayer the burden of proving that his determination is incorrect.

It is suggested in the conclusion of this article that the intent of the law might be better achieved if the state courts would adopt some such formula as that which the Tax Court has adopted, but the author adds a statement that "there would seem to be no warrant for the federal courts and the Bureau of Internal Revenue to disregard the state law on the subject".

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THE TWILIGHT OF SCHOLARSHIP

It is curious that it should be necessary nowadays to make a special plea for the importance of teaching and scholarship in national life. Yet, as Jacques Barzun has put it: 'Teaching is not a lost art but the regard for it is a lost tradition.' Up to forty or fifty years ago teachers and scholars enjoyed a quite notable respect and esteem in Canada. They might be shabby and underpaid, but they were invited to Government House receptions or similar symbolic social functions. Their ideas and ideals might be hard for workaday citizens to grasp, and making fun of professors might be an easy popular sport, but there was quite widespread pride in Canada's learned men and an underlying acknowledgment of the essential dignity which derived from placing intellect above worldly considerations. There was also a keen interest in discovering how well native Canadians measured up to British and American professors at the universities, and the progress of Canadian students abroad was carefully followed and recorded in the press so that when they returned it was to a public which could render them their due. (John Bartlet Brebner: Scholarship for Canada (1945). Ottawa: Canadian Social Science Research Council)

THE BENEFITS OF JURY-TRIAL

If it be said that errors are unavoidably committed by Jurors into which professional judges would not fall, the answer is, that in all well-constructed judicial systems, means are provided for correcting these, or for obviating their effects. If it be alleged that an obstinate Juror may, in defiance of the truth, and in disregard of his oath, suffer the guilty to escape, from party or from personal bias; it must, on the other hand, be borne in mind, that this is a small price to pay for the perfect security which a Jury affords to all men, even the humblest, against the ruin that power and its minions might bring upon them. As long as a Jury must be appealed to by the most powerful parties in the State in order to overwhelm an obnoxious individual, we may rest assured that there is little hazard of such a catastrophe destroying an innocent man. This is a real power, a solid influence, an efficacious check to misgovernment, placed in the hands of the people, and never likely to be abused. (Henry Lord Brougham: On Democracy and Mixed Monarchy)