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The Accountant and the Law *

By J. Harry Covington

To discuss the range of necessary knowledge which the man engaged in any business or profession should possess is to bring up a topic of absorbing interest. Varied indeed are the views of men of affairs toward the present-day habit of intense and even narrow specialization in the acquisition of exact scientific knowledge. It is not my purpose, however, today in my brief matter-of-fact talk, to speculate upon the full range of the knowledge which you as public accountants should have. I want simply to talk a bit about some things which you must know if you are really entitled to be in full practice in your profession.

As the constantly expanding business affairs of our country have become more and more complicated those professional experts in various fields who deal with such affairs find a constantly increasing need of a good knowledge of sciences beyond the domain of their own particular professions. The finished trial lawyer must know something of most of the sciences if he is intelligently to examine technical witnesses so as to get at the truth. The accomplished patent lawyer must have a fair understanding of mechanics, of chemistry and of electricity. The surgeon must know something of mechanics, engineering and electricity if he is to put to the best use the various instruments and devices which are his aids in the alleviation of suffering. So the public accountant, preparing an audit and report, the truth and soundness of which must rest upon a foundation of demonstrable facts, or conducting a hearing in which the result of his examination and accounting picture is to be determined by the probative value of the facts upon which the result has been reached, should have a fair knowledge of the general principles of the law.

The late Joseph H. Choate once gave an amusing definition of the many-sided culture of a professional man on an occasion when he was approached in a Swiss hotel by an English gentleman who had sat opposite him at dinner. The Englishman said: "We have been observing you, as an American, with much

* An address delivered at the annual meeting of the American Institute of Accountants at Washington, D.C., September 16, 1925.

interest, and I want to ask you a very impertinent question, if I may. What are you by occupation or profession? Won't you be good enough to tell me, because my wife says you are a clergyman, my daughter insists you are an actor, and I say you are a lawyer. We can't all be right." "Yes, you can," instantly retorted Mr. Choate, "I am something of all three—three in one. I preach a good deal, act a little, and practise more or less law—which means that I am an American lawyer. Tell your wife and daughter you all guessed right."

In recent months you have had published in THE JOURNAL OF ACCOUNTANCY an able address that dealt in most interesting detail with the methods of procedure in federal tax appeals by one who spoke with both the voice of authority and the knowledge of experience. You have also had recently published a most scholarly and absorbing address on the accountant's duty to uncover questions of law, which deals admirably with the ethical responsibility of the accountant to lay bare those legal problems which come to his knowledge in the course of his labor in any particular audit or investigation so that they may be rightly settled by the appropriate legal agency. The remarkable thing about those addresses is that both the authors presume that the accountant who undertakes responsible work in accountancy—such work as entitles him to be considered in a really professional service—must have, within limitations, a knowledge of law.

Indeed, in that part of the accountant's work which puts him forward as the spokesman of his client in a public hearing of a controversial character I make bold to say that he is not competent to act for his client unless he has a fair knowledge of the probative value of facts. And such knowledge can be had only through a clear comprehension of at least the more general rules of that vital branch of procedural law, the law of evidence.

Of course, when any controversy is a legal one pure and simple—make no mistake about it—no supplementary knowledge of the law will enable one who is not a lawyer to undertake the cause of a party to the controversy. In such cases the lawyer is as much a necessity as is the surgeon for an operation on the body. But in the cases where the accountant is abstractly supposed to be competent to deal with his client's cause in controversy, in each concrete case he is still incompetent unless he has undertaken to know something of the law of evidence just

as the accomplished trial lawyer knows something, say, of engineering or of medicine.

Now, the law of evidence is more largely the creature of experience than logic. And, peculiarly enough, it is not so much concerned with what is admissible in proof as with what is inadmissible. To be admiss ble, evidence must be relevant, that is, it must have a definite probative value as the result of experience. In other words, facts which are offered to be proved must not merely be related to the ultimate fact which is at issue in a controversy, but they must also be such matters of fact as according to human experience best and clearly tend to prove the ultimate fact.

As that great master of the law of evidence, the late Professor Thayer, of Harvard, once said:

> "It must be noticed, then, that 'evidence' in the sense used when we speak of the law of evidence has not the large meaning imputed to it in ordinary discourse. It is a term of forensic procedure; and imports something put forward in a court of justice. Chiefly, it determines, as among probative matters—matters in their nature evidential—what classes of things shall not be received. This *excluding* function is the characteristic one in our law of evidence. Admissibility is determined, first, by relevancy—an affair of logic and experience, and not at all of law; second, by the law of evidence, which declares whether any given matter which is logically probative is excluded."

It follows that to a considerable extent the rules of the law of evidence are purely arbitrary. They must, therefore, be studied, comprehended and kept clearly in memory, without regard to whether or not they seem responsive to rules of logic, by those who are to use them. They are the indispensable guideposts to the traveller along a road which is both winding and beset with pitfalls.

Sir James Fitzjames Stephen, a distinguished judge of the high court of justice in England, and a great authority on the law of evidence said that "the great bulk of the law of evidence consists of negative rules declaring what, as the expression runs, is not evidence." That statement is a succinct declaration of a fundamental conception of our jurisprudence. The English law in the evolution of centuries has devised the one system of law by which a definite issue is evolved by the pleadings in all controversies between litigants. With a clear issue of fact to be

determined, and the legal rights or obligations of the litigants to be settled by the judge in accordance with what is the outcome of the issue of fact, only those facts are admissible which furnish a practical basis of inference in ascertaining the fact in issue. Those facts from which can be inferred the fact in issue must also always be proved by the best evidence available. It can thus be readily seen that quite naturally and in keeping with the scientific development of our law a great body of rules, quite incomprehensible to the layman, but both necessary and effective in administering justice, have grown up. And that these rules still exist and are rigorously enforced is conclusive as to their necessity in the effective dispensation of justice in our courts. To the critic, who cries aloud in the valor of ignorance, may be quoted the words of Lord Erskine, great lawyer, orator and judge, who once said: "No precedents can sanction injustice; if they could, every human right would long ago have been extinct upon the earth."

It is not my purpose to give you an extended discourse upon the rules of the law of evidence. They are, as you may have already gathered, many and complex. But a few simple illustrations will, I think, indicate the necessity of knowing something of those rules if one is to attempt to serve a client in any cause where such rules are to be applied. There is the general rule that hearsay evidence is inadmissible. That is to say, a statement made by a person who is not himself a witness has no probative value as to the truth of the matter stated and may not be testified to by one who heard him. To this rule, however, there are innumerable exceptions. It is impossible to apply one's general reasoning powers to determine in what circumstances a hearsay statement is in fact admissible. One must know the rules. A simple exception is that an oral admission made by a person against whom it is to be used is deemed to be a relevant fact as against that person. On the other hand it is not deemed to be a relevant fact in his favor.

Again, take the rule respecting the proof of a transaction between two parties one of whom is dead. There is no rule of logic which establishes to one's mind the fact that the living person may not be trusted to tell the truth concerning the transaction and yet the rule justified by experience is that where one of two parties to a transaction is dead the living party may not himself testify to it. It therefore becomes necessary to prove the

transaction by some third party who himself has actual knowledge of it.

Another exception to the hearsay rule is that declarations of a deceased testator as to the contents of his will are deemed to be relevant when his will has been lost and when there is a question as to what were its contents. It is interesting to note that, as a satisfactory rule of admissibility which has worked in these cases, it is immaterial whether the declarations were made before or after the making of the will.

Recently I came across an amusing instance of the strictness with which the hearsay rule may be enforced. In some parts of England the carrying of a corpse over a path or across a field conferred a right of way ever after. In a case tried in Nottinghamshire, a witness testified that a funeral party had gone along a certain path, over which a right of way was being claimed. The opposing counsel asked the witness if he had seen a corpse carried there, and he answered, no doubt truthfully, that he had seen a coffin carried by four men. The counsel asked how he knew that the coffin contained a corpse, and when the witness declared that he had been told it did, the objection to the evidence as being hearsay was allowed, and a witness had to be found who actually saw the corpse in the coffin, and the undertaker had to testify that the coffin had not been out of his sight from the time he screwed down the lid until it left the house for burial. This was certainly enforcing the hearsay rule to the limit.

Controversies relating to the acts and liabilities of corporations largely revolve around their books and documents. The rules respecting the appropriate proof of the contents of such books and the authenticity of such documents are necessarily strict. So it is with opinion evidence. When such evidence may be received and how to establish the qualifications of a witness who is to give his opinion as an expert are matters not to be determined by mere rules of seeming reason. Such questions are determined by definite rules of the law of evidence which one must know much as he knows his multiplication table.

Facts similar to but unconnected with the facts in issue are logically irrelevant and under the general rule of evidence are inadmissible. For example, when the question is whether or not a man committed a certain crime, the fact that he formerly committed another such crime is inadmissible evidence against

him. But as an exception to the rule, when there is a question whether a particular act was done, the existence of any course of office or business according to which it naturally would have been done is a relevant and admissible fact.

But, say many laymen, why all these peculiar rules? Are we not much too legalistic in our methods of accomplishing the distribution of justice? Indeed, I doubt not that some of you, halted, confused and therefore annoyed by some legal barrier you could not understand, have been impatient of the law's restraints. The answer is simple: The priceless heritage of orderly liberty under the law has made for centuries the civilization of the English-speaking peoples the most progressive and humane in the world. That civilization has as its deep tap-root the vital and scientific body of legal principles called the common law. The common law, developed by the wisdom and learning of English judges, has constantly expanded to admit new remedies as the varied habits and activities of the people developed new rights to be enforced, and the modes of procedure have as constantly been broadened and systematized so as to assure the certain and impartial enforcement of the substantive law itself.

When our forefathers established governments in America they laid the foundations of these governments on the common law. When difficulties grew up between them and the mother country, they acted as their English ancestors had always acted in their political troubles—interposed the common law as the shield against arbitrary power. When the united colonies met in congress in 1774, they therefore claimed the common law of England as a branch of those "indubitable rights and liberties to which the respective colonies are entitled."

That great American jurist, Chancellor Kent, has said:

> "The common law of England, so far as it was applicable to our circumstances, was brought over by our ancestors upon their emigration to this country. The revolution did not involve in it any abolition of the common law. It was rather calculated to strengthen and invigorate all the first principles of that law, suitable to our state of society and jurisprudence. It has been adopted, or declared in force, by the constitution of some of the states, and by statute in others. And where it has not been so explicitly adopted, it is nevertheless to be considered as the law of the land, subject to the modifications which have been suggested and to express legislative repeal."

The common law has always had as its very heart a system of procedure by which the courts, through rules of pleading and evidence rigidly enforced, assure impartial justice to the rich and the poor, the high and the low.

The immortal words of *Magna Carta* ring today—keynote of the common law—as they did on that long-ago June day at Runnymede when the barons wrested the great charter from King John—*justice freely without sale, fully without denial, speedily without delay.* And there will be no present-day distortion of the science of the law, no abandonment of those sound rules of procedure which make it what it is merely to give some wanton wayfarer on its narrow but safe path a chance to wander to the danger of those he seeks to guide.

To return to a consideration of the law of evidence I must also remind you that not all determinations admitting or excluding evidence are referable to the law of evidence. When a judge rules that the testimony produced by a plaintiff in an action for negligence is no evidence of negligence he is not making an ordinary ruling that there is no evidence of a fact. He rules that the acts proved do not constitute a ground of legal liability. The man who knows the rules of evidence alone would be like a babe in the woods in arguing the soundness or unsoundness of that ruling. The trained lawyer who alone could cross swords with the judge in such an instance must have a scientific mastery of that elusive part of the substantive law known as the law of torts.

Again—and this is a question that may well come up with you in your accountancy practice—the general rule of the law of evidence is that when a contract between parties has been reduced to the form of a document signed by such parties no evidence may be given of the terms or effect or operation of the contract except the document itself. However, the existence of any separate contemporaneous oral agreement on which the document is silent, which is not inconsistent with its terms, may be proved by oral evidence if from the circumstances of the case the judge infers that the parties did not intend the document to be a complete and final statement of the agreement between them. When the judge admits or rejects the oral evidence he is not making an ordinary ruling on a question of evidence; he is ruling on one of the most involved and vexing questions known to the substantive law of contract; he is interpreting the docu-

ment signed by the parties and determining whether from all the circumstances surrounding its execution it is a full and complete agreement between them. No man who knows merely the ordinary rules of evidence could for a moment discuss intelligently such a ruling.

By this time I presume you are wondering why I have told you that as a genuinely educated professional accountant you should have some general knowledge of the law, and particularly some general conception of the rules of evidence, and then apparently have tried to appall you with the idea of the mysteriousness of the law. My purpose is, however, one I am sure you will quickly appreciate. There is an old adage, "Let not your sail be bigger than your boat." It is an adage appropriate to a vast variety of people, to none more so than to the man who in this day of complex life seeks boldly "to rush in where angels fear to tread."

Making the application direct: When your client has a problem that is really a legal one don't try to be his counsel. Within the clearly bounded realm of the substantive law you will need a guide as much as he. If, however, his problem is primarily one to be evolved through accountancy, but is nevertheless to be presented to a public tribunal of any sort where you may appear as his advocate, remember that the rules of evidence designed by judicial experience to bring forth truth through acid test of strict procedure will not be abrogated to aid you in your ignorance. You must either get a good general knowledge of those rules or else in honesty to your client and yourself not undertake to appear in any forum where they are enforced.

And now, as a final word, I trust I may not be misunderstood if I undertake to admonish you about the broad standards of education and proficiency which should be maintained in your profession. It is indeed a vain thing to discuss with you the need for an expanding knowledge within the domain of the law if you are not certainly thorough masters of all those subjects intimately connected with accountancy.

You are truly a young profession. Your collective position is still one which permits of much growth. No time-honored tradition of culture and of service fixes your stature in the public mind as it does that of the doctor whose technical skill has ministered unto the lame and the halt through the ages, or as it does that of the lawyer who has with professional mastery

caused the science of jurisprudence through centuries of civilization to force justice eventually to the fore, or as it does that of the astronomer whose scientific knowledge of the heavens long ago opened the way for the fearless navigator to advance civilization over uncharted seas. On the contrary, within the memory of many men here you have advanced from the status of glorified bookkeepers to the enviable position you undoubtedly occupy today. Even at this moment our department of labor, in the enforcement of certain laws having to do with the classification of learned professions, is unwilling to designate broadly public accountants as members of a learned profession. Your public position is therefore yet largely in your own control. The complex mass of statutes in the forty-eight states which seek to regulate in ways frequently inadequate, sometimes amazing, and occasionally incomprehensible, the practice of your profession will not for many years be moulded into any such harmonious, intelligent and rigid uniform statutory system as to enable you to say that a state certificate to practise public accountancy is conclusive evidence that you are a member of a learned profession. The standards of education, efficiency and ethics which you establish and maintain will therefore determine your right to be held in public estimation as professional men.

And what an opportunity the American Institute of Accountants has for continued service of this sort! It has undertaken to maintain standards of its own. Those standards are fully in keeping with the conception of the accountant as belonging to a learned profession. Whatever others may do, regardless of the variations and laxity of state laws pertaining to accountancy let the Institute be concerned with advancing the education and elevating the ethical tone of the accountant and it will occupy a position of trust and confidence in the mind and heart of the people from which no storm of opposition can dislodge it.