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Foreword

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A SYMPOSIUM ON ESTATE PLANNING*

FOREWORD

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The American novelist and poet, Edward Carpenter, has a stanza which might be the theme song of Modern Company of Estate Planners—or, for that matter, of World Planners!

> "Newer ways are ours,
> New thoughts, new fancies, and we deem our lives
> New-fashioned in a mould of vaster powers;
> But as of old with flesh the spirit strives."

Thus the poet expresses the familiar double thought—that there is nothing new under the sun and that in whatever man attempts he contends with man's infirmities.

From the standpoint of the lawyer, of course, neither of these commonplace assumptions is in any way discouraging. Indeed, a newer and clearer expression of some old idea is early recognized by the lawyer to be his only likely contribution to his science; he equally early assumes that any proposition framed by him is bounded on North, East, South and West by man and his foibles. I can think, indeed, of less interesting boundaries and of more confining restrictions upon creative ability. The fact is that as the world opens and as man's relationships with man become more intricate and interdependent, the possible patterns of design in the Planning of Estates and the Administration of Fiduciary Portfolios become correspondingly variegated. Modern Estate Planning, in short, demands real imagination.

In order to get a proper measure of modern Estate Planning I think it may be useful to consider, very briefly, some aspects of its history. The family trust was born into our jurisprudence in an environment which had been moulded in that solid and immovable pyramid called feudalism. In that social order there was nothing of imaginative elasticity. Lateral allegiances or entanglements were as little known as lateral movements. All lines of authority moved from the top; all discharges of duties were rendered vertical-

*An article by Mr. Lloyd W. Kennedy treating legal aspects of federal taxation of trusts has been delayed due to illness and will appear in a subsequent issue.

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ly to the liege lord next above. As with human relationships so also with property. The turreted and fortified provincial seat of that day, like as not surrounded by a deep water moat, provided its own economy; save for its contribution of natural produce, and its quota of fines, recoveries and fighting power to the liege lord, it knew not the outside world. In those days the word "value" had no significance; the world of wide application was the legal term "use." The money changer had yet to make his place in society—so far backward, indeed, had men fallen from the ordered days of Rome that the limits of trade movements, of government authority and of human intercourse were actually and truly a matter of visible horizons.

Out of that kind of society the parent or predecessor of the modern trust was evolved. As a reflection of practical fact it was called a "use." The duties and responsibilities of the feoffee to uses, so-called, or the trustee of that day, were little more than those of continued possession, active defense and safe delivery. A trustee could not then be criticized who properly accounted at the end of the appointed term for the identical thing which had been entrusted to him. It was not his task to trade it for something else, or even to preserve its value. It was his task merely to hold it, and to administer its produce, whether flax or hides or meat or wine, to the use of the designated beneficiary.

That social order, lacking mobility and elasticity, inevitably passed away. It could not hope to defend itself in a cosmos where, as we now have come to realize, the order is constant flux and relative activity. The modern notion of preservation of values, upon systems of exchanges, came only as a result of explorations through a world which was suddenly discovered to be not only round, but in constant flight. As these concepts dawned on men it was to some degree realized that it was no longer enough to hide within ramparts and to rely upon moats.

The concept of mere safe conduct for a specific piece of property was likewise outmoded. Senses of lateral obligation became real, the relationships of family to other families, of tribes to other tribes, of nations to other nations, of individuals to other individuals became matters of inquiry among men of power and learning. Upon these expanding concepts the world-wide British empire was built and out of that new order the rapidly developing colonies of America, eventually insisting upon their right of self determination, gained their place as a new nation.

It now became the duty of the fiduciary to preserve not an individual piece of property, but to preserve a *value* expressed in monetary terms. The money changers and money assumed positions of social importance. The private and public express trust flourished. Philosophic speculations of the most daring sort were indulged in. It became clear, abundantly clear, that safety lay only in mobility, ingenuity, compromise, adjustment and

adaptation. The rigorous and fixed concepts of Feudalism, the Divine Right of Kings, Puritanism and Didactic Christianity all were shaken on their foundations together. For Darwin had spoken, Voltaire had written and Christopher Columbus had explored. The persistent notion of the power of protection of fixed battlements had been badly dislocated.

It seems to me that these new ideas began to race by with gathering speed in the second half of the 18th century and the first half of the 19th Progress was, of course, uneven—in some respects we are still somewhat medieval in approach. In this Republic at least, and in Britain, many remarkable things took place between 1775 and 1850. The effects of the French Revolution and of the American Revolutionary struggle were dramatic parts of the developing scene. American trade, commerce and social activity burgeoned. In New England particularly, a race of hardy pioneers undertook experiment after experiment, in philosophy and religion, in education and in commerce. The Anglo-American civilization, flexible in every part, drove energetically to every corner of this continent and to many parts of the world. So mobile was our economy that caste distinctions crumbled persistently; year after year the waves of immigration from the old countries found their places and opportunities here.

Capital was vigorously employed. Shares of clipper ship ventures, mill shares, real estate development shares and shares of insurance companies and banks were not only eagerly purchased by merchant princes and by bourgeois proprietors, alive and breathing, but were just as eagerly purchased and retained by the managers of many a family trust fund. This had been made especially possible in Massachusetts and in jurisdictions which followed the Massachusetts lead by a penetrating decision of the Supreme Judicial Court of Massachusetts, decided in March of 1830, which announced what has come to be known as the Prudent Man Rule.[1] The family trust arrangement flowered tremendously; the private banking system of this Republic blossomed along with it. We had in America a constantly growing reservoir of accumulated savings, ever nourishing new enterprises and the expanding development of old enterprises.

Intermittently this process has continued. It is necessary to use the word "intermittently" because in the period since 1850 and particularly since 1915 there have been a number of powerful influences at work which threaten to take away from trust administration something of the dynamic vigor which, accompanied by tremendous mobility, has made our Republic and our social Democracy a truly formidable force.

One of these repressive influences is, of course, nothing more than the comparative conservatism which seems always to come with approaching

1. Harvard College v. Amory, 9 Pick. 446 (Mass. 1830).

maturity. There is a question whether we are not placing an enormous aggregation of funds on the shelf, so to speak, in a comparatively static condition. There is room for doubt whether our legal framework, as well as our type of fiduciary thinking, has not served to sterilize a large part of our savings of our vigorous past generations. There are, in important jurisdictions of the country like New York and Pennsylvania, lingering relics of legislative impediment upon the free use of fiduciary funds in American industry. There is some doubt whether the professional fiduciaries in the United States should not assume a much more alert and imaginative attitude toward the employment of fiduciary funds and use affirmatively, instead of defensively, the broad managerial powers which are increasingly granted to them under the terms of their trust instruments. But of one thing we can be reasonably certain; the Victorian custom of endowing succeeding generations with large portfolios of investment securities is not so likely to characterize the second half of the twentieth century as it did the second half of the nineteenth. *What is very likely to happen is that more and more men are going to be forced to leave to their families a variegated assortment of business enterprises and bricks and mortar which will represent about all that remains after taxes are paid. If this is so the estate planners and the fiduciary administrators of the nation are faced with an architectural and managerial problem of the very highest order of magnitude.*

Even under present conditions, let alone those of the future, estate planning has turned out to be a team job. The members of the team, ordinarily, are four or five in number: the person whose property and family are in question, his legal adviser, his banking or investment adviser, his insurance adviser and, oftentimes, his accounting adviser. Even casual acquaintance with the manner in which estate plans are now being originated, and brought to execution, demonstrates the need of clarifying the individual responsibilities of the various members of the team and of improving their cooperative technique, all to the end that relationships between the client and his advisers, and between the advisers themselves, will be bettered, their efficiency increased and their product improved.

The present "system" is certainly defective. Some aspects of it are causing strained feelings between organized groups of professional advisers and there is no doubt that estate plans which are every day coming into existence show signs of having been warped to suit the private interests of one set of advisers or the other.

The estate planning team ought properly to be captained by the lawyer. The estate plan is essentially a legal transaction and the lawyer's special knowledge and skill in draftsmanship are indispensable in its creation. The lawyer, moreover, is free from the element of strong self-interest which must necessarily tend to affect the judgment of at least two of the remaining

three members of the group. The insurance underwriter, obviously, must strive to sell his special product; the professional corporate fiduciary has a legitimate primary interest in obtaining a continuing account in its chosen field of fiduciary administration. While the accountant is rarely affected by motives of self-interest of any sort, his individual contribution to the enterprise is necessarily of limited character.

It seems important, and particularly in the modern business scene, when the air is full of variegated advertising broadsides emanating from every point of the compass, for the professional and business world to keep steadfastly in mind that if any individual person is to have a full and honest right to call himself an estate planner he must be thoroughly skilled in the law pertaining to wills, trusts and estates; he must possess the skills of concise and unambiguous draftsmanship; he must have expended the time and energy to understand both the broad trends and the precise rules of taxation and he must have familiarity, if not experience, not only with the actual administration of fiduciary portfolios and insurance but also with the essentials, at least, of accountancy.

The mere statement, however, of the foregoing elementary requisites of honest profession as an "estate planner" demonstrates how very few in numbers these persons must be. Possession of all of those essential skills inevitably represents an enormous travail. It is not usual to find one workman who has mastered so many trades. Lawyers have not been trained, in their formal education, to approach the problem of estate planning with much knowledge of insurance, investments or accountancy; the emphasis in law school studies of wills and trusts bas long been placed, not on problems of administration but on theoretical aspects of legal history and structure. In practice, moreover, the lawyer necessarily deals with the entire arc of human relations and unless he consciously specializes in estate planning matters he must inevitably find himself deficient in one or more of the skills which are collateral to the art. While he is properly captain of the team, in short, he can scarcely hope to play the game all by himself.

The lawyer will find it useful, for example, to discover those insurance agents in his community who are skilled in analysis and who have mastered not only the complicated provisions of the multitudinous forms of life insurance now available but also the practices of home offices with relation to settlement agreements of every sort. The lawyer ought also to become thoroughly acquainted with the practices and customs of the professional fiduciaries in his area. The actual creation of the plan in its detailed fabric will best be accomplished, likewise, after consultation with expert advisers on the intricacies of life insurance, on taxes, on the administration of trusts and estates and, very often, on accountancy.

The power and increasing value of conferences and symposia of the

sort which the *Vanderbilt Law Review* has arranged is that a team of first class men are gathered together to give testimony and useful advice upon the various independent factors which must be taken into account in solution of this fascinating problem. When a group of distinguished scholars and practitioners like those participating in this symposium are willing to make thoughtful contributions to this sort-of round table, without hope of compensation except for the satisfaction that comes from the provision of sound ideas and the education that stems from listening to the sound ideas of others, a valuable addition to the working tools of thousands of "laborers in the vineyard" is certain to result. And if I had any critical suggestion to make of the entire venture it would be that there should be added to this genial group of learned disputants the authoritative expression of leaders in the field of life insurance, accountancy and professional fiduciary administration.