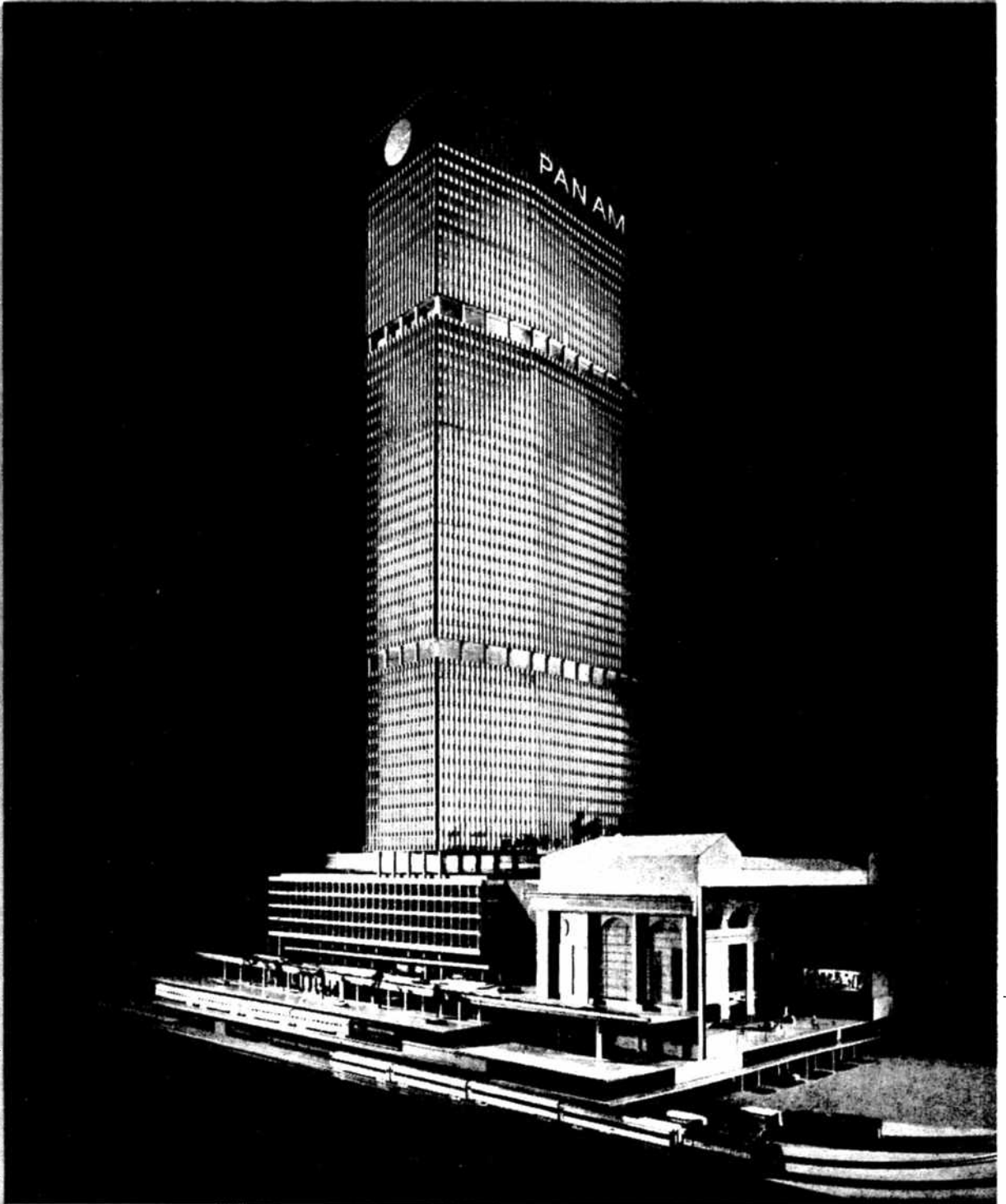


TRUSTS *and* ESTATES

MARCH 1962



MID-WINTER TRUST CONFERENCE PROCEEDINGS

TRUSTS and ESTATES

MARCH 1962
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CORRESPONDENCE

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 an investment advisory service. The views advocated in signed articles.

Cover Picture ... Growing higher every
 day, the new \$100 million Pan Am Building
 already towers over New York's mid-Man-
 hattan, as it heads for anticipated comple-
 tion before the end of 1962. The steel, stone
 and glass building, with 59 floors reaching
 808 feet into the sky, will be the largest
 office building in the world, housing about
 25,000 executives and workers. The entire
 steel skeleton is being erected by American
 Bridge, a division of United States Steel
 Corporation, which is furnishing and erect-
 ing 45,000 tons of structural steel. New
 techniques of steel construction have been
 devised to meet a variety of unusual prob-
 lems, the least of which is that the building
 is being constructed directly over Grand
 Central Terminal.

The structural problems are indicative of
 some of the adaptations and new techniques
 constantly being developed by the steel in-
 dustry to meet the challenge of competitive
 materials and technology (see Scientific En-
 gineering Developments Column, p. 248).
 Photo Courtesy of Grand Central Building, Inc.

Trust or Option?

Recognizing Mr. Wormser's reputa-
 tion in the field of estate planning, I am
 surprised to read in his article (January
 issue, p. 33) "... in almost all cases,
 use a trust as recipient instead of settle-
 ment options." I am a supporter of the
 trust principle, but I should like to raise
 the question: "Why throw away up to
 \$1,000 a year in tax free income for
 widows 'in almost all cases'?" Surely,
 Mr. Wormser doesn't think of inflation
 in any such drastic terms as would
 equate with the loss of a 20%, 30%, or
 higher tax inroad into money which
 under "spouse's exclusion" might other-
 wise be tax free.

Fred A. Lumb, C.L.U.

General Agent

New England Mutual,
 Grand Rapids, Mich.

Mr. Wormser's Reply

Mr. Lumb is quite right in maintain-
 ing that in some instances the \$1,000 a
 year in tax-free income for widows un-
 der an installment settlement option is
 desirable. Indeed, there are several spe-
 cial situations in which the use of a
 settlement option might be preferable to
 having insurance principal payable into
 a trust, for example, in some instances
 where the intended beneficiary is aged
 and the risk of substantial loss through
 inflation is therefore minimal.

However, my position in general is a
 simple and, I think, clear one. Life in-
 surance has no competitor. When it is
 needed, there is no comparable avail-
 able alternative. That it is subject to
 attack by inflation does not make it less
 desirable in its unique protective func-
 tion. However, to ignore the impact of
 inflation on life insurance seems to me
 shortsighted. Consequently, I believe in
 directing one's efforts (a) to buying in
 the most economical fashion and (b) to
 trying to preserve the purchasing power
 of the principal when it falls in. It is
 unfortunate that insurance companies
 cannot protect the beneficiary against
 inflation, but it is a fact that they can-
 not. Therefore, while the risks of infla-
 tion must necessarily be taken during a
 continuance of a policy, it seems to me
 shortsighted unnecessarily to continue
 this risk when the policy matures. The
 very serious and tragic problem of infla-
 tion impels me, in general, to advocate
 the use of trusts for the administration
 of matured principal.

New York City

René A. Wormser

Second class postage paid at New York, N. Y., and Paterson, N. J.

PERILS AND PRIVILEGES OF TRUSTEESHIP

THOMAS H. BEACOM

President, Trust Division, American Bankers Association;
Senior Vice President, The First National Bank of Chicago

OUR MODERN CONCEPTS OF HOLDING something for the benefit of others began to take form and shape in 1536 upon enactment of the Statute of Uses in England. In the beginning there were, of course, no corporate trustees. It was not until 1818 that the first trust institution was chartered in our country. Today, in the 66th year of our Trust Division, there are 13,917 chartered banking institutions; of these, 3,095 have trust powers and the 2,950 which exercise trust powers are members of the Trust Division. Congress first authorized national banks to enter the trust field in 1913, and by coincidence the same year we got the income tax.

St. Luke quotes one of the multitude: "Master, speak to my brother that he divide the inheritance with me." And his answer: "Man, who hath appointed *me* judge or divider over *you*? Take heed and beware of all covetousness, for a man's life doth not consist in the abundance of things which he possesseth." Couldn't this also be taken as a forecast of things to come in a red world where the state divides all and no man possesses any abundance?

Political Risks

In preparing our positions, we should remind ourselves that what we sometimes regard in our business as inalienable rights are in terms of law treated as revocable privileges. For example, the 'right' of inheritance is taxed as a transfer or succession privilege. Usually what we call a right of transmission is by definition a statutory permission. A privilege can be withdrawn or forfeited. For example, the privilege of citizenship can be revoked from naturalized aliens; native born can forfeit certain claims of citizenship by committing a felony. The title to real estate can be taken by the sovereign power through exercise of eminent domain.

Without difficulty, a man with oratorical talents can build a bridge of seeming logic to the conclusion that

expropriation or seizure by government is no more than restoration to the people of their ancient rights. Thus our individual freedom to work where we choose, to provide for our families, to save and to give, as we elect — these could conceivably be wrested away by means of the ballot box, after a campaign of propaganda.

I stress these possibilities simply to indicate deep concern as to whether the public is adequately informed and sufficiently alert in exercising their obligations as voters. As trustmen we are in a position to act as spokesmen for the thrifty citizen who works and saves for his old age; the man who puts capital to work in productive enterprise and in land. In future struggles between competing public and private interests we can be a moderating and helpful influence.

We have the great privilege, if we have the capacity, to serve as interpreters of vital economic issues, and as effective intermediaries between our customers who seek our counsel and the governmental agencies which are over all of us. We must be concerned about inflationary threats, about the impact on our domestic ventures of foreign exports and imports, of the effects on prosperity of various kinds of taxes.

As guardians of retirement funds caretakers of the financial future of millions of workers — we must not only aim at competence, we must strive for excellence. We have the high privilege to help yet unborn generations and guide them in the sane and socially constructive use of inherited wealth.

Keep the Guards Posted

These privileges must seem vague and nebulous, in contrast with the perils of our calling, which are real and identifiable. First would be sins of commission: the faults most likely to cost us money — the surcharge cases. But often unrecognized and usually unintended, there may also be errors and stupidities that cost us friends and the loss of public confidence.

Second would be sins of omission:

failures that may come through oversight. These are the effects that follow our inertia or neglect to exercise intelligently our rights as stakeholders in the nation's economy. In the third place, there are the perils of environmental dangers from which we tend to excuse ourselves with the plea that we can do nothing about them.

In these remarks I am suggesting to you that we cannot hold ourselves entirely blameless if we lose our freedom of action because of bad things we did or because we did not do the good things we could have done. It is well, I think, that no man is an island; that life has never been without peril and that courage guided by right reason can change the world. In our business, whatever one incompetent trustee does, all without discrimination may be suspected of doing. As professional fiduciaries we do not want this stigma. The record of our performance generally is excellent; this is particularly true of the court record. Litigated cases contain overwhelming evidence that wrongdoing involving defalcations and dishonesty has never characterized corporate fiduciaries but rather has been found in only a few isolated individuals. Let us never fail in the protective measures we take against the frailties of human nature . . . and make sure that our auditing procedures are the best and in good working order.

That Insidious Self-Dealing

A more insidious peril we identify as 'self-dealing.' Sometimes this can be an unconscious, or thoughtless, or merely accidental act. It may not be intended wrongdoing, but if it occurs, there is no escaping the consequences. For example, the institution that makes a mortgage in one department, or underwrites a municipal bond and then, on its own authority, sells the debt to a trust account "under the same roof." Examiners have told me of this being done without apparent consciousness on the part of anyone involved that a commission hidden in the loan or concealed in the price spread would be unlawful, and that the sale it-

From address before 43rd Mid-Winter Trust Conference, American Bankers Association, New York, February 1962.

self, even at no profit, would in certain circumstances make the seller actually a guarantor of the debt itself. Before concluding that such blindness is incredible, I suggest you quiz a few examiners.

Another area that calls for special care and policing is in the marketing of a bank's stock by its trust department. Many of us are glad to see officers and employees buy our own bank stock; be sure that they never acquire shares which the trust department has to sell.

Still another area where trustmen can get blind spots, without volition, is the field of private investments. Are we always scrupulous about not acting on inside information, not buying for ourselves any security that as trustees we negotiated into a public offering? Here the danger is not so much the possibility that our objective judgment about the fairness of the price may be actually affected as it is the virtual certainty that our motives and opinions will both be suspect if we do not avoid buying until long after the issue has been seasoned in the public market-place.

Another 'occupational hazard' is to get confused with the power that belongs to or in an estate, such as the corporate trustee which inherits control of a successful business. The board of directors, the management, the employees, the beneficiaries entitled to dividends — all these may be very conscious indeed of the character and judgment of the spokesman for the trustee bank. If he lacks perspective, if he thinks of himself as being the boss instead of just a representative of the estate, if he undertakes

to substitute his preference for the mandates incorporated in the controlling trust instrument — he is guilty of a serious mistake. More than that, he will imperil successful settlement of the problems his employer has inherited. In short, that kind of man is the wrong kind of man for the job; he is the famous square peg that needs replacement.

Some Hardy Perennials

If the beneficiaries are lacking the cooperative spirit — and some *do* lack admiration of the estate plan that governs their benefits — they are likely to attribute to the trustee bank all the faults and failings, imaginary or real, that they see personified in the trust representative. There is no magic formula for solution of this problem. It is inherent in any service occupation.

Other perennial risks could be summarized under four headings: (1) tort liabilities; (2) liabilities of successor trustees; (3) disagreements with the Bench as to the meaning of prudent investment actions; and (4) disagreements with the Bar about the extent and limitations of the practice-of-law concept. They are generally understood and easily recognized. Suffice it merely to throw out a few warnings.

In most states a trustee is personally and in his individual capacity liable for his tort actions, whether negligent or intentional. The "Restatement" would distinguish the trustee without personal fault from the one guilty of negligence or bad intent by limiting damage against the former to the amount the trust is

able to reimburse. These risks suggest certain precautions: (a) carrying comprehensive insurance; (b) checking titles before accepting real estate; (c) avoid complicity in conversion of property belonging to a third person; (d) checking leases for covenants running with the land that would affect liability; and (e) taking care not to take over insolvent estates without good indemnity.

In connection with successor appointments, a trustee should always have the guidance of capable counsel. The successor must be certain all assets have been honestly accounted for; that prices have been fairly determined; that deductions taken are allowable; that there have been no breaches of trust or, if any, that they are redressed and not continued; and that there has been delivery of every asset to the successor.

Bench and Bar

In fixing surcharges a court has 20-20 hindsight and, therefore, holds a sword of Damocles over the head of every trustee every time an investment is made. The protection here comes from vigilance, due care in the maintenance of records, and a clear head — which is better as defense against a disaffected complainant than a clean heart.

In relations with the Bar my observation, after 33 years of exposure, is that both Bar and Bank *mean* well. So long as our motives continue pure, so long as both *aim* at the best interests of the public, I have no doubt that a majority of our occasional differences will be amicably resolved. I see no peril in an injudicious minority.

I mention briefly the one calamity that could effectively as the hydrogen bomb could destroy private property and, as a result, the trust business; the symbolic figure for this economic catastrophe is Karl Marx. In their strange jargon, in their rewritten history, the Communists themselves say the common man has been liberated from the exploitation of capitalists and now has complete freedom. Not freedom of speech, freedom of worship, freedom from want and freedom from fear — but the freedom to vote yes or else. These men say our downfall is inevitable, their ultimate victory a certainty. In their minds, all our American values are topsy-turvy. If the Berlin wall faces in two directions and keeps more in than out, the world must say nothing about it. There is one answer for this conclusion — it is not the wall that will determine our future. It is our will.

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about bequests for important causes

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Δ Δ Δ

EMPHASIZING THE POSITIVE*

SYLVESTER C. SMITH, Jr.

General Counsel, Prudential Insurance Company of America;
President-elect, American Bar Association

THE FIRST STATED OBJECTIVES OF THE American Bar Association are "To uphold and defend the Constitution of the United States and maintain our representative form of government." The organized bars, both national and state, are greatly concerned about the "hour of national peril" that President Kennedy spoke of in his inaugural address. The President added that "We must never be lulled into believing that either power (the Soviet Union and Communist China) has yielded its ambitions for world domination."

One of the great difficulties with us in America is the fact that we take too much for granted. We have constant discussion, pro and con, of a public issue, for example. This does not take place behind the Iron Curtain.

Two recent events will have a great effect upon the future of private enterprise under a free democratic government. On December 5, 1960, the statement by the 81 Marxist-Leninist parties was released, a long document, known as the Communist and Workers' Parties Manifesto. It is likely to rank with the Marx Manifesto of 1848. On January 6, 1961, Mr. Khrushchev in a 2½ hour speech interpreted the Communist Workers' Parties Manifesto of 1960 and left no doubt of the objective of world domination and the destruction of all capitalistic forms of government and economy.

Ten years ago the American Bar Association appointed a Special Committee on Communist Tactics, Strategy, and Objectives. These distinguished lawyers, then and since, have made reports — educational, factual and tempered. Last year the American Bar Association adopted a resolution urging the teaching in the public schools of the nature of Communism, its objectives, its strategy, and the facts about Communism so that these might be compared with the advantages which we in our daily lives can see and enjoy. One state, Louisiana, has already made such instruction compulsory and a number of other states and municipalities are considering this

project. It is but fair to say that it will take time to accomplish these objectives, particularly since there seems to have grown up in America the feeling that the mention of the word "Communism" by any teacher in the public schools is wrong.

Since 1918 in the Soviet Union and in the subjected, or as the Communists would say, "liberated" countries no child has gone to school who has not been taught day in and day out that the Communist philosophy is the only way to gain material and spiritual happiness. Their only instruction about us is misrepresentation . . . "Wall Street runs the United States" . . . "The capitalists shoot labor leaders" . . . "America has no law and order." Isolated incidents in our nation are magnified, but there is no mention of the good things.

There is no alternative for the Free World democracies than to be militarily strong and defend ourselves against attack even though this costs us in taxes and individual sacrifices. However, the Communists planned strategy to capture the young minds in democratic countries. The American Bar Association believes it is important that Americans know more about Communism.

This year the Special Committee has been holding seminars in connection with local bar associations to which are invited lawyers, teachers and other citizens. The purpose is to give them a better understanding in three phases: first, the factual Communist form of government and objectives; second, their legal

system; third, the place of religion in Communist countries. What surprised me was the intense interest of lawyers and laymen alike in hearing a factual, intellectual discussion, free from name-calling.

There is one caution which must be given in trying to capture the minds of American children. We must permit them to make the decision by comparison of facts as they exist. We must follow our American way of free discussion. It is a frequent Communist tactic to try to attach the term "Communism" to suggested social legislation. The purpose is not to have the proposal succeed but to have it defeated. They detest democratic reforms because they know such changes will make the free government stronger.

It is time for us to take stock and emphasize how under our form of government we have developed means of serving people and their posterity. The best example is the development of trusts as a means of providing for the future of posterity through foresight on the part of the individual under free enterprise. The legal profession has in large measure contributed to this blessing of liberty through conceiving new forms of the use of trusts under our way of life.

Where in the world does a free citizen enjoy a higher standard of living — and this includes those of different race, religion or sex? Daily we exercise our right of freedom of speech, freedom of the press, freedom from search and seizure, protected so strongly by the courts, and freedom of religion. We have no fear of secret police coming without warning day or night.

I have been informed on investigation there are no trust companies in Russia . . . the government provides all social benefits limited by party policy. There are no free and independent judges . . . they are the servants of the state. There are no free and independent lawyers . . . all are members of legal collectives established by the government and administered by governmental agencies.

The decision which the President says will be made in the future will not be made by you nor perhaps by your children. It will be made by your children's children. If they are taught to hold fast that which is true and to distinguish the deceit and misrepresentation of the totalitarian ideas, I am certain that they will pledge, as our founding fathers did, their lives, their fortunes, and their future to preserve our American way of life.



*Summary of address before Mid-Winter Trust Conference, American Bankers Association, Feb. 7, 1962.