
BUSINESS TRUSTS

TOPIC SCOPE

Scope of Topic:

This article considers the business or "Massachusetts" trust, an organization created voluntarily by a trust instrument whereby trustees manage the trust estate for the benefit of holders of transferable certificates representing their proportionate interests and rights in the proceeds and corpus of a trust estate. Matters treated include the creation, organization, and duration of a business trust; the nature, attributes, and liability of the trust estate; shareholders, members, or cestuis que trustent, and their rights, shares, and liabilities; trustees, officers, and agents of such a trust, and their powers, rights, and liabilities; taxation and governmental regulation of business trusts; the termination, dissolution, reorganization, and merger of such trusts; and practice and procedure in cases involving business trusts, insofar as peculiarly relevant or distinctively applied to such trusts.

Treated Elsewhere:

are other forms of business organizations (see such topics as 6 Am Jur2d, Associations and Clubs ; Corporations ; Foreign Corporations ; Joint Stock Companies ; Partnership).

Federal Aspects:

Business trusts are subject to bankruptcy proceedings and may be reorganized in bankruptcy (see 9 Am Jur 2d, Bankruptcy).

I. DEFINITIONS AND NATURE; VALIDITY

A. In General

§ 1 Definitions and terminology

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One of the distinctive devices by means of which individuals may combine their resources to operate a business for profit is the so-called business trust, or "Massachusetts trust,"¹ which may be comprehensively defined as an unincorporated business organization created by an instrument by which property is to be held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing the beneficial interests in the trust estate.² Such an organization has also been frequently termed a "common-law trust,"³ but this

phrase is not descriptive of any of the peculiar characteristics of such organizations. 4

Business trusts are excluded from the coverage of the Restatement of the Law of Trusts, wherein it is pointed out that the business trust is a special kind of business association and can best be dealt with in connection with other business associations. 5 Under the Uniform Commercial Code, the term "organization," unless the context otherwise requires, is defined to include a business trust. 6

§ 1 ----Definitions and terminology [SUPPLEMENT]

Practice Aids: Defining a "business trust": proposed amendment of Section 101(9) of the Bankruptcy Code, 30 Harv J Leg 499 (1993).

Massachusetts or business trust. 88 ALR3rd 704.

Footnotes

Footnote 1. So called because this type of organization has reached its fullest and most extensive use in that state. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

Footnote 2.

Annotation: 156 ALR 27.

The Supreme Court of the United States has defined the Massachusetts trust as a form of business organization, common in that state, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. *Hecht v Malley*, 265 US 144, 68 L ed 949, 44 S Ct 462.

A trust of this nature is created when several persons transfer the legal title in property to trustees, with power vested in the latter to manage and control the property and business and to pay the profits of the enterprise to the creators of the trust or their successors in interest. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

Footnote 3. See, for instance, *Brown v Donald* (Tex Civ App) 216 SW2d 679; *State ex rel. Colvin v Paine*, 137 Wash 566, 243 P 2, 247 P 476, 46 ALR 165.

Footnote 4. *Willey v W. J. Hoggson Corp.* 90 Fla 343, 106 So 408.

The basis for the terminology "common-law trust," in this connection, is not that such organizations are the creatures of the common law, as distinguished from equity, but that they are created under the common law of contracts and do not depend upon any statute. *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485.

Footnote 5. Restatement, Trusts 2d § 1, Comment b, wherein it is further explained that although many of the rules applicable to trusts are applied to business trusts, yet many of the rules are not applied, and there are other rules which are applicable only to business

trusts.

It is appropriate to treat business trusts on a somewhat different basis than private trusts. *Swartz v Sher*, 344 Mass 636, 184 NE2d 51, citing Restatement.

Footnote 6. Uniform Commercial Code § 1-201(28).

For a list of jurisdictions which have adopted the Uniform Commercial Code, see Am Jur 2d Desk Book, Document 130 (and supp).

§ 2 Origin and development of business trusts

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The application of trust principles to the conduct of commercial enterprise is said to have originated in Massachusetts as a result of inability to secure corporate charters for acquiring and developing real estate without a special act of the legislature. 7 Also, it has been said that the type of organization commonly denominated "Massachusetts trust" originated because of the hostility of some states toward corporations and out of a desire to secure some of the advantages of incorporation without incurring the burdens and restrictions thereto. 8 In any event, the Massachusetts trust has reached its fullest development and use in that state. 9

The jurisprudence on the subject has grown up in comparatively recent years, although the law reports contain several instances of the use of this form of commercial enterprise more than a century ago. 10 As certain inherent advantages 11 of the business trust over other forms of commercial enterprise gained recognition, it was adapted to a wide range of business operations. Many large and well-known concerns have carried on their businesses under this form of organization, 12 and it is interesting to note that the popular use of the term "trust," in connection with monopolies and combinations in restraint of trade, is traceable to the employment of the business trust form of organization by some of the best known of such combinations. 13

§ 2 ----Origin and development of business trusts [SUPPLEMENT]

Practice Aids: Modern status of the Massachusetts or business trust. 88 ALR3rd 704.

Footnotes

Footnote 7. *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13.

Annotation: 156 ALR 29.

Footnote 8. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

Footnote 9. *Goldwater v Oltman*, supra; *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485; *Lindeke Land Co. v Kalman*, 190 Minn 601, 252 NW 650, 93 ALR 1393; *Baker v Stern*, 194 Wis 233, 216 NW 147, 58 ALR 462.

Footnote 10. *Ward v Davis*, 5 NY Super Ct (3 Sandf) 502 (trust created in 1836); *Yeaman v Galveston City Co.* 106 Tex 389, 167 SW 710 (trust organized in 1837); *Durkee v Stringham*, 8 Wis 1 (trust organized in 1837).

Annotation: 156 ALR 29.

Footnote 11. § 5, infra.

Footnote 12.

Annotation: 156 ALR 29 (listing some of these organizations).

Footnote 13. The "Standard Oil Trust" was involved in *Rice v Rockefeller*, 134 NY 174, 31 NE 907, and in *State ex rel. Watson v Standard Oil Co.* 49 Ohio St 137, 30 NE 279.

The "Sugar Trust" was involved in *People v North River Sugar Ref. Co.* 121 NY 582, 24 NE 834.

§ 3 Nature and attributes

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The distinctive features of the business trust are indicated in the definition thereof. 14 It is unincorporated, although for the purposes of regulatory statutes or by express statutory inclusion it is sometimes treated as a corporation for certain purposes. 15 It is created by the voluntary act of the parties and is based on contract. It is intended for the purpose of carrying on some kind of business or commercial activity for profit. Indeed, the profit-making function is one of the most significant characteristics of the business trust. Title to the capital of the organization is vested in trustees, 16 who usually manage the affairs of the trust. The beneficial interests in the trust estate and in the profits are evidenced by transferable certificates, similar to corporate shares, 17 and the existence or life of the organization is not affected by the death or disability of a member or shareholder or by the sale or transfer of his interest. 18

Basically, a business trust has been said to be merely the application of an ordinary trust to the purpose of operating a commercial enterprise; when an express trust is so used, it is known as a business trust. 19 Accordingly, equitable principles governing trust estates generally underlie business trusts as well, 20 although business trusts and ordinary trusts are not always governed by the same principles. 1 And in some respects, business trusts closely resemble both partnerships and corporations. 2 Aside from any question of mere terminology, some courts treat business trusts as partnerships for the purpose of determining the liability of shareholders for the debts of the trust. 3 However,

regardless of its similarity to an ordinary trust, to a partnership, and to a corporation, the general opinion is that the business trust should be regarded as sui generis. 4

It must be remembered that the nature and legal status of a business trust is not an absolute and invariable factor, but depends to a large degree upon the purpose for which the inquiry is made and upon the direction from which the matter is approached, 5 and it has been said that the character of such a trust is to be determined from the trust instrument. 6 The essential nature of a business trust is not affected by the smallness of the number of participants, 7 nor by the limited scope of its business. 8

§ 3 ----Nature and attributes [SUPPLEMENT]

p 377, n 4-

Practice Aids: Allegation in complaint as to status of defendant as business trust. 5
Am Jur Pl & Pr Forms (Rev), Business Trusts, Form 2.

Footnotes

Footnote 14. § 1, supra.

Footnote 15. §§ 78 et seq., §§ §§ 84 et seq., infra.

Footnote 16. § 55, infra.

Footnote 17. § 22, infra.

Footnote 18. §§ 27, 29, infra.

Footnote 19. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

Annotation: 156 ALR 28, 30.

"Because a new use is being made of the trust does not mean new principles of law are to be applied in determining the rights of the trustees, the cestuis que trust or persons dealing with the trustees." *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485.

Footnote 20. *McCamey v Hollister Oil Co.* (Tex Civ App) 241 SW 689, affd 115 Tex 49, 274 SW 562.

Footnote 1. § 8, infra.

Footnote 2. It has been said that a business trust is hybrid in nature, savoring of both corporation and partnership. *Oklahoma Fullers Earth Co. v Evans*, 179 Okla 124, 64 P2d 899.

Such organizations have been referred to as partnerships which masquerade as

corporations. *Hoey v Coleman* (CC) 46 F 221.

Footnote 3. § 34, *infra*.

Footnote 4. *Thomle v Soundview Pulp Co.* 181 Wash 1, 42 P2d 19.

A business trust is a distinct form of organization, which, for some purposes, must be differentiated from both ordinary partnerships and corporations. *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13.

See also 37 Yale LJ 1119.

As to distinctions concerning corporations and partnerships, see §§ 9-11, *infra*.

Footnote 5. See *Burk-Waggoner Oil Asso. v Hopkins* (DC) 296 F 492, *affd* 269 US 110, 70 L ed 183, 46 S Ct 48.

Footnote 6. *Re Associated Trust* (DC) 222 F 1012.

Practice Aids: –Trust instrument provision as to character of organization. 3 Am Jur Legal Forms 3:1, 3:12.

Footnote 7. *Helvering v Coleman-Gilbert Associates*, 296 US 369, 80 L ed 278, 56 S Ct 285; *Swanson v Commissioner of Internal Revenue*, 296 US 362, 80 L ed 273, 56 S Ct 283. These cases involved federal taxation.

Footnote 8. *Helvering v Combs*, 296 US 365, 80 L ed 275, 56 S Ct 287.

§ 4 --As a legal entity

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There is a difference of opinion on the question whether a Massachusetts or business trust is a distinct legal entity. Some courts answer the question in the affirmative, 9 and some statutes designate or recognize the organization as a distinct legal entity. 10 A business trust may, under the Bankruptcy Act, be adjudicated a bankrupt on a voluntary or involuntary petition. 11

Other courts (and sometimes the same courts in other decisions) have taken the view that a business trust is not a distinct legal entity, 12 even where a statute permits the maintenance of an action at law against a business trust. 13 But even in a jurisdiction so holding, it has been held that where trustees of a business trust, pursuant to their authority under the trust instrument, adopt a trust name and a conditional sales contract is assigned to them in that name, the assignment is not made to a nonentity but is effectively made to the trustees in the name under which they have chosen to do business, and they, in their capacity as trustees, may bring an action to recover damages for the breach of the contract. 14

Footnotes

Footnote 9. *National City Finance Co. v Lewis* (Cal App) 3 P2d 316, reh den 4 P2d 163, and superseded 216 Cal 254, 14 P2d 298; *Beilin v Krenn & Dato*, 350 Ill 284, 183 NE 330; *Hemphill v Orloff*, 238 Mich 508, 213 NW 867, 58 ALR 507, affd 277 US 537, 72 L ed 978, 48 S Ct 577.

Annotation: 156 ALR 32.

A business trust has been said to be a quasi-legal entity, separate and distinct from the members who compose it. *Brown v Bedell*, 263 NY 177, 188 NE 641, reh den 264 NY 453, 191 NE 510, motion den 264 NY 513, 191 NE 541.

A common-law trust association has been held to be capable of taking and holding title to property, so as to support a conviction of its employee for embezzlement. *Ridge v State*, 192 Ind 639, 137 NE 758.

Footnote 10. A statute attributing to a business trust association the characteristics of a legal or corporate entity does not involve any unconstitutional impairment of the obligation of contract. *American R. Exp. Co. v Asher*, 218 Ky 172, 291 SW 21.

It has been suggested that a statute specifically authorizing unincorporated associations, enacted subsequent to decisions holding business trusts not to be corporations, recognizes the business trust as a legal entity. *Edwards v Belknap*, 66 Idaho 639, 166 P2d 451.

It was said in *Williams v Schulte* (Mo App) 103 SW2d 543, that a common-law trust is regarded as a legal entity, the court referring to a statute authorizing suit against such a trust in the name it has selected.

Footnote 11. See 9 Am Jur 2d, Bankruptcy § 140.

Footnote 12. *Manufacturers' Finance Trust v Collins*, 227 Mo App 1120, 58 SW2d 1004 (right to prosecute action in trust name); *Gordon Campbell Petroleum Co. v Gordon Campbell-Kevin Syndicate*, 75 Mont 261, 242 P 540 (general statement in case involving power of trustees to contract on behalf of the trust estate); *Fisheries Co. v McCoy* (Tex Civ App) 202 SW 343.

Annotation: 156 ALR 32.

Business trusts are not entities apart from the trustees. *Swartz v Sher*, 344 Mass 636, 184 NE2d 51.

Such a trust has no legal existence, apart from its trustees, so far as concerns the right of contracting parties to recover on a contract made in the name of the trust. *Linn v Houston*, 123 Kan 409, 255 P 1105. And see *Fitch v United Royalty Co.* 143 Kan 486, 55 P2d 409.

It is quite true that a business trust is not a legal entity for the purpose of making a contract. *Schwartz v Abbott Motors, Inc.* 344 Mass 28, 181 NE2d 334, citing *Peterson*

v Hopson, 306 Mass 597, 29 NE2d 140, 132 ALR 1.

Footnote 13. Dolben v Gleason, 292 Mass 511, 198 NE 762. And see Peterson v Hopson, 306 Mass 597, 29 NE2d 140, 132 ALR 1.

Annotation: 156 ALR 33.

Other than for purposes of being sued, a business trust is not a legal entity.
Commissioner of Corp. & Taxation v Springfield, 321 Mass 31, 71 NE2d 593.

Footnote 14. Schwartz v Abbott Motors, Inc. 344 Mass 28, 181 NE2d 334, wherein the court said that nothing in Peterson v Hopson, 306 Mass 597, 29 NE2d 140, 132 ALR 1, is at variance with these principles.

§ 5 Advantages and disadvantages of business trust form of organization

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As compared with other forms of commercial enterprise, the business trust exhibits certain advantages which have made it an attractive means of conducting a business. From the great body of equity jurisprudence relating to trusts it derives the heritage of flexibility and adaptability, and of direct action and personal responsibility on the part of the trustees. Being created by the act of the parties and governed by the terms of their agreement, a business trust is as general and as elastic as a contract. 15 The latitude of the powers and activities of the trustees of a business trust is greater than that of ordinary trustees. 16 Founded in equity, a business trust enjoys the advantage that the trustee may avail himself of one of the few exceptions to the general principle that courts will not declare future rights, and he may apply to a court of equity for directions in the execution of the trust 17 or maintain a suit for a declaratory judgment to establish the meaning and intent of the trust instrument. 18

One of the objects of business trusts is to obtain for the associates most of the advantages of corporations, without the authority of any legislative act and with freedom from the restrictions and regulations generally imposed by law upon corporations. 19 Where these aims can be realized, the business trust enjoys a definite advantage over the corporation. However, for a number of years there has been a tendency to subject business trusts to the same regulations and taxes or exactions as are imposed upon corporations. But although the advantages enjoyed by such trusts in these respects are not so pronounced as formerly, they still occupy in some states a more favorable position than do corporations with respect to taxation and statutory regulations. 20 And in some instances, the shareholders of a business trust enjoy an even greater immunity from personal liability than is accorded to stockholders of corporations. 1

The principal advantages which the business trust has over partnerships are its centralized management, the introduction of large numbers of participants, the possibility of transferring beneficial interests without affecting the continuity of the enterprise, 2 the fact that the death or disability of a shareholder does not terminate the trust, 3 and

the immunity of shareholders from personal liability under some conditions. 4

On the other hand, the possible liability of shareholders is a serious disadvantage of business trusts in some jurisdictions. In many states the shareholders are personally liable, as partners, for the debts of the trust, where the trust instrument vests them with the power of control over the trustees in the management of the affairs of the trust. 5 However, in most states the parties may avoid liability by vesting in the trustees the exclusive management of the business, free from the control of the shareholders, 6 at least where the trust instrument specifically exempts them from personal liability, 7 and in all jurisdictions they may effectively guard against liability by agreement with creditors, as by making their personal immunity a condition of the contract or obligation. 8

Footnotes

Footnote 15. Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485.

Footnote 16. Ashworth v Hagan Estates, 165 Va 151, 181 SE 381.

Footnote 17.

Annotation: 156 ALR 50, 231.

Footnote 18. Dunbar v Redfield, 7 Cal 2d 515, 61 P 2d 744.

Footnote 19. Ashworth v Hagan Estates, 165 Va 151, 181 SE 381.

Footnote 20. See §§ 77 et seq., See §§ 83 et seq., *infra*.

Footnote 1. Goldwater v Oltman, 210 Cal 408, 292 P 624, 71 ALR 871.

Footnote 2. Morrissey v Commissioner of Internal Revenue, 296 US 344, 80 L ed 263, 56 S Ct 289.

Footnote 3. See Spotswood v Morris, 12 Idaho 360, 85 P 1094; Hossack v Ottawa Development Asso. 244 Ill 274, 91 NE 439.

The chief advantages of this form of organization are their comparative freedom from regulation and from corporation taxation, freedom of the members from the personal liability which is imposed upon partners, and the fact that the trust does not dissolve, as does a partnership, upon the transfer of a share or upon the death, insanity, or bankruptcy of a member. Goldwater v Oltman, 210 Cal 408, 292 P 624, 71 ALR 871.

Footnote 4. §§ 34 et seq., *infra*.

Footnote 5. § 34, *infra*.

In a few jurisdictions they are liable irrespective of the power of control. § 34, *infra*.

Footnote 6. §§ 34 et seq., *infra*.

Footnote 7. § 37, *infra*.

Footnote 8. § 40, *infra*.

§ 6 Validity of, and efficacy as, business trust

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Broadly speaking, business trusts are regarded as legal and valid, 9 at least in the sense that such organizations are not, by reason of their nature, illegal 10 or contrary to public policy. 11 While business trusts are subject to the general principles of law governing the legality of contracts and trusts, and must conform with the public policy of the state in all particulars, a court will not declare such a trust void unless impelled to do so by clear and firmly established principles. 12 It has been held that public policy is not offended by permitting a business to be carried on by trustees who limit their liability to the trust estate, 13 nor, under the prevailing view, do statutes authorizing limited liability partnerships and corporations by implication prohibit the creation of other types of organizations, such as business trusts, enjoying similar immunity by virtue of the common law. 14 A business trust is not invalid because there was no compliance with statutes relating to incorporation, 15 nor does such a trust violate any policy evidenced by statutes of this kind. 16 The motive in forming such a trust is generally not considered by the courts in determining validity, and it has been held that a business trust is not rendered illegal because of the fact that it was formed for the express purpose of reducing or avoiding taxation. 17 Such an organization will not be condemned as an attempt to take advantage of the corporate immunities without assuming the burdens and obligations connected with corporations. 18 Properly speaking, the retention by the shareholders of the power of control over the trustees does not have the effect of invalidating the trust, regardless of the other consequences thereof. 19

The fact that persons appointed as trustees are shareholders in the trust does not affect the validity of the trust. 20 However, it has been held that there can be no valid business trust, at least for the purpose of exempting the shareholders from personal liability, where all of the shareholders are trustees and the trustees and shareholders are identical persons, 1 although the organization may subsequently become valid when persons other than the trustees become shareholders. 2

In no jurisdiction are business trusts, as such, held to be totally invalid in the sense that no effect whatever will be given the trust instrument and the parties will be treated as strangers. However, the courts frequently deal in terms of "validity" with the question whether a business trust has achieved a particular purpose, such as to insulate shareholders from personal liability, or to obtain corporate advantages without corporate burdens, or the like. 3 In some few jurisdictions an organization in the form of a business trust is regarded as a corporation; 4 or as a partnership, for the purpose of determining the individual liability of shareholders; 5 or as a company or association for the purposes of the blue sky law. 6 Under yet another view the conduct of business by a business trust which has neither incorporated nor complied with laws applicable to

trust companies is held to be an unlawful usurpation of corporate powers by the trustees.
7 However, only the state can complain of such unlawful assumption of corporate
functions, 8 and, at least as between the members and parties to the trust instrument, the
courts will give effect to the provisions thereof according to the general principles of
contract law. 9

§ 6 ----Validity of, and efficacy as, business trust [SUPPLEMENT]

Case authorities:

It is clear that Maryland recognizes a business trust as an entity of its own kind from provisions of Maryland law recognizing a real estate investment trust as a permitted form of unincorporated trust or association for the conduct of business, with the power to sue and be sued and to complain and defend in all courts, and prescribing a method of service and process. *Lafayette Bank & Trust Co. v Branchini & Sons Constr. Co.* (1975) 32 Conn Supp 124, 342 A2d 916.

Footnotes

Footnote 9. *Hemphill v Orloff*, 277 US 537, 72 L ed 978, 48 S Ct 577 (investment trust); *Dunbar v Redfield*, 7 Cal 2d 515, 61 P2d 744 (construction of trust instrument); *Beilin v Krenn & Dato*, 350 Ill 284, 183 NE 330 (validity of contract for sale of trust lands); *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13; *Larson v Sylvester*, 282 Mass 352, 185 NE 44 (liability of trustee); *Wm. Lindeke Land Co. v Kalman*, 190 Minn 601, 252 NW 650, 93 ALR 1393 (liability of trustees on lease); *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493 (liability of shareholders); *Brown v Bedell*, 263 NY 177, 188 NE 641, reh den 264 NY 453, 191 NE 510, motion den 264 NY 513, 191 NE 541 (expressly recognizing the validity of business trusts, but holding that the organization involved in this case was not a true trust, but created the relationship of principal and agent); *Pennsylvania Co. v Wallace*, 346 Pa 532, 31 A2d 71, 156 ALR 1; *Baker v Stern*, 194 Wis 233, 216 NW 147, 58 ALR 462 (proceeding directly involving validity of trust).

Annotation: 156 ALR 54.

The conclusion that business trusts are generally valid is reached more readily where such trusts are recognized as valid by legislative act. *Baker v Stern*, *supra*.

A statute of Oklahoma expressly authorizes the creation of a trust to carry on and conduct any lawful business designated in the instrument of trust, and generally to do any lawful act in relation to such trust property which any individual owning the same absolutely might do. *Liquid Carbonic Co. v Sullivan*, 103 Okla 78, 229 P 561.

Footnote 10. *Phillips v Blatchford*, 137 Mass 510. And see *Roberts v Aberdeen-Southern Pines Syndicate*, 198 NC 381, 151 SE 865, 71 ALR 885.

Walburn v Ingilby, 1 Myl & K 61, 39 Eng Reprint 604.

Annotation: 156 ALR 57.

Footnote 11. *Baker v Stern*, 194 Wis 233, 216 NW 147, 58 ALR 462 (proceedings directly involving validity of trust).

Footnote 12. *Liberty Nat. Bank & T. Co. v New England Investors Shares* (DC Mass) 25 F2d 493 (law of Massachusetts).

Footnote 13. *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485.

Footnote 14. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

Footnote 15. *Hodgkiss v Northland Petroleum Consolidated*, 104 Mont 328, 67 P2d 811.

Footnote 16. *State ex rel. Knox v Edward Hines Lumber Co.* 150 Miss 1, 115 So 598.

Footnote 17. *Weeks v Sibley* (DC) 269 F 155; *Phillips v Blatchford*, 137 Mass 510.

Footnote 18. *Narragansett Mut. F. Ins. Co. v Burnham*, 51 RI 371, 154 A 909, wherein the court said: "It is not an evasion of legal responsibility to take what advantages may accrue from the choice of any particular form of organization permitted by the law."

Footnote 19. *Hart v Seymour*, 147 Ill 598, 35 NE 246 (at least, where the shareholders have never exercised such powers).

Footnote 20. *Commercial Casualty Ins. Co. v Pearce*, 320 Ill App 221, 50 NE2d 434; *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Footnote 1. *Enochs & Flowers v Roell*, 170 Miss 44, 154 So 299.

Footnote 2. As soon as other parties became holders of beneficial interests so that their estate and that of the trustees were separate and distinct and the trustees were in fact trustees for them as well as for themselves, then life was thereby imparted to the trust agreement and it became a valid instrument. *Henry G. Taussig Co. v Poindexter*, 224 Mo App 580, 30 SW2d 635.

Footnote 3.

Annotation: 156 ALR 52, 54.

Footnote 4. Business trusts are regarded in Kansas as corporations, and it is said that the only way in which the members of such an organization may secure for themselves immunity from personal liability is to comply with the laws of the state with respect to incorporation, or else to follow the statutes relating to limited partnerships. *Weber Engine Co. v Alter*, 120 Kan 557, 245 P 143, 46 ALR 158. However, the existence of the organization is given some legal recognition and effect in this state. *Beltz v Griggs*, 137 Kan 429, 20 P2d 510 (sustaining the power of the trustees to hold and convey title to real estate); *Hamilton v Young*, 116 Kan 128, 225 P 1045, 35 ALR 496 (holding a Massachusetts trust to be a legal entity, so as to exempt from personal liability, by virtue of the Negotiable Instruments Law, officers of the trust executing a promissory note in a representative capacity). **Annotation:** 156 ALR 59.

Footnote 5. See *Ing v Liberty Nat. Bank*, 216 Ky 467, 287 SW 960; *Standard Drilling Co.*

v Slate, 203 Ky 599, 262 SW 969. But even in this jurisdiction a provision of the trust instrument purporting to exempt shareholders from personal liability will be given effect as against one who was one of the organizers of the trust and who had notice of the provision. Dunning v Gibbs, 213 Ky 81, 280 SW 483. Annotation: 156 ALR 60.

In Texas the view is held that a business trust is, at least in relation to outsiders, in effect a partnership, so that provisions of the trust instrument purporting to limit liability of the shareholders for debts of the trust are of no effect. Thompson v Schmitt, 115 Tex 53, 274 SW 554. Annotation: 156 ALR 60. However, as between the parties to the trust agreement, it appears that the trust relationship will be recognized. Culp v Robey (Tex Com App) 299 SW 846; Burton v Ross (Tex Com App) 292 SW 207. Annotation: 156 ALR 61.

Footnote 6. King v Com. 197 Ky 128, 246 SW 162, 27 ALR 1159.

Footnote 7. State ex rel. Colvin v Paine, 137 Wash 566, 243 P 2, 247 P 476, 46 ALR 165; State ex rel. Range v Hinkle, 126 Wash 581, 219 P 41.

Annotation: 156 ALR 61.

Declaring a common-law trust or business trust to be a corporation does not deprive anyone of property without due process nor deny to anyone the equal protection of the laws. State ex rel. Colvin v Paine, 137 Wash 566, 243 P 2, 247 P 476, 46 ALR 165.

Footnote 8. Thomle v Soundview Pulp Co. 181 Wash 1, 42 P2d 19; Haynes v Central Business Property Co. 140 Wash 596, 249 P 1057.

Footnote 9. Thomle v Soundview Pulp Co. 181 Wash 1, 42 P2d 19, wherein the court stated that, as between the members and the trustees, the trust instrument presents simply a question of contract augmented by a question of agency, to be determined by the rules pertaining to those subjects, and the intention of the parties as expressed in the instrument will govern.

Annotation: 156 ALR 62.

§ 7 What law governs

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It is generally held that an instrument creating a business or Massachusetts trust should be construed by the law of the state where the trust was organized. 10 And a statute of the state in which a trust was organized, authorizing suit and attachment against such a trust and providing a specific manner for service of process, has been held to be applicable in an action in another state, 11 and failure to comply with the stipulated method of service of process has been held to confer, on the court of the forum state, no jurisdiction of an action against a business trust. 12 On the other hand, the fact that by

the law of the state where a business trust was organized it would not be treated as a corporation for the purpose of service of process has been held not to prevent the application of a local statute authorizing service on a trust as a foreign corporation. 13

The law of the state wherein a business trust was organized will not be applied to produce a result contravening the public policy of the forum state. Accordingly, courts have refused, as violative of public policy of the forum state, to give effect to provisions of trust instruments executed in other states purporting to exempt shareholders from personal liability for the debts of the trust. 14 It has been held otherwise, however, where the state of the forum had no settled law on the subject. 15

It has been held that the validity of a business trust the property of which consists of personalty is to be determined by the law of the domicile of the persons creating the trust, and that if the trust is valid there, it is valid everywhere. 16 This is especially so where the trust instrument expressly provides that the rights and duties of the parties are to be determined according to the laws of the state of their domicile. 17

§ 7 ----What law governs [SUPPLEMENT]

Case authorities:

Massachusetts law was applicable to a business trust organized and existing under the laws of Massachusetts where the declaration of trust, with which the shareholders became associated only by voluntary choice on the part of each of them, expressly provided that the law of Massachusetts should be the applicable law as to the rights of all parties. *Greenspun v Lindley* (1975) 36 NY2d 473, 369 NYS2d 123, 330 NE2d 79, 88 ALR3d 697.

Notwithstanding the existence of substantial contacts between Massachusetts business trust and the state of New York, where declaration of trust contained provision whereby parties agreed that their rights under the trust were to be governed by Massachusetts law, shareholders had right to rely on the terms of the declaration and, therefore, it was appropriate to apply Massachusetts law to determine, inter alia, whether complaint in shareholder's derivative action was insufficient in failing to allege a demand on trustees and shareholders. *Rottenberg v Pfeiffer*, 86 Misc 2d 556, 383 NYS2d 189.

Footnotes

Footnote 10. *Re Associated Trust* (DC) 222 F 1012; *Marchulonis v Adams*, 97 W Va 517, 125 SE 340 (trust instrument construed under Massachusetts law in action for personal injuries).

Annotation: 156 ALR 34.

The character of a business trust organized in another state will be determined, for the purposes of suit against it, by the law of the state where it was organized, and not by the law of the forum. *Textile Properties v M. J. Whittall Associates*, 157 Misc 108, 282 NYS 17.

Footnote 11. *Textile Properties v M. J. Whittall Associates*, supra.

Footnote 12. *Vischer v Dow Jones & Co.* 325 Ill App 104, 59 NE2d 884.

Footnote 13. *Harris v United States Mexico Oil Co.* 110 Kan 532, 204 P 754, error dismd 260 US 694, 67 L ed 467, 43 S Ct 11, cert den 260 US 720, 67 L ed 480, 43 S Ct 11.

Footnote 14. *Farmers & M. Nat. Bank v Anderson*, 216 Iowa 988, 250 NW 214, refusing to apply the law of Texas, which ordinarily would have been applicable, by which the shareholders of a business trust are held liable as partners notwithstanding provisions in the trust instrument expressly negating such liability, since this view was fundamentally contrary to the well-established rule of the forum that the existence of a partnership depends upon an agreement, express or implied, for mutual liability for losses, and that such liability cannot exist where, as here, there is an express stipulation against it.

Annotation: 156 ALR 121.

The established public policy of the forum is supreme, and will not be relaxed upon the ground of comity to enforce contracts which contravene such policy, even though such contracts are valid where made. *Means v Limpia Royalties* (Tex Civ App) 115 SW2d 468.

Footnote 15. *Marchulonis v Adams*, 97 W Va 517, 125 SE 340, holding that the law of Massachusetts, where the trust was organized, governed the construction of the trust instrument for the purpose of determining the liability of shareholders for the torts of the trust.

Footnote 16. *Liberty Nat. Bank & T. Co. v New England Investors Shares* (DC) 25 F2d 493 (involving law of Massachusetts).

Annotation: 156 ALR 54.

Footnote 17. *Liberty Nat. Bank & T. Co. v New England Investors Shares*, supra.

B. Other Organizations and Relationships Compared and Distinguished

§ 8 Generally

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Business trusts differ from ordinary trusts in that the primary purpose of the Massachusetts or business trust is to conduct a business for profit, while the object of the traditional trust is to hold and conserve particular property and its powers are incidental to this purpose. 18 Accordingly, business trusts are excluded from the coverage of

the Restatement of the Law of Trusts, 19 although broad trust principles apply, to a certain extent, with regard to business trusts. 20

The shareholders in a business trust will not be treated as mere co-owners of the trust property, 1 nor is a business trust a joint adventure. 2 And the fact that the declaration of trust designates the trustees as "joint tenants" does not make them such. 3

Although business trusts are, in some jurisdictions, treated as associations or considered to be associations for particular purposes, for example, for federal tax purposes, 4 business trusts may, properly speaking, be distinguished from associations. The relationship between members of a true association involves an element of mutual association and organization which does not necessarily exist between the shareholders of a business trust. Thus, it has been held that an organization created by an instrument of trust settling absolute title and control of property, and complete supervisory powers, in trustees, and giving shareholders no rights other than to receive dividends and share in the property upon dissolution of the business, cannot be deemed an association of the shareholders as contemplated by a statute providing for suit, attachment, and service of process against an association as if it were a corporation. 5

A "sociedad anonima" of the Philippine Islands, although said to have no exact counterpart in our law, apparently bears a close resemblance to a business trust. 6

§ 8 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Case authorities:

While the object of any ordinary trust is to hold and conserve a particular res, a business trust, which resembles the traditional trust in name only, is simply a convenient medium for conducting business and sharing profits. *Carey v U. S. Industries, Inc.* (1976, ND Ill) 414 F Supp 794.

Footnotes

Footnote 18. *Morrissey v Commissioner*, 296 US 344, 80 L ed 263, 56 S Ct 289.

Rules, evolved to govern the traditional type of trust, cannot be carried over and applied without change in the field of business trusts created not to conserve an estate or guarantee a steady income to certain beneficiaries, but to aggregate capital contributions of the associates for the purpose of conducting an extensive and complex business which ordinarily would be carried on by a partnership or a corporation. *Bomeisler v M. Jacobson & Sons Trust* (CA1 Mass) 118 F2d 261, cert den 314 US 630, 86 L ed 505, 62 S Ct 61.

Footnote 19. § 1, supra.

Footnote 20. §§ 3, 5, supra.

Footnote 1. *Ricker v American Loan & T. Co.* 140 Mass 346, 5 NE 284.

Footnote 2. *Polk v Chandler*, 276 Mich 527, 268 NW 732; *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Annotation: 156 ALR 35.

A joint adventure is essentially a combination of persons for the purpose of carrying out some single business enterprise or some special transaction for profit, and is treated as a partnership covering that particular transaction or enterprise and controlled largely by the principles applicable to partnerships. See *Joint Adventures*.

Footnote 3. *Re Rainbow Family Laundry Co.* (DC Ref) 47 Am Bankr Rep (F) 655.

Annotation: 156 ALR 35.

Footnote 4. §§ 87 et seq., *infra*.

Footnote 5. *Bouchard v First People's Trust*, 253 Mass 351, 148 NE 895, holding that such shareholders lacked the essential element of organization contemplated by the word "association."

Footnote 6. See *Perkins v Benguet Consol. Min. Co.* 55 Cal App 720, 132 P2d 70, cert den 319 US 774, 87 L ed 1721, 63 S Ct 1435.

§ 9 Corporations

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It is generally held, so far as pure legal principle is concerned and apart from any declaration to the contrary in a statute or constitution, 7 that a Massachusetts or business trust is not a corporation, 8 inasmuch as there are obvious, important, and fundamental differences between the two types of organizations. 9 But while a business trust is not a corporation, it has some of the attributes of a corporation 10 and is similar in its practical effect. 11 Thus, the corpus of the trust corresponds to the capital of the incorporated company; the trustees, to the board of directors; the beneficiaries, to the stockholders; the beneficial interests, to shares of stock; and the declaration of trust, to the charter. 12

Business trusts are sometimes and for some purposes, by constitution or statute, placed in the same category as corporations or, by definition, classified as such. 13 But the fact that such a trust is regarded as a corporation for certain purposes, for example, for the purpose of determining the individual liability of the members or trustees, does not mean that the corporate analogy will be indiscriminately applied or that the organization will be treated as a corporation for all purposes, 14 and such a provision has been held not to render illegal a business trust on the ground that it was a corporation within the definition and did not comply with the statutory provision with respect to corporations.

Footnotes

Footnote 7. As to statutory and constitutional provisions, see the discussion *infra*, this section.

Footnote 8. *Page v Arkansas Natural Gas Corp.* (CA8) 53 F2d 27, *affd* 286 US 269, 76 L ed 1096, 52 S Ct 507; *Swartz v Sher*, 344 Mass 636, 184 NE2d 51; *Ricker v American Loan & T. Co.* 140 Mass 346, 5 NE 284; *Michigan Trust Co. v Herpolsheimer*, 256 Mich 589, 240 NW 6 (in absence of statute); *Roberts v Aberdeen-Southern Pines Syndicate*, 198 NC 381, 151 SE 865; *State ex rel. Combs v Hopping Invest. Co.* (Okla) 269 P2d 997; *Bank of Commerce & T. Co. v McCabe*, 164 Tenn 591, 51 SW2d 850.

Annotation: 156 ALR 35.

Footnote 9. In the first place, corporations are created by charter or franchise, while a business trust owes its existence to the will and agreement of its organizers, and is not formed under the laws relating to the organization of corporations. *Hoey v Coleman* (CC) 46 F 221; *Hoadley v Essex County*, 105 Mass 519; *Roberts v Aberdeen-Southern Pines Syndicate* 198 NC 381, 151 SE 865. Annotation: 156 ALR 36.

The business trust is fundamentally different from the corporation. The stockholders of the corporation control, through the board of directors, the business of the corporation, while the unit holders of a business trust have no mutual rights and obligations and do not control the action of the trustees. The trustees of a business trust are analogous to the directors of a corporation in that both are the managers of the business of their respective institutions, but a trustee is the holder of the legal title of the trust estate and deals with it as principal, subject only to an equitable obligation to account to the beneficiaries of the trust estate, while a director does not deal with the funds of the corporation as principal but as the agent of the company. A trustee is personally liable on his contract, but a director is not as long as he acts within his authority. A trust is no entity at all, while a corporation is an artificial person. A trust is an estate, the legal title to which is vested in a trustee and the equitable title to which is held by individuals who bear no contractual relations among themselves. A corporation is an artificial body composed of individuals who own its capital stock and whose rights and liabilities are fixed by statute. *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485.

Trust shareholders are often held personally liable for the debts of the trust, while stockholders in a regularly formed corporation are not so liable. *State v Cosgrove*, 36 Idaho 278, 210 P 393.

In *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493, holding that a business trust was not a corporation under a constitutional definition of the term "corporation" as including all joint-stock companies or associations having any powers or privileges not possessed by individuals or partnerships, the court said: "In our view, the cases mentioned, and the constitutional and statutory provisions cited, do not apply here to the subscribers who are not associated in the ownership of property, or in any way in its management or control, since both the title and the property and the control [are] vested in the syndicate managers."

Footnote 10. *Rice v Rockefeller*, 134 NY 174, 31 NE 907; *Roberts v Aberdeen-Southern Pines Syndicate*, 198 NC 381, 151 SE 865.

Annotation: 156 ALR 37.

Business trusts share with corporations the characteristics that title to the property is not vested in the holders of the beneficial interests, there is centralized management, there may be transfers of beneficial interests, the liability of shareholders is limited, and the continuity of the organization is not interrupted by the death of a shareholder. *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13.

Like a corporation, a business trust has its own profits and losses, and the shareholders, like stockholders, have none, except through the medium of the trustees and in the form of dividends or assessments. *Brown v Bedell*, 263 NY 177, 188 NE 641, reh den 264 NY 453, 191 NE 510, motion den 264 NY 513, 191 NE 541.

An elaborate comparison between trusts and corporations is made by Prof. Wilgus in 13 Mich L Rev 71, 205.

Footnote 11. *Swartz v Sher*, 344 Mass 636, 184 NE2d 51.

Footnote 12. *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485.

Footnote 13. *Nedeau v United Petroleum*, 251 Mich 673, 232 NW 202 (within meaning of statute requiring corporations to file reports and pay fees); *Hemphill v Orloff*, 238 Mich 508, 213 NW 867, 58 ALR 507, affd 277 US 537, 72 L ed 978, 48 S Ct 577 (within statute regulating foreign corporations doing business in the state).

Annotation: 156 ALR 37.

In *Weber Engine Co. v Alter*, 120 Kan 557, 245 P 143, 46 ALR 158, a business trust was, under the constitutional provision therein involved, held to be in the nature of a corporation. Generally, as to the rule in this jurisdiction, see § 6, supra.

Footnote 14. *Kresberg v International Paper Co.* (CA2 NY) 149 F2d 911, cert den 326 US 764, 90 L ed 460, 66 S Ct 146; *Hamilton v Young*, 116 Kan 128, 225 P 1045, 35 ALR 496 (under a constitutional provision defining the term "corporation" so as to include all associations and joint-stock companies having powers and privileges not possessed by individuals or partnerships).

Footnote 15. *Hodgkiss v Northland Petroleum Consolidated*, 104 Mont 328, 67 P2d 811 (holding the constitutional provision to intend a definition of the term as applied to that particular article of the constitution, and not to extend to every statutory provision relative to corporations). And see *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Annotation: 156 ALR 38.

§ 10 Partnerships

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It is often stated generally that a business trust is not a partnership and that the members or shareholders thereof are not partners. 16 But while there are essential differences between a business trust and an ordinary partnership, 17 certain courts have stated generally that business trusts are partnerships and that the members or shareholders thereof are treated as partners. 18 It is to be noted, however, that the question whether a particular business trust is, in legal contemplation, a partnership, may depend upon the situation in which the question is presented and the purposes for which it is to be determined. Accordingly, general statements as to the status of business trusts, such as the statement that they are governed by the rules applicable to ordinary partnerships, should be considered in their context and not extended to the determination of an issue different from that in the mind of the court uttering the statement. 19 Furthermore, the question whether a strict trust or a partnership is created has been said to depend upon the language of the trust instrument involved in each case. 20

In Massachusetts and some other jurisdictions such trusts are treated as partnerships for certain purposes where the power of control over the property and business of the trust is vested in the shareholders. 1 But even in a jurisdiction which is strict in holding shareholders of business trusts liable as partners for the debts of the organization, it is held that they are not partners as between themselves or as against the trustees. 2

§ 10 ----Partnerships [SUPPLEMENT]

Practice Aids: Provision—No partnership created. Business Trusts 4 Am Jur Legal Forms 2d § 51:16.

Footnotes

Footnote 16. Crocker v Malley, 249 US 223, 63 L ed 573, 39 S Ct 270, 2 ALR 1601 (for purposes of federal tax); Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485 (involving liability of shareholders for debts); City Bank Farmers' Trust Co. v Graves, 272 NY 1, 3 NE2d 612, 108 ALR 333 (involving an excise tax on such a trust); Rhode Island Hospital Trust Co. v Copeland, 39 RI 193, 98 A 273 (liability of shareholders for debts of the trust).

Annotation: 156 ALR 39.

Footnote 17. Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485, involving personal liability of shareholders on contract of the trust.

Annotation: 156 ALR 39.

In an ordinary partnership membership is limited to those people selected by the individual partners for their personal qualifications, a new partner cannot be introduced without the consent of the other partners, and the death of a partner dissolves the partnership; but none of these characteristics are applicable to a business trust with transferable shares. *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13.

One of the principal features distinguishing a business trust from a partnership is that in the former the legal title is in the trustee, with certain equitable or beneficial rights in others. *Liquid Carbonic Co. v Sullivan*, 103 Okla 78, 229 P 561, involving liability of shareholders.

Footnote 18. *Willey v W. J. Hoggson Corp.* 90 Fla 343, 106 So 408 (holding that all shareholders, as partners, must be joined in an action by or on behalf of the trust); *Ing v Liberty Nat. Bank*, 216 Ky 467, 287 SW 960 (involving liability of members for debts); *American Nat. Bank v Reclamation Oil Producing Asso.* 156 La 652, 101 So 10 (liability of shareholders for debts); *Thompson v Schmitt*, 115 Tex 53, 274 SW 554 (involving liability of shareholders for debts); *Means v Limpia Royalties* (Tex Civ App) 115 SW2d 468 (involving personal liability of shareholders).

Annotation: 156 ALR 39.

Footnote 19. *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13.

Footnote 20. *Betts v Hackathorn*, 159 Ark 621, 252 SW 602, 31 ALR 847, involving personal liability of trustees and shareholders.

Practice Aids: –Trust instrument provision negating partnership relation. 3 Am Jur Legal Forms 3:1, 3:12.

Footnote 1. § 11, *infra*.

Footnote 2. *Davis v Hudgins* (Tex Civ App) 225 SW 73.

Annotation: 156 ALR 41.

A business trust is treated as a partnership only for the purpose of fixing the liability of the shareholders to third parties, and as between the members or shareholders the trust agreement is binding and the organization will not be treated as a partnership. *Ziegelmeyer v Joyce* (Tex Civ App) 97 SW2d 346, for purpose of fixing venue of action.

§ 11 --Tests for determining true nature of organization; "control test"

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According to the prevailing modern view, the question whether a trust instrument gives rise to a partnership or to a true business trust depends upon such additional elements as an intention or agreement of the parties to share losses and to become partners, and not merely or exclusively upon their right to participate in profits. 3

The criterion most frequently applied in determining whether an organization in the form of a Massachusetts or business trust is, in legal effect, a true trust or a partnership, and which is particularly applied in determining whether or not shareholders are liable as partners for the debts of the trust, 4 is the "control test." According to this doctrine, whether an organization in the form of a business trust is a true trust or a partnership depends upon the manner in which the business is to be conducted and upon the repository of the ultimate power of control over the affairs and property of the concern. If, under the trust instrument, the trustees are vested with title to its property and with the exclusive right to manage its business and conduct its affairs, free from the control of the shareholders, the organization is treated as a trust; but if the trustees are subject to the control of the shareholders in these particulars and the shareholders have the real mastery over the affairs of the concern, the organization is treated as a partnership and the shareholders as partners. 5

The fact that by the terms of the trust instrument the trustees, and not the shareholders, are the masters, is indicative of a true trust and not of a partnership. 6 On the other hand, where the instrument constitutes the trustees merely managing agents and not principals, the organization will be treated as a partnership, 7 and this result follows, although the control is to be exercised by and through a business manager, where he is the agent of the beneficiaries for this purpose. 8

It is generally held that under the control test, control is to be measured by the potential residing in the shareholders under the terms of the trust instrument, rather than by the degree to which it has been actually exerted. 9

Factors indicative of ultimate control of a business trust, and hence whether it is in legal contemplation a true trust or a partnership, include the right of the shareholders to annually or regularly elect trustees, to remove the trustees at any time without cause and fill vacancies caused by the removal, to amend or terminate the trust, and to direct the action of the trustees. 10 These are treated in detail under the discussion of the shareholders' liability, where the question of trust or partnership is particularly apposite. 11 It may be noted, however, that in resolving this question the courts generally refer to a combination of factors rather than to any single factor as constituting the ultimate power of control. 12

§ 11 --Tests for determining true nature of organization; [SUPPLEMENT]

p 386, n 5-

Practice Aids: Answer denying that defendant company is a business trust. 5 Am Jur Pl & Pr Forms (Rev), Business Trusts, Form 5.

Footnotes

Footnote 3. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871 (involving personal liability of shareholders and trustees); *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485 (involving personal liability of shareholders); *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493 (involving liability of shareholders for debts).

Annotation: 156 ALR 42.

Footnote 4. § 34, *infra*.

Footnote 5. *Hecht v Malley*, 265 US 144, 68 L ed 949, 44 S Ct 462 (for purposes of federal taxation); *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871; *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485; *Hamilton v Young*, 116 Kan 128, 225 P 1045, 35 ALR 496 (involving liability of trust officers on note); *First Nat. Bank v Chartier*, 305 Mass 316, 25 NE2d 733; *Downey Co. v Whistler*, 284 Mass 461, 188 NE 243 (involving liability of successor trustees as partners); *Darling v Buddy*, 318 Mo 784, 1 SW2d 163; 58 ALR 493; *Goubeaux v Krickenberg*, 126 Ohio St 302, 185 NE 201 (involving application of statute requiring partnerships to file a certificate of fictitious name); *Earlsboro Gas Co. v Vern H. Brown Drilling Co.* 175 Okla 320, 52 P2d 730; *Narragansett Mut. F. Ins. Co. v Burnham*, 51 RI 371, 154 A 909 (for purposes of taxation).

Annotation: 156 ALR 42, 43.

In the leading case of *Williams v Milton*, 215 Mass 1, 102 NE 355, the court adopted the control test, holding that where title to the property and the exclusive management and control of the trust business are vested in the trustees, and the sole right of the shareholders is to have the property administered in their interest by the trustees and to receive the income from the business and property and their share of the corpus when the trust comes to an end, the organization is a true trust and not a partnership. The question involved in this case was whether the trust amounted to a partnership for the purpose of taxation.

Footnote 6. *Williams v Milton*, *supra*, involving taxation.

Footnote 7. *Neville v Gifford*, 242 Mass 124, 136 NE 160, involving liability of shareholders.

Annotation: 156 ALR 45.

"The true test of such a trust seems to be to determine whether the relation between the parties is that of principal and agent or trustee and beneficiary, and whether the subscribers are separated from direct interest, ownership, and control of the property and affairs of the trust." *Brown v Bedell*, 263 NY 177, 188 NE 641, reh den 264 NY 453, 191 NE 510, motion den 264 NY 513, 191 NE 541, involving liability of members.

Footnote 8. *Engineering Service Corp. v Longridge Investment Co.* 153 Cal App 2d 404, 314 P2d 563, followed in *Bariffi v Longridge Development Co.* 156 Cal App 2d 583, 320 P2d 192 (title to property held by trustee but control vested in three named

representatives of the beneficiaries); *Bernesen v Fish*, 135 Cal App 588, 28 P2d 67.

Footnote 9. *Goubeaux v Krickenberg*, 126 Ohio St 302, 185 NE 201 (right to sue in trust name without filing certificate of fictitious name); *Marchulonis v Adams*, 97 W Va 517, 125 SE 340 (involving liability of shareholders for the torts of the trust).

Annotation: 156 ALR 45, 46.

To characterize a business trust as a partnership on the ground of control retained by the shareholders, it is not necessary that the power of control should be actually exercised, but is sufficient if the power is given or reserved, though never exercised. *Simson v Klipstein* (DC NJ) 262 F 823, right of trustees to maintain action.

Footnote 10. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

Annotation: 156 ALR 46, 114 et seq.

Footnote 11. § 36, *infra*.

Footnote 12. § 36, *infra*.

§ 12 Joint-stock companies

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Although the business trust has been referred to as a joint-stock company or association in a number of cases (most of which were decided relatively early in the history of such trusts),¹³ and although it has been treated as such in one state,¹⁴ such a trust is generally held not to be a joint-stock company or association.¹⁵ The relationship between shareholders and managers is basically different in the two institutions. In a joint-stock company the managers are agents for the shareholders, but in the case of a business trust the trustees are principals and the shareholders are *cestuis que trustent*,¹⁶ and it has been said that it would be unnatural to group together the beneficiaries and the trustees of a Massachusetts real-estate trust and to convert them into a joint-stock association by uniting their contrasted functions and powers.¹⁷ Nevertheless, an attempt to create a business trust may result in an organization in the nature of a joint-stock company where the shares are evidenced by transferable certificates, the trustee is divested of control and made subservient to the beneficiaries, the management of the association is vested in a committee, and it is apparent that the parties do not intend to create a partnership.¹⁸

Footnotes

Footnote 13. See, for instance, *Clagett v Kilbourne*, 1 Black (US) 346, 17 L ed 213; *Holt v Blake*, 47 Me 62.

Annotation: 156 ALR 47.

Footnote 14. A business trust engaged in the mercantile business is a joint-stock company under a statute governing such companies, and the shareholders are liable as partners, although the trust instrument vests exclusive control over the trust property and business in the trustees and purports to exempt the shareholders from personal liability. *Thompson v Schmitt*, 115 Tex 53, 274 SW 554.

A Massachusetts trust is usually nothing more or less than a joint-stock association. *Continental Supply Co. v Adams* (Tex Civ App) 272 SW 325, error ref.

Annotation: 156 ALR 48.

Footnote 15. *Crocker v Malley*, 249 US 223, 63 L ed 573, 39 S Ct 270, 2 ALR 1601 (for purposes of federal taxation); *Betts v Hackathorn*, 159 Ark 621, 252 SW 602, 31 ALR 847; *Bouchard v First People's Trust*, 253 Mass 351, 148 NE 895.

Annotation: 156 ALR 48.

Footnote 16. *Betts v Hackathorn*, 159 Ark 621, 252 SW 602, 31 ALR 847.

"If we take the unincorporated joint-stock association, abolish the board of managers or directors, and vest the management directly in the trustees, who hold legal title to all the property, we have the so-called business trust." Magruder, 23 *Columbia L Rev* 423, 425.

Footnote 17. *Crocker v Malley*, 249 US 223, 63 L ed 573, 39 S Ct 270, 2 ALR 1601.

Footnote 18. *Earlsboro Gas Co. v Vern H. Brown Drilling Co.* 175 Okla 320, 52 P2d 730, liability of shareholders for debts incurred by the association.

II. CREATION, ORGANIZATION, AND DURATION

§ 13 Generally

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Massachusetts or business trusts are created by the act and agreement of the parties, and do not depend upon statutory law for their validity. 19 A trust of this nature is generally established by execution of a trust instrument by one or more trustees who hold or will receive the corpus of the trust, setting forth the terms of the trust, details of the organization, and the manner of conducting business. 20

Although the business of the trust is usually managed by the trustees in whom is vested the title to the trust property, for the benefit of the holders of transferable certificates of

beneficial interest, sometimes the management is vested in other persons named as officers or as a board. 1 The flexibility of the business trust admits considerable latitude in adapting the organization to unusual requirements of the particular enterprise. 2

§ 13 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Footnotes

Footnote 19. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871; *Morriss v Finkelstein* (Mo App) 127 SW2d 46.

Footnote 20. *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485.

Annotation: 156 ALR 63.

Footnote 1. *American R. Exp. Co. v Asher*, 218 Ky 172, 291 SW 21.

Footnote 2. For example, the trust instrument may authorize the trustees to create a subsidiary or auxiliary trust. *Berlin v Krenn & Dato*, 350 Ill 284, 183 NE 330.

§ 14 The trust instrument

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A business trust is formed under, or on the basis of, an instrument or declaration of trust, 3 which must conform to the statutory and other requirements relating to trusts generally and should be executed in the same manner as are other trust instruments and contracts. The formalities to be observed in the execution and acknowledgment of the instrument depend upon the character of the property involved and upon the provisions of local statutes. Where no real estate is involved and there is no statute requiring a writing, it is even possible (though of course never advisable) to create a business trust by parol agreement. 4

No special form need be followed in creating a Massachusetts or business trust. It is even possible to create such a trust without the use of the word "trust" or "trustee," where the intention to do so appears from the instrument as a whole. 5 The trust instrument should, however, embody all the elements necessary to constitute a business trust. There should be an unequivocal declaration of trust, a vesting of title in named trustees, a description of the character of the business to be carried on, an outline of the powers and duties of the trustees, provisions for the tenure and election of trustees and for the issuance of certificates of beneficial interest and the transfer thereof, with a statement of the rights of shareholders with respect to profits and dividends. If desired, there may be

provisions fixing the term and duration of the trust and limiting or negating the liability of shareholders and trustees to third persons. 6

The members and trustees are entitled to have the trust instrument applied according to its terms, so long as it does not offend the law or public policy of the state. 7 But the parties to the trust instrument may, so far as concerns their rights as among themselves, waive the provisions of the trust instrument. 8

§ 14 ----The trust instrument [SUPPLEMENT]

Practice Aids: Composite declaration and agreement of business trust. 4 Am Jur Legal Forms 2d § 51:15.

Declaration of trust. 15 Am Jur Legal Forms 2d § 218:15.

Footnotes

Footnote 3. Hecht v Malley, 265 US 144, 68 L ed 949, 44 S Ct 462; Goldwater v Oltman, 210 Cal 408, 292 P 624, 71 ALR 871; Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485.

Footnote 4.

Annotation: 156 ALR 64.

As to requirements with regard to trust instruments generally, see Trusts.

Footnote 5. Darling v Buddy, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Annotation: 156 ALR 65.

Furthermore, it is not necessary that all of the conditions of the trust be expressed in a single document. So, the fact that certain property acquired by a business trust is not described in the declaration of trust does not defeat the title of the trust estate, where it is adequately described in the conveyance to the trust. Hodgkiss v Northland Petroleum Consolidated, 104 Mont 328, 67 P2d 811.

Footnote 6.

Annotation: 156 ALR 65, 73.

Practice Aids: –Declarations and articles of business trusts. 3 Am Jur Legal Forms 3:1-3.26.1. **Annotation:** 156 ALR 65.

Footnote 7. Hamilton v Young, 116 Kan 128, 225 P 1045, 35 ALR 496; Reffon Realty Corp. v Adams Land & Bldg. Co. 128 Md 656, 98 A 199. And see Hossack v Ottawa Development Asso. 244 Ill 274, 91 NE 439.

Practice Aids: –Provision that trust instrument shall be binding on shareholders. 3 Am Jur Legal Forms 3:104, 3:105.

§ 15 --Construction

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In the construction of a business trust instrument, the intention of the parties, as expressed in the instrument, will govern. 9 While ordinary deeds of trust are construed strictly in order to afford the maximum protection to the beneficiaries, it has been held that instruments creating business trusts are to be construed as analogous to a corporate charter and as broadly interpreted, so far as concerns the powers of the trustees. 10

An express provision of the trust instrument that the rights and duties of the several parties shall be determined according to the law of the state of the domicile of the persons creating the trust has been given effect in determining these matters, 11 as has a provision that the trustees shall have the power to construe the instrument and that their construction shall be final and conclusive. 12

The trust instrument will be construed, if possible, as prohibiting the trustee from doing, on his individual account and for his individual advantage or profit, any of the things therein specified as the business or activities of the trust. 13 Also, a declaration of trust will not be construed as rendering the trustees immune from accounting for their conversion or misappropriation of the assets of the trust, if any other construction can be given the language. 14

Footnotes

Footnote 9. *Thomle v Soundview Pulp Co.* 181 Wash 1, 42 P2d 19.

Footnote 10. *Bomeisler v M. Jacobson & Sons Trust (CA1 Mass)* 118 F2d 261, cert den 314 US 630, 86 L ed 505, 62 S Ct 61.

Footnote 11. *Liberty Nat. Bank & T. Co. v New England Investors Shares (DC)* 25 F2d 493.

Footnote 12. *Lambach v Anderson*, 228 Iowa 1173, 293 NW 505.

Footnote 13. *Oil Fields Corp. v Dashko*, 173 Ark 533, 294 SW 25, cert den 275 US 548, 72 L ed 419, 48 S Ct 85, reh den (US) 72 L ed 1016, 48 S Ct 206, wherein the court said: "Certainly those who became beneficiaries under the terms of the trust instrument had the right to expect the trustee, so long as he was engaged in the character of business set forth in . . . the trust instrument, to conduct same not for his individual and private account, but solely for the beneficiaries."

Footnote 14. *Palmer v Taylor*, 168 Ark 127, 269 SW 996, holding that a provision of a declaration of trust that the shareholders shall not have a right to call for a partition, for a

dissolution of the trust, or for an accounting, will be construed as being intended to give permanency to the trust, and not as giving the trustees the right to convert or misappropriate the assets of the trust or to enjoy immunity from accounting therefor.

Annotation: 156 ALR 156, 157.

A provision of the trust instrument that the trustee should be liable only "for the result of his own gross negligence or bad faith" was held not to relieve such trustee from liability for his wilful diversion of funds. *Digney v Blanchard*, 226 Mass 335, 115 NE 424.

§ 16 --Recording

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The necessity, permissibility, and effect of recording a business trust instrument depend upon local statutes. An authorized recording of such an instrument has been held to constitute notice to persons dealing with the trust. 15 However, the recording of the trust instrument does not give constructive notice of the contents thereof to parties dealing with the trust, where the instrument is not such as is required or entitled to be recorded. 16

The failure to record the declaration of trust as required by state law has been held not to deprive the trustees of the powers expressly conferred upon them by the terms of the trust. 17

Footnotes

Footnote 15. *Re Rainbow Family Laundry Co.* (DC Ref) 47 Am Bankr Rep (F) 655.

Annotation: 156 ALR 72.

Apparently one dealing with a trustee in his individual capacity, with respect to land the title to which was wrongfully taken by the trustee in his own name, is not charged with notice of the provisions of the trust instrument limiting the trustee's powers in this respect, unless the trust instrument is recorded in the county where the land is situated. See *Oil Fields Corp. v Dashko*, 173 Ark 533, 294 SW 25, cert den 275 US 548, 72 L ed 419, 48 S Ct 85, reh den (US) 72 L ed 1016, 48 S Ct 206.

Footnote 16. *Hunter v Winter*, 268 Ill App 487; *Continental Supply Co. v Adams* (Tex Civ App) 272 SW 325; *Harvey Co. v Braden* (Tex Civ App) 260 SW 655.

Recording of a declaration of trust does not necessarily charge third parties with notice of its provisions. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

The specific statutory requirements in this state governing filing declarations of business

trusts and their annual reports provide the public with reasonable means of obtaining information of such trusts. Recording the trust agreement in the registry of deeds places upon that record the terms of such a trust sufficiently to apprise purchasers of the trustees' powers. But in the absence of a specific statutory requirement that a certificate of the issue of shares of such a trust be recorded in the registry of deeds, no such obligation to record exists by implication, and such recording is not essential to a showing upon the record that the trust exists. *Swartz v Sher*, 344 Mass 636, 184 NE2d 51.

Footnote 17. *Gutelius v Stanbon* (DC) 39 F2d 621.

§ 17 --Amendment

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The power to amend the business trust instrument or to change the terms of the trust depends upon the provisions of that instrument, 18 which will usually provide for the amendment of the trust by the trustees or by the shareholders, or by the former with the assent of the latter.

Business trusts would seem to be subject to the general rule applying to ordinary trusts, that in the absence of a provision to the contrary therein the instrument cannot be modified or amended except with the consent of all the parties. 19 Moreover, a nonassenting shareholder in a business trust has been held not to be bound by a fundamental change in the character of the trust from a profit to a nonprofit organization, and to be entitled to recover from the reorganized trust and its trustees the face value of his certificates with legal interest. 20

Where trust managers seek the approval of the shareholders of a proposed amendment to the trust instrument, they owe the duty of a full and fair disclosure of all pertinent facts to the shareholders. 1

§ 17 --Amendment [SUPPLEMENT]

Practice Aids: Amendment of trust instrument. 4 Am Jur Legal Forms 2d § 51:74.

Case authorities:

While provision for majority control of trustees is a practical and effective means of facilitating business operations and a majority vote of the trustees may bind the trust with respect to amendment of trust instruments, all trustees must be adequately consulted and must participate in business transactions involved in administration of the trust. *Richardson v Clarke* (1977) 372 Mass 859, 364 NE2d 804.

Footnotes

Footnote 18. See generally Annotation: 128 ALR 1173 et seq.

Practice Aids: –Provisions as to amendment. 3 Am Jur Legal Forms 3:1, 3:7, 3:65, 3:66.

Footnote 19. See *Dunbar v Redfield*, 7 Cal 2d 515, 61 P2d 744, wherein the evidence was held to sustain a finding that the shareholders' assent to the amendment of the trust instrument was not procured by fraud on the part of the trustees.

As to trusts generally, see *Trusts* (1st ed § 68).

Footnote 20. *Memorial Park v Vaughn*, 191 Okla 50, 126 P2d 711.

Footnote 1. Where trust managers, in notifying the beneficiaries of a proposed amendment to the trust instrument, do more than briefly specify the nature of the proposed amendment, as directed by the trust instrument, and become advocates for the adoption of the amendment, it then becomes their duty to make full and fair disclosure to the shareholders of all facts upon which the shareholders must exercise their judgment in determining whether to approve or disapprove the amendment; and an amendment adopted without full disclosure is ineffective and void. *Shapiro v Chicago Title & Trust Co.* 328 Ill App 650, 66 NE2d 731.

§ 18 Name and seal

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The business trust normally derives its name from the declaration of trust, although the trustees may be given the authority to select a name for the organization for business purposes. 2 In the absence of a statute prohibiting it, a business trust may adopt and carry on business and make contracts under an assumed name, or tradename, 3 which may be entirely fictitious. 4

Statutes requiring persons or partnerships transacting business under a fictitious name to file a certificate giving the names and addresses of those making use of such name do not apply to Massachusetts or business trusts that are, in their nature, pure trusts and not partnerships. 5 However, a different result has been reached where, because of the power of control vested in the shareholders, the organization is, in legal effect, a partnership. 6

Business trusts sometimes adopt and use a seal. 7

Footnotes

Footnote 2. *Hamilton v Young*, 116 Kan 128, 225 P 1045, 35 ALR 496; *Schwartz v Abbott Motors, Inc.* 344 Mass 28, 181 NE2d 334 (wherein the declaration of trust

provided that the trustees could act "under the name of Community Acceptance Co., or such other name or names as the Trustees may from time to time adopt").

Practice Aids: –Trust instrument provisions as to name or change of name. 3 Am Jur Legal Forms 3:1, 3:3, 3:68.1.

Footnote 3. *Hamilton v Young*, 116 Kan 128, 225 P 1045, 35 ALR 496; *Rand v Farquhar*, 226 Mass 91, 115 NE 286; *Hodgkiss v Northland Petroleum Consolidated*, 104 Mont 328, 67 P2d 811.

Annotation: 156 ALR 78.

There is no legal inhibition on the power of trustees of a business trust to adopt a business name or style for the transaction of the affairs of the trust. *Beilin v Krenn & Dato*, 350 Ill 284, 183 NE 330.

The use of an adopted name by the trust is not only convenient but often avoids confusion and ambiguity as to the capacity in which the trustees make contracts and carry on the business. *General American Oil Co. v Wagoner Oil & Gas Co.* 118 Okla 183, 247 P 99.

The adoption and use by a business trust of a name indicating its trust character does not violate a statute prohibiting the assumption of a fictitious corporate name. *Venner v Chicago City R. Co.* 258 Ill 523, 101 NE 949, in which the name "Chicago City and Connecting Railways Collateral Trusts" was held not to imply a corporation.

Footnote 4. *General American Oil Co. v Wagoner Oil & Gas Co.* 118 Okla 183, 247 P 99.

See 13 Mich L Rev 208, 209.

The right of trustees of a trust created for business purposes to adopt a name for the conduct of their business is no less than the right universally conceded to individuals, partnerships, and corporations. In this respect, the principles of agency are not involved. *Schwartz v Abbott Motors, Inc.* 344 Mass 28, 181 NE2d 334.

Footnote 5. *National City Finance Co. v Lewis* (Cal App) 3 P2d 316, reh den (Cal App) 4 P2d 163, and superseded 216 Cal 254, 14 P2d 298. And see *General American Oil Co. v Wagoner Oil & Gas Co.* 118 Okla 183, 247 P 99.

Annotation: 156 ALR 79.

Footnote 6. *Kadota Fig Asso. v Case-Swayne Co.* 73 Cal App 2d 796, 167 P2d 518; *Goubeaux v Krickenberg*, 126 Ohio St 302, 185 NE 201.

Footnote 7. See *Spotswood v Morris*, 12 Idaho 360, 85 P 1094; *Superior Oil & Ref. Syndicate v Handley*, 99 Or 146, 195 P 159.

Annotation: 156 ALR 79.

Practice Aids: –Authorization of trustees to adopt and use seal. 3 Am Jur Legal

§ 19 Bylaws

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Business trusts sometimes operate under bylaws similar to those adopted by corporations to govern the details of corporate affairs, 8 and there would seem to be no reason why the creators of such a trust may not adopt bylaws or insert in the trust instrument a provision authorizing the trustees to do so. Indeed, it would seem that the trustees would ordinarily have the power, without specific authorization, to adopt bylaws consistent with the trust instrument to facilitate the functioning of the trust and the transaction of trust business. 9

§ 19 ----Bylaws [SUPPLEMENT]

Practice Aids: Trustees' regulations 15 Am Jur Legal Forms 2d §§ 218:34, 218:35.

Footnotes

Footnote 8. See *Spotswood v Morris*, 12 Idaho 360, 85 P 1094; *Horgan v Morgan*, 233 Mass 381, 124 NE 32. See also *First Nat. Bank v Chartier*, 305 Mass 316, 25 NE2d 733, in which there was no formal trust deed or agreement, other than bylaws.

Practice Aids: –Trust instrument provisions as to adoption, amendment, and repeal of bylaws. 3 Am Jur Legal Forms 3:67.

–Authorization to trustee to formulate rules and regulations. 3 Am Jur Legal Forms 3:64.

Footnote 9.

Annotation: 156 ALR 75.

§ 20 Purpose or business

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The business trust has been utilized in many types of business endeavor, 10 including

businesses of considerable magnitude. 11 In the absence of statutory restrictions, 12 there is nothing inherent in the business trust to prevent it from carrying on any kind of lawful business activity that individuals, partnerships, or corporations might engage in, 13 as is evident from a consideration of the wide variety of business pursuits for which business trusts have been organized. 14

§ 20 ----Purpose or business [SUPPLEMENT]

Practice Aids: The vires defence—"ultra vires" as a defence to criminal or civil proceedings, 51 Cambridge LJ 308 (1992).

Management and development of real estate. 4 Am Jur Legal Forms 2d § 51:23.

Export business. 4 Am Jur Legal Forms 2d § 51:27.

Employee welfare promotion. 4 Am Jur Legal Forms 2d § 51:28.

Footnotes

Footnote 10. In *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871, it was said that the law "is not static, but is ever growing and expanding, and in recent years this form of handling property has been extended to nearly every field of activity."

Footnote 11. § 2, *supra*.

Footnote 12. §§ 77 et seq., *infra*.

Footnote 13.

Annotation: 156 ALR 79.

In jurisdictions which view business trusts as organizations in the nature of corporations, it has been said that they should be limited to business purposes allowed to private corporations under general laws. *Weber Engine Co. v Alter*, 120 Kan 557, 245 P 143, 46 ALR 158. But a later holding indicates that business trusts are less handicapped with ultra vires problems than corporations. *Linn v Houston*, 123 Kan 409, 255 P 1105.

Footnote 14. See the following illustrative cases: *Helvering v Coleman-Gilbert Associates*, 296 US 369, 80 L ed 278, 56 S Ct 285 (operation and management of apartment houses); *Helvering v Combs*, 296 US 365, 80 L ed 275, 56 S Ct 287 (oil well development); *Morrissey v Commissioner of Internal Revenue*, 296 US 344, 80 L ed 263, 56 S Ct 289 (construction and operation of golf course); *Crocker v Malley*, 249 US 223, 63 L ed 573, 39 S Ct 270, 2 ALR 1601 (real-estate business); *Eliot v Freeman*, 220 US 178, 55 L ed 424, 31 S Ct 360 (purchasing, improving, holding, and selling land and buildings, and operating an office building with elevator service, janitor service, etc.); *White v Hornblower (CA1 Mass)* 27 F2d 777 (liquidation of corporation); *Palmer v Taylor*, 168 Ark 127, 269 SW 996 (manufacturing); *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871 (production of motion pictures); *Charles Nelson Co. v Morton*, 106 Cal App 144, 288 P 845 (building and equipping racing speedway); *Wimer & Co. v*

Downs, Inc. 77 Colo 377, 237 P 155 (mining); Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485 (real-estate business); Weber Engine Co. v Alter, 120 Kan 557, 245 P 143, 46 ALR 158 (road-construction enterprises); Hamilton v Young, 116 Kan 128, 225 P 1045, 35 ALR 496 (manufacturing, producing, and refining oil); Schwartz v Abbott Motors, Inc. 344 Mass 28, 181 NE2d 334 (business of making loans, with or without security); First Nat. Bank v Chartier, 305 Mass 316, 25 NE2d 733 (loan and mortgage business); Hemphill v Orloff, 238 Mich 508, 213 NW 867, 58 ALR 507, affd 277 US 537, 72 L ed 978, 48 S Ct 577 (dealing in commercial paper); People v Clum, 213 Mich 651, 182 NW 136, 15 ALR 253 (collection of accounts for members); Wm. Lindeke Land Co. v Kalman, 190 Minn 601, 252 NW 650, 93 ALR 1393 (restaurant business); Darling v Buddy, 318 Mo 784, 1 SW2d 163, 58 ALR 493 (acquisition and operation of railroad); Memorial Park v Vaughn, 191 Okla 50, 126 P2d 711 (cemetery business); Liquid Carbonic Co. v Sullivan, 103 Okla 78, 229 P 561 (manufacturing and bottling); Yeaman v Galveston City Co. 106 Tex 389, 167 SW 710 (promotion of establishment of city); Connally v Lyons, 82 Tex 664, 18 SW 799 (general mercantile business); Lowman v Guie, 130 Wash 606, 228 P 845 (publication of newspaper).

Annotation: 156 ALR 80-82.

Practice Aids: –Purpose provisions in trust instruments. 3 Am Jur Legal Forms 3:1, 3:13-3:26.1.

§ 21 Duration 15

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The duration of a business trust may properly be, and generally is, specified by the terms of the instrument of trust. 16 However, in the absence of statute 17 there seems to be no legal necessity for limiting the term of a business trust. It is generally held that a business trust which is to continue for an indefinite period does not violate the rule against perpetuities nor that against restraints on alienation, since these rules are directed solely against remoteness of vesting and suspension or withholding of the power of alienation, and all interests provided for in the property of such a trust vest immediately and may be conveyed or transferred by the owners thereof. 18 This is especially clear where the business of the trust, and its main object and purpose, are to develop and sell its real property. 19

Footnotes

Footnote 15. As to termination and dissolution, see §§ 92-94, *infra*.

Footnote 16. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871; *Mallory v Russell*, 71 Iowa 63, 32 NW 102.

Practice Aids: –Trust instrument provisions as to duration of business trust. 3 Am Jur

Legal Forms 3:1, 3:63, 3:114, 3:115.

Footnote 17. See *Hauser v Catlett*, 197 Okla 668, 173 P2d 728; *Liquid Carbonic Co. v Sullivan*, 103 Okla 78, 229 P 561, involving an Oklahoma statute authorizing the creation of express trusts, including business trusts, requiring that such trusts be limited in duration either to a definite period of not to exceed 21 years or to the period of the life or lives of the beneficiary or beneficiaries thereof, and requiring that the trust instrument shall specify the period of duration.

Footnote 18. *Hart v Seymour*, 147 Ill 598, 35 NE 246; *Hodgkiss v Northland Petroleum Consolidated*, 104 Mont 328, 67 P2d 811; *Baker v Stern*, 194 Wis 233, 216 NW 147, 58 ALR 462.

Annotation: 156 ALR 76.

The entire ownership is never for a moment uncertain or unvested, and at any time each owner can freely dispose of his property or it can be transferred to his creditor by the ordinary processes of the law or the trust can be terminated at the will of the owners of the equitable interest. *Howe v Morse*, 174 Mass 491, 55 NE 213.

A provision of a trust instrument giving shareholders the right at any time to terminate the trust and to acquire absolute ownership of a portion of the trust property is sufficient to prevent a perpetuity or an illegal restraint upon alienation. *Liberty Nat. Bank & T. Co. v New England Investors Shares, Inc.* (DC Mass) 25 F2d 493.

Footnote 19. *Hart v Seymour*, 147 Ill 598, 35 NE 246.

III. SHARES AND CERTIFICATES

§ 22 Generally

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The proportional equitable ownership interest of each cestui que trust in a business trust is usually evidenced by a certificate known as a share, stock share, certificate, or receipt. 20 The certificate is a muniment of title and evidence of the ownership of stock, 1 and it has been said that such certificates are not chattels but are evidence of intangible rights which have some of the characteristic qualities of chattels. 2

The courts have taken somewhat different views of the nature of a shareholder's rights in the trust estate, depending to some extent upon the purpose of the determination. Thus, the interest of a shareholder in a business trust has been said to constitute personalty and not real estate, although the trust estate consists largely of real property, 3 and notwithstanding the frequent statement that shareholders have an equitable interest in the

trust property. 4 However, for purposes of taxation it has been held that shares in a Massachusetts trust partake of the nature of the trust property and are real or personal property accordingly as the property of the trust is, actually or under the principle of equitable conversion. 5 And a certificate of shares in a true business trust has been held to be not a "security," within the meaning of a taxing statute, but a muniment of title to an equitable interest in the real estate constituting the trust res. 6

In the absence of statutory provision to the contrary it would appear that shares in a business trust are not subject to execution or attachment for the debts of the shareholder. 7

The shares of business trusts are sometimes listed and dealt in on stock exchanges. 8

§ 22 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Trust instrument provision—Issuance of shares. 4 Am Jur Legal Forms 2d § 51:166.

Footnotes

Footnote 20. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871; *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485.

Annotation: 156 ALR 87.

These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property and, upon termination of the trust, in the proceeds *Hecht v Malley*, 265 US 144, 68 L ed 949, 44 S Ct 462.

Transferable certificates of shares in a business trust are equitable choses in action bearing a close resemblance to certificates of stock in a corporation. *Goodhue v State Street Trust Co.* 267 Mass 28, 165 NE 701.

Designation of the shareholders' certificates as "unit certificates" does not change their real character, since they are essentially certificates of stock in the association in spite of that designation. *Continental Supply Co. v Adams* (Tex Civ App) 272 SW 325, error ref.

Practice Aids:—Trust instrument provisions as to shares or certificates. 3 Am Jur Legal Forms 3:1, 3:9, 3:10, 3:37, 3:38, 3:85-3:96.

Footnote 1. *Yeaman v Galveston City Co.* 106 Tex 389, 167 SW 710.

Footnote 2. *Goodhue v State Street Trust Co.* 267 Mass 28, 165 NE 701.

Footnote 3. *Mallory v Russell*, 71 Iowa 63, 32 NW 102 (holding that the wife of a deceased cestui que trust cannot claim dower in land held by the business trust); *Pittsburg*

Wagon Works' Estate, 204 Pa 432, 54 A 316 (holding that the interest of a member cannot be sold under execution as real estate); Parker v Mona-Marie Trust (Tex Civ App) 278 SW 321 (holding such shares to be personal property and, accordingly, to convey no interest in an oil lease, this being regarded as real property); Stephenson's Estate, 171 Wis 452, 177 NW 579 (for purposes of taxation).

Footnote 4. See Atty. Gen. v New York, N. H. & H. R. Co. 198 Mass 413, 84 NE 737, stating that shareholders are "equitable tenants in common."

Generally as to right of shareholders in property of the trust, see § 33, *infra*.

Footnote 5. Bartlett v Gill (DC) 221 F 476, *affd* (CA 1) 224 F 927.

The certificate holders are the ultimate proprietors of the property of the trust, and their rights constitute not choses in action but a substantial property right. Peabody v Treasurer, 215 Mass 129, 102 NE 435, involving inheritance tax on shares.

The nature of the interest of a shareholder in a Massachusetts trust, the entire estate of which consisted of real property, was held to be an equitable interest in land, for the purposes of legacy and inheritance taxes. Baker v Commissioner of Corporations & Taxn. 253 Mass 130, 148 NE 593, involving an organization that was a true trust, and not a partnership.

Footnote 6. Narragansett Mut. F. Ins. Co. v Burnham, 51 RI 371, 154 A 909.

Footnote 7.

Annotation: 156 ALR 97.

The interests of shareholders in a business trust have been held not to be attachable in an action at law, since they can be reached only through proceedings in equity. Hussey v Arnold, 185 Mass 202, 70 NE 87.

Footnote 8. See Reffon Realty Corp. v Adams Land & Bldg. Co. 128 Md 656, 98 A 199 (involving shares of the Adams Express Company); Venner v Great Northern R. Co. 117 Minn 447, 136 NW 271; Rice v Rockefeller, 134 NY 174, 31 NE 907.

§ 23 Classes of shares; participation agreements

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As in the case of corporations, business trusts may be empowered to issue preferred as well as common stock, to issue more than one class of either type, and to issue no-par shares. 9 The character and terms of such shares are usually prescribed by the trust instrument, and their form is similar to that of the shares of corporations. 10

Business trusts organized for the purpose of producing oil sometimes issue, in addition to

the ordinary trust shares, participating agreements entitling the holders to a certain share of the oil produced. 11 The distinction between such participation agreements and ordinary certificates of beneficial interest will be observed by the courts. 12

§ 23 ----Classes of shares; participation agreements [SUPPLEMENT]

Practice Aids: Certificate–Common shares. 4 Am Jur Legal Forms 2d § 51:171.

–Preferred shares. 4 Am Jur Legal Forms 2d § 51:172.

–Trustee's shares. 4 Am Jur Legal Forms 2d § 51:173.

Footnotes

Footnote 9. *Morrissey v Commissioner of Internal Revenue*, 296 US 344, 80 L ed 263, 56 S Ct 289; *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485; *Bouchard v First People's Trust*, 253 Mass 351, 148 NE 895; *People v Clum*, 213 Mich 651, 182 NW 136, 15 ALR 253.

Annotation: 156 ALR 89.

Footnote 10. *People v Clum*, *supra*, setting out form for such certificates.

Annotation: 156 ALR 89.

Practice Aids: –Certificate of preferred shares. 3 Am Jur Legal Forms 3:90.

–Trust instrument provision as to dividends on preferred shares. 3 Am Jur Legal Forms 3:87.

Footnote 11. See *Schiffman v Richfield Oil Co.* 8 Cal 2d 211, 64 P2d 1081; *Julian v Schwartz*, 16 Cal App 2d 310, 60 P2d 887.

Footnote 12. *Schiffman v Richfield Oil Co.* 8 Cal 2d 211, 64 P2d 1081, holding that a reference to such participation agreements by the owner thereof in a pleading as "certificates" and as "beneficial interests in said trusts" will not preclude him from asserting that the agreements are not certificates of beneficial interest.

§ 24 Subscription or purchase

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The trustees of a business trust are usually given the power to receive subscriptions to shares in the trust and to sell and issue such shares. 13 It has been held that sales of

certificates of shares in a business trust are not governed by the Uniform Sales Act, except the statute of frauds embodied therein. 14 And in a jurisdiction regarding business trusts as being in the nature of corporations, a sale of shares is not the equivalent of doing business within the intendment of a statute requiring foreign corporations to qualify in a certain manner before doing business within the state. 15 However, shares of a business trust have been held to be within the operation of a statute prescribing certain conditions for the sale of stock of any corporation, company, or association. 16

The trustees may maintain an action to recover the amount due on subscriptions to shares, 17 or at least so much thereof as is necessary to enable the trustees to satisfy obligations incurred by them on the strength of the subscriptions. 18 And in like manner it has been held that a creditor of a business trust may maintain a suit in equity to require the trustees to collect, and the subscribers to pay, amounts due and unpaid on subscription agreements, under the theory that subscriptions to capital stock of the business trust are capital assets which, upon insolvency of the trust, constitute a trust fund for the payment of its debts. 19 Such a suit will not be abated because the statute of limitations has run on subscribers' notes evidencing the unpaid portions of their subscriptions, since the action is founded on the subscribers' continuing obligation to pay their agreed portions of the capital of the trust rather than on the notes given as evidence of their obligations. 20

Whether or not the trustees of a business trust have the right to repurchase its own shares depends upon the terms of the trust instrument. Such a repurchase, for the purpose of cancellation, has been held not to be improper. 1 Also, it has been held that a subscriber for shares in a business trust may enforce an agreement made by the president and trustee of the trust that if the subscriber became dissatisfied the trust would take back the stock and refund the purchase price. 2 However, the trustee of a business trust has been held not to be personally liable on a guaranty to a subscriber executed in the name of the trust contemporaneously with the purchase of shares, where the bylaws of the trust exempted the trustees and shareholders from personal liability on any engagement or contract made on behalf of the trust. 3

§ 24 ----Subscription or purchase [SUPPLEMENT]

Practice Aids: Trust instrument provision—Declaration as to issuance of certificates. 4
Am Jur Legal Forms 2d §§ 51:164, 51:165.

Issuance of additional shares. 15 Am Jur Legal Forms 2d § 218:26.

Footnotes

Footnote 13. See *Yeaman v Galveston City Co.* 106 Tex 389, 167 SW 710, holding that the conveyance by the trustees of the land constituting the capital of the trust does not end their power to sell shares in the trust.

Annotation: 156 ALR 90.

Practice Aids: —Trust instrument provisions as to sale or issuance of shares by trustees. 3 Am Jur Legal Forms 3:1, 3:10, 3:37, 3:58.

Footnote 14. *Goodhue v State Street Trust Co.* 267 Mass 28, 165 NE 701.

Footnote 15. *Home Lumber Co. v Hopkins*, 107 Kan 153, 190 P 601, 10 ALR 879.

Footnote 16. *People v Clum*, 213 Mich 651, 182 NW 136, 15 ALR 253.

Generally as to blue sky laws or securities acts, see §§ 80-82, *infra*.

Footnote 17. See *Cross v Jackson*, 5 Hill (NY) 478.

Footnote 18. *Dunbar v Broomfield*, 247 Mass 372, 142 NE 148.

Footnote 19. *Bartelt v Lehmann* (Tex Civ App) 207 SW2d 131, 11 ALR2d 1374, error ref, involving trust instrument containing stipulation against personal liability of shareholders and trustees and providing for nonassessability of the stock only to the extent that it was paid for.

Footnote 20. *Bartelt v Lehmann*, *supra*.

Annotation: 11 ALR2d 1380.

Footnote 1. *Cohen v United States Trust Securities Corp.* 311 Mass 152, 40 NE2d 282.

Footnote 2. *Mims v Stephens County-Ranger Oil Co.* (Tex Civ App) 268 SW 1014.

Footnote 3. *Burton v Ross* (Tex Com App) 292 SW 207.

§ 25 --Effect of fraud, misrepresentation, or violation of law, generally

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Upon a proper showing of fraud inducing his subscription, a subscriber to shares in a business trust may rescind the subscription and recover the amount paid by him thereon, or he may maintain an action for damages. 4 By electing to sue for damages the subscriber precludes himself from thereafter rescinding the contract of subscription. 5 The subscriber may, of course, waive any fraud inducing him to purchase the shares, and may ratify the contract of subscription, 6 but he cannot speculate upon the success of the venture by waiting until events disclose whether or not it will be to his interest to rescind. 7 It has been held that a shareholder cannot withdraw his subscription after he has paid for his shares and permitted the use of the subscription as a part of the capital of the trust, as against a creditor of the trust, even on the ground of fraud, where the creditor is without notice of the fraud. 8 And in the absence of fraud or misrepresentation a subscriber cannot hold a promoter liable for the amount paid for shares in the trust merely because the project failed. 9

One induced to purchase shares in a business trust which has violated the law by its

failure to comply with the Blue Sky Law may rescind the subscription and recover back the price paid thereon. 10 This is clear where the noncompliance with the statute renders the shares and the sale thereof void. 11 Such a subscriber is not in pari delicto, 12 and he is not to be precluded from asserting the invalidity of the sale of shares, on grounds of ratification or estoppel. 13 The trust cannot recover on a note given for the purchase price of shares sold in violation of such a statute. 14

Footnotes

Footnote 4. A shareholder may maintain an action against the trust based on fraud and misrepresentation in inducing her to subscribe for the shares, without any accounting or dissolution of the trust. *Wineinger v Farmers' & Stockmen's Loan & Invest. Assn.* (Tex Civ App) 278 SW 932, *affd* (Tex Com App) 287 SW 1091.

Footnote 5. *Cleaves v Thompson*, 122 Kan 43, 251 P 429.

Footnote 6. See *Cleaves v Thompson*, *supra*.

Footnote 7. See *Moran v Union Bank*, 266 Ill App 315, *affd* 352 Ill 503, 186 NE 182.

Footnote 8. *Reeves v Powell* (Tex Civ App) 267 SW 328, stating that since the subscriber had permitted his stock contribution to be used by the trustees to carry on trust business, he would be held to have acquiesced in the fraud.

Footnote 9. *McCrea v Day*, 113 Neb 538, 204 NW 56.

Footnote 10. *Reilly v Clyne*, 27 Ariz 432, 234 P 35, 40 ALR 1005; *Landwehr v Lingenfelder* (Mo App) 249 SW 723; *Schmidt v Stortz*, 208 Mo App 439, 236 SW 694.

Footnote 11. *Barrett v Gore*, 88 Cal App 372, 263 P 564.

Annotation: 156 ALR 91.

Footnote 12. *Reilly v Clyne*, 27 Ariz 432, 234 P 35, 40 ALR 1005; *Landwehr v Lingenfelder* (Mo App) 249 SW 723; *Schmidt v Stortz*, 208 Mo App 439, 236 SW 694.

Footnote 13. *Reilly v Clyne*, 27 Ariz 432, 234 P 35, 40 ALR 1005.

Footnote 14. *Reilly v Clyne*, *supra*.

§ 26 --What amounts to fraud or misrepresentation

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The sale of shares in a Massachusetts or business trust is not fraudulent per se, so as to entitle the subscriber to recover damages for fraud or deceit on the sole ground that the

organization was a business trust and not a corporation, in the absence of a showing that there was a misrepresentation in this respect and that the misrepresentation that the shares were those of a corporation was material to the subscriber. 15 But a false representation by a person selling shares in a business trust that the organization was a corporation organized under the laws of the state has been held to constitute such a material misrepresentation as would constitute a defense to an action on a note by one other than a holder in due course, where the shareholders in such a trust were not accorded the same immunity from liability as were stockholders in a corporation. 16

A provision of the declaration of trust to the effect that shareholders shall not have the right to call for a partition or division, a dissolution of the trust, or an accounting, is not on its face fraudulent so as to entitle subscribers for shares in the trust to a rescission of their subscription, nor is a provision authorizing the expenditure of 30 percent of sums collected by the trust as commissions for selling stock and for promotion purposes. 17 And the breach of a promise made by promoters and trustees to a subscriber for shares that the trust would buy printed matter amounting to a certain sum from the subscriber does not entitle the latter to a rescission of his subscription contract in an action based on fraud and misrepresentation and not for damages for breach of the contract as to the printed matter. 18

Where the promoters and trustees of a business trust have grossly and fraudulently exaggerated the value of a lease transferred to the trust, shareholders may maintain an action against such persons for the cancellation of the transfer, the rescission of their subscription contracts, and the recovery of the price paid for their shares. 19 But the improper appropriation by trustees of property of the trust is not a ground for the rescission of a prior sale of stock to subscribers. 20

One who is induced to purchase shares in a business trust by false representations that the organization has complied with the Blue Sky Law may recover back the amount paid for the shares. 1

Footnotes

Footnote 15. *Erisman v McCarty*, 77 Colo 289, 236 P 777, stating that the question whether it was material to a plaintiff to have stock in a corporation instead of a business trust, so as to entitle him to recover on the ground of misrepresentations in this connection, is a question which is ordinarily for the jury. Annotation: 156 ALR 92.

Footnote 16. *Farmers State Bank v Rueschhoff*, 121 Kan 784, 250 P 335.

Footnote 17. *Palmer v Taylor*, 168 Ark 127, 269 SW 996.

Footnote 18. *Palmer v Taylor*, *supra*.

Footnote 19. *Webb v Shea*, 149 Ark 406, 232 SW 602, holding also that the relief in such a case is not limited to the profits secretly obtained by the trustees and promoters but may extend to a recovery of the full price paid for the shares by the plaintiffs.

Footnote 20. *Palmer v Taylor*, 168 Ark 127, 269 SW 996.

§ 27 Transfer or pledge 2

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One of the distinctive features of the business trust, as compared to an ordinary trust or a partnership, is the transferability of its shares; it is in no way illegal to provide for transferable shares, 3 and instruments declaring business trusts usually contain such a provision. 4 Statutes prohibiting or restricting the transfer of interests in trusts have been held not to apply to business trusts. 5

It is competent to provide in the trust instrument that the shares of a business trust must be offered to the trustees before being transferred to outsiders. 6 A provision requiring that any shareholder or his personal representatives desiring to sell and transfer his shares in the trust should file with the trustees a bona fide offer from the proposed purchaser, and giving the trustees the right to purchase the shares at the price offered within a period of ten days, is valid. 7 Where this is done and the trustees do not elect to purchase the shares, they may be compelled to transfer the shares to the offeror on their books. 8

If the trustees fail to make a periodic valuation of the shares of the trust as required by the trust instrument, as a basis for their acquisition of the shares of a member who dies or withdraws, the court may determine the true value of such shares. 9

Shares in a business trust may be pledged by the owner thereof, 10 and it has been held that they may be pledged without complying with a provision of the trust instrument requiring a transfer on the records of the trust and the issuance of a new certificate where there has been a "transfer" of shares. 11

Footnotes

Footnote 2. As to bequest or inheritance, see § 29, *infra*.

Footnote 3. *Hossack v Ottawa Development Asso.* 244 Ill 274, 91 NE 439; *Swartz v Sher*, 344 Mass 636, 184 NE2d 51 (recognized); *Phillips v Blatchford*, 137 Mass 510.

Footnote 4.

Practice Aids: –Trust instrument provisions as to transferability or assignability of shares. 3 Am Jur Legal Forms 3:1, 3:2, 3:91, 3:92.

–Assignment of shares. 3 Am Jur Legal Forms 3:93.

Footnote 5. *Baker v Stern*, 194 Wis 233, 216 NW 147, 58 ALR 462. See also *Liberty Nat. Bank & T. Co. v New England Investors Shares (DC)* 25 F2d 493 (law of Massachusetts).

Annotation: 156 ALR 93.

Footnote 6. *Hecht v Malley*, 265 US 144, 68 L ed 949, 44 S Ct 462, before transfer to persons outside the family which organized the trust.

A form of such a provision appears in *Fairfield Holding Corp. v Souther*, 258 Mass 540, 155 NE 639.

Footnote 7. *Fairfield Holding Corp. v Souther*, *supra*.

Footnote 8. *Fairfield Holding Corp. v Souther*, *supra*, although the offer was made by a corporation as agent for another person.

Footnote 9. *Dooley v Resnik*, 256 Mass 205, 152 NE 231.

Footnote 10. *Snow v Hogan*, 312 Ill App 636, 38 NE2d 934.

Footnote 11. *Snow v Hogan*, *supra*, in which the pledge was attacked as fraudulent by creditors of the shareholder.

§ 28 --Effectuation of transfer

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Instruments creating business trusts usually prescribe the manner in which a transfer or assignment of shares therein is to be effectuated. 12 These provisions are binding upon purchasers of shares 13 as well as upon other persons. Thus, it has been held that the trustees of a business trust may refrain from transferring certificates on the books of the trust until the procedure prescribed for transfer has been followed, and may withhold payment of dividends to the transferees until transfer on the trust books can be made. 14 As between the parties to a transfer of shares unperfected on the books of the trust, however, the transfer is good, and actual knowledge thereof will charge the trustees with liability for dividends paid to the transferor thereafter. 15

The trustees of a business trust may be compelled to recognize and enter on their books a transfer of shares made in accordance with the trust instrument. 16 Upon the presentation of the certificate indorsed in blank with the genuine signature of the owner, the trust is under duty to transfer the shares and issue a new certificate on demand, and it is not negligent in so doing, in the absence of fraud or collusion or notice of lack of title in the persons presenting the certificate. 17 A court of equity has jurisdiction to compel the trustees to effectuate such a transfer in accordance with the provisions of the trust instrument, but the burden is on an alleged transferee to show that he is entitled to have the transfer perfected. 18

It has been held that a brokerage firm regularly dealing in shares of a business trust may maintain an action to compel the trustees to make transfers in accordance with the trust

instrument. 19 And the fact that a purchase of shares was made by a corporation as agent for another person does not relieve the trustees of their duty to recognize and record the transfer, where the offer was made in good faith and met all the requirements of the declaration of trust. 20 However, a court will not compel the trustees of a trust to transfer shares obtained through a breach of faith and the use of confidential information secured through the former employment of the purchasers by the trust. 1

§ 28 --Effectuation of transfer [SUPPLEMENT]

p 399, n 13—Peoples Bank v D'Lo Royalties, Inc. (Miss) 235 So 2d 257.

Footnotes

Footnote 12.

Practice Aids: —3 Am Jur Legal Forms 3:1, 3:91, 3:92.

Footnote 13. *Wimer & Co. v Downs, Inc.* 77 Colo 377, 237 P 155.

A provision of a trust instrument requiring a notation of a "transfer" of shares on the books of the trust, and the issuance of new shares, does not apply to a pledge of such shares. *Snow v Hogan*, 312 Ill App 636, 38 NE2d 934, the court stating that neither law nor custom require the issuance of a new certificate upon a mere pledge.

Footnote 14. *Baar v Fidelity & Columbia Trust Co.* 302 Ky 91, 193 SW2d 1011.

Footnote 15. Trust instrument provisions to the effect that possession of a certificate shall not vest ownership of the shares represented thereby in any person other than the one in whose name the certificate is issued, as between the trustees and such holder, until the transfer is duly made on the books of the trustees, will not relieve the trustees from liability for wrongfully paying dividends to a previous owner of the stock after they come into knowledge of the transfer. *Baar v Fidelity & Columbia Trust Co.*, supra.

Footnote 16. *Fairfield Holding Corp. v Souther*, 258 Mass 540, 155 NE 639; *Rice v Rockefeller*, 134 NY 174, 31 NE 907.

Where the trust instrument provides for the transfer of shares on the books of the trust, the trustees, although given absolute and sole supervision of the affairs of the trust, have no right to control the sale of shares and no power to refuse to transfer them on the books of the trust, where the holder complies with the requirements of the trust instrument. *Wimer & Co. v Downs, Inc.* 77 Colo 377, 237 P 155.

Footnote 17. *United States Fidelity & G. Co. v Ramey* (Tex Civ App) 261 SW 503, holding also that when a certificate is presented for cancellation for the purpose of having a new certificate issued, and the certificate bears the signature of the owner thereof in blank, by way of assignment, the only duty the trust owes to the owner is to verify his signature and to ascertain its genuineness.

Footnote 18. *Rice v Rockefeller*, 134 NY 174, 31 NE 907.

Footnote 19. *Wimer & Co. v Downs, Inc.* 77 Colo 377, 237 P 155.

Footnote 20. *Fairfield Holding Corp. v Souther*, 258 Mass 540, 155 NE 639.

Footnote 1. *Wimer & Co. v Downs, Inc.* 77 Colo 377, 237 P 155, holding also that the court will not grant any relief tending to aid such purchasers in a business based upon their breach of an undertaking not to engage in a business competing with that of the trust.

§ 29 Bequest or inheritance

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Shares in a Massachusetts or business trust may be bequeathed by the shareholder, ² and upon the death of a shareholder intestate, his personal representative becomes vested with the right to the shares and the undivided profits. ³

Under a statute providing for an accounting in the local probate court in the administration on the estate of a nonresident, with respect to "his estate found here," ancillary executors of a deceased shareholder have been held to be accountable for shares in a Massachusetts trust in the state in which the shares were kept, the trustees resided, the home office of the business was located, and in which certificates must be transferred and new certificates issued, although the testator was domiciled in another state. For this purpose, there is said to be no difference between such a certificate and a certificate of shares in a domestic corporation. ⁴

Footnotes

Footnote 2. See *Douglass v Safe Deposit & T. Co.* 159 Md 81, 150 A 37.

Footnote 3. See *Taber v Breck*, 192 Mass 355, 78 NE 472; *Bryan v Seiffert*, 185 Okla 496, 94 P2d 526 (right of heirs to accounting).

Annotation: 156 ALR 97.

Footnote 4. *Kennedy v Hodges*, 215 Mass 112, 102 NE 432.

IV. SHAREHOLDERS, MEMBERS, OR CESTUIS QUE TRUSTENT

A. In General

§ 30 Generally

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In jurisdictions where the business trust is regarded primarily as a trust and there is no governing statute, shareholders occupy a relation to the business trust similar to the relation of stockholders to a corporation. 5 However, the relationship is somewhat different where the business trust is treated as a partnership, since the shareholders then may be said to have a direct interest in the affairs of the trust. 6

Shareholders are charged with notice of the provisions of the trust instrument, 7 and become bound by those provisions on the purchase of shares. 8

§ 30 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Footnotes

Footnote 5. Mallory v Russell, 71 Iowa 63, 32 NW 102.

Annotation: 156 ALR 99.

Footnote 6. Stephenson v Kirkhan (Tex Civ App) 297 SW 265 (comparison for the purpose of determining the disqualification of a judge because of his relationship to a shareholder in such a trust).

Footnote 7. George v Hall (Tex Civ App) 262 SW 174; Hardee v Adams Oil Asso. (Tex Civ App) 254 SW 602.

Footnote 8. Cox v Lucky Pat Oil & Gas Asso. (Tex Com App) 241 SW 105, revg (Tex Civ App) 230 SW 858; George v Hall (Tex Civ App) 262 SW 174; Burnett v Smith (Tex Civ App) 240 SW 1007.

Apparently shareholders become chargeable with notice of the rules and bylaws of a business trust from the moment they assume that status. See Burton v Ross (Tex Com App) 292 SW 207.

§ 31 Eligibility

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The rule applicable to trusts generally that any person having capacity to take and hold legal title to property has capacity to be the beneficiary of a trust of such property 9 would appear to apply to business trusts as well. Accordingly, while an unincorporated voluntary association which is not a legal entity cannot hold title to shares in a business trust, 10 there would appear to be no reason why one business trust, where regarded as a legal entity, 11 may not become a shareholder in another such trust. 12 And where business trusts are treated as true trusts rather than as partnerships, no inherent reason is apparent why a corporation may not hold shares of such a trust as well as the shares of another corporation. However, particular statutory or charter provisions may prevent a corporation from holding shares in a business trust. 13 And the principles or statutory limitations which prohibit corporations from entering into a partnership have been held to preclude them from becoming shareholders in a business trust which is, in contemplation of the law, a partnership. 14 Thus, it has been held that a corporation violated its charter and subjected itself to dissolution by becoming a party to a business trust agreement which had the effect of creating a partnership. 15

Trustees of a business trust are not disqualified from being shareholders thereof; 16 in fact, provision for ownership of shares by the trustees is frequently incorporated in trust instruments. 17 The only limitation in this regard seems to be that the sole trustee cannot be the sole shareholder, and perhaps that all of the trustees and all of the shareholders must not be identical persons. 18

Footnotes

Footnote 9. See *Trusts* (1st ed § 137).

Footnote 10. *Comstock v Dewey*, 323 Mass 583, 83 NE2d 257, holding, however, that the effect of registering shares of a business trust in the name of a club which is a voluntary unincorporated association is to vest ownership in the members of the club jointly, and that the members can collectively transfer control of the trust shares to the club directors and empower them to appoint a proxy to vote the shares, thus giving the club a voice in the administration of the trust.

Footnote 11. § 4, *supra*.

Footnote 12. See *Greco v Hubbard*, 252 Mass 37, 147 NE 272, sustaining the status and rights of an investment trust as a shareholder in a business trust in which all shares had been acquired by the former.

Annotation: 156 ALR 99.

Footnote 13. A statutory prohibition against a railroad corporation directly or indirectly holding stock in any other corporation has been held to prevent a railroad company from becoming a shareholder in a business trust organized to hold corporate stocks, because this would amount to an indirect holding of corporate stock by the railroad company. *Atty. Gen. v New York, N. H. & H. R. Co.* 198 Mass 413, 84 NE 737. To the same effect is *Williams v Johnson*, 208 Mass 544, 95 NE 90.

Footnote 14. *Merchants' Nat. Bank v Wehrmann*, 69 Ohio St 160, 68 NE 1004, rev'd on other grounds 202 US 295, 50 L ed 1036, 26 S Ct 613, holding that a national bank could not, by reason of the federal laws, become a shareholder in a business trust in the nature of a partnership whose members would be liable for its debts.

Footnote 15. *People v North River Sugar Ref. Co.* 121 NY 582, 24 NE 834 ("Sugar Trust" case). And see *State ex rel. Watson v Standard Oil Co.* 49 Ohio St 137, 30 NE 279 (quo warranto proceedings by the state against the corporation participating in the trust arrangement of the "Standard Oil Trust").

Footnote 16. *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493; *Henry G. Taussig Co. v Poindexter*, 224 Mo App 580, 30 SW2d 635.

Footnote 17. See *Rhode Island Hospital Trust Co. v Copeland*, 39 RI 193, 98 A 273.

Footnote 18. § 43, *infra*.

B. Rights and Powers

§ 32 Generally

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The provisions of the declaration of trust are binding upon the shareholders of a business trust, and determine their rights. 19 Thus, the right of shareholders to the earnings and profits of the trust depends upon the terms of the trust instrument. 20 The extent and manner of exercise of the shareholders' right to vote on affairs of a business trust may be, and frequently are, governed by the terms of the trust instrument. In this connection, the propriety of making provision for voting by proxy has been recognized. 1 In determining their rights, the courts apply, by analogy, the rules governing the rights of stockholders in corporations, so far as the rules of equity will permit. 2

In a suit to marshal the assets of a business trust, the stockholders have the right to have the property of the trust applied to the payment of its debts, so that they would be individually liable only for the deficiency. 3

The rights of shareholders as against the trustees have been treated herein in connection with the corresponding duties and liabilities of the trustees, 4 and various shareholders' actions are discussed in the division of this article on practice and procedure. 5

§ 32 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Trust instrument provision—Dividends on preferred shares. 4 Am Jur Legal Forms 2d § 51:168.

—Conversion privilege. 4 Am Jur Legal Forms 2d § 51:169.

Rights of certificate holder—Dividends. 4 Am Jur Legal Forms 2d § 51:186.

Meetings of shareholders. 4 Am Jur Legal Forms 2d § 51:190.

Sufficiency of notices to shareholders. 4 Am Jur Legal Forms 2d § 51:192.

Footnotes

Footnote 19. *Todd v Ford*, 92 Colo 392, 21 P2d 173; *Wimer & Co. v Downs, Inc.* 77 Colo 377, 237 P 155; *Hardee v Adams Oil Asso.* (Tex Civ App) 254 SW 602.

Annotation: 156 ALR 101.

Practice Aids: —Trust instrument provisions as to rights of shareholders. 3 Am Jur Legal Forms 3:1, 3:79, 3:103 et seq.

Footnote 20. *Smith v Moore*, 129 Mass 222.

Annotation: 156 ALR 98.

Practice Aids: —Trust instrument provisions as to rights of shareholders to profits and dividends. 3 Am Jur Legal Forms 3:1, 3:87, 3:96, 3:112.

Footnote 1. *Comstock v Dewey*, 323 Mass 583, 83 NE2d 257.

Practice Aids: —Trust instrument provisions as to meetings of, and voting by, shareholders. 3 Am Jur Legal Forms 3:1, 3:107-3:109.

Footnote 2. *Wineinger v Farmers' & Stockmen's Loan & Invest. Asso.* (Tex Civ App) 278 SW 932, affd (Tex Com App) 287 SW 1091.

Footnote 3. *Howe v Keystone Pipe & Supply Co.* 115 Tex 161, 278 SW 177, deng reh of 115 Tex 158, 274 SW 563.

Footnote 4. §§ 61 et seq., *infra*.

Footnote 5. §§ 104 et seq., *infra*.

§ 33 Proprietary interests

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The proprietary interests of shareholders are subject to the terms of the trust instrument. 6 And their rights in the property of the trust depend upon the title actually acquired by the trustees, and are subject to the defects in the title of the trustees, even though such defects do not appear of record and the shareholders have no notice thereof. 7 Where (as is usually the case) the legal title to the trust property is vested in the trustees, 8 the shareholders have an equitable interest, 9 and only an equitable interest, 10 in the property. However, it has been said that the members of a business trust who, by the laws of the state, are held liable for the debts of the trust, are also entitled to the assets which have been acquired in behalf of the trust, on the analogy of the rights of persons undertaking to form a corporation who fail to perfect the same in conformity to the statute. 11

Shareholders, even after the termination of the period provided as the lifetime of the trust, do not have any such interest in the real property of the trust as will enable them to maintain an action of trespass to try title. 12 And, in the absence of a provision in the trust instruments granting them that power, they have no authority to contract for the sale of trust lands. 13 Instruments creating business trusts often contain provisions expressly denying shareholders the right to a partition, 14 and even in the absence of such a provision, it is held that they have no such right prior to the termination or dissolution of the trust. 15

Footnotes

Footnote 6. *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13.

Practice Aids: –Trust instrument provisions negating shareholders' ownership of trust property. 3 Am Jur Legal Forms 3:1, 3:103, 3:113.

Footnote 7. *Bisbee v Mackay*, 215 Mass 21, 102 NE 327.

Footnote 8. § 55, *infra*.

Footnote 9. *Reconstruction Finance Corp. v Goldberg* (CA7 Ill) 143 F2d 752, cert den 323 US 770, 89 L ed 616, 65 S Ct 117, reh den 323 US 817, 89 L ed 649, 65 S Ct 266; *Goodhue v State Street Trust Co.* 267 Mass 28, 165 NE 701.

Annotation: 156 ALR 102.

Footnote 10. *Kinney v Treasurer*, 207 Mass 368, 93 NE 586.

Footnote 11. *Fitch v United Royalty Co.* 143 Kan 486, 55 P2d 409.

Footnote 12. *Kountze v Smith*, 135 Tex 543, 144 SW2d 261 (trust instrument expressly providing that the certificates of shares, and the rights and benefits evidenced thereby, should be personal property).

Footnote 13. See *Spotswood v Morris*, 12 Idaho 360, 85 P 1094.

Footnote 14.

Practice Aids: –3 Am Jur Legal Forms 3:11.

Footnote 15. Aronson v Olsen, 348 Ill 26, 180 NE 565.

Annotation: 156 ALR 103.

C. Liability for Trust Debts and Obligations

§ 34 Generally

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According to the generally accepted view—that is, the "control test" 16 —the status of a business trust for the purpose of determining the liability of the shareholders depends upon who has the power of control over the business and property of the trust. If the ultimate power of control is vested in the trustees, who also hold the legal title to the trust property, the organization is treated as a true trust, rather than as a partnership, and the shareholders are not liable for the debts or contractual obligations incurred by the trustees. 17 As stated by some courts, if the organization is actually a Massachusetts trust, 18 or a true trust, the shareholders are not liable for its debts. 19 But if the shareholders have the power of effectual control over the trustees or over the affairs of the trust, the concern is regarded as a partnership, and the shareholders are consequently liable. 20 Where the ultimate power of control over the property and business of the trust is vested in the shareholders, they are liable as partners for the debts of the trust even under a statute expressly authorizing the creation of a trust to carry on any lawful business designated in the trust instrument, since such an organization is not a trust, but a partnership. 1

In a few jurisdictions the shareholders of a business trust are held liable for the debts of the trust, irrespective of the question of their control over the affairs of the trust. 2 And shareholders have been held liable, as partners, for the debts of the trust, where the business of the organization was carried on under a name which would indicate that it was a corporation and the shareholders did not hold themselves out as operating under a trust agreement. 3 Even in a jurisdiction where, by statute, shareholders are generally exempt from personal liability for the debts of the trust, persons who associate for the purpose of forming a business trust, but who fail to perfect the trust, are liable as partners for goods purchased on behalf of the association. 4 And in a jurisdiction which regards business trusts as imperfect corporations, it has been held that the shareholders of such a trust are in the position of persons who begin but never complete the organization of a corporation, and, as such, are liable for the debts of the trust. 5

The fact that credit was not extended to the trust on the financial responsibility of a particular shareholder, or even that at the time credit was extended to the trust the

creditor did not know that the particular shareholder had any connection with the trust, does not prevent the creditor from holding such shareholder personally liable for the debt, where the trust is regarded as a partnership. 6

Former shareholders are not liable for debts contracted on behalf of the trust after they have ceased to be shareholders. 7 And this rule has been applied, notwithstanding the fact that there was no transfer on the books of the trust as required by its rules, in the absence of a showing that the creditor, at the time the debt was incurred, knew of the membership of such shareholder and relied thereon in extending credit to the trust. 8

One who inherited shares in a business trust, held by the court to constitute a partnership, prior to the time when a note was executed, and who asserted his ownership of the stock, was recognized as its owner by the trust, participated in the business, and received dividends on the shares up to a time only one month before the debt was incurred, was held liable as a shareholder for the debt. 9 However, it has been indicated that a person inheriting shares in such a trust after the time when the trust incurred an indebtedness would not be personally liable for the debts, and that in such case the creditor's remedy would be restricted to the enforcement of a lien against the shares so inherited. 10 Where the control over the business and property of the trust is vested in the trustees, and not in the shareholders, the executor of a deceased shareholder may continue to hold the shares without rendering himself liable for any obligation or indebtedness of the trust, in a jurisdiction adhering to the "control test." 11

§ 34 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Case authorities:

Under a trust agreement for the holding and developing of a parcel of real estate, which required beneficiaries to make such payments to the trustee so that there would be full compliance with the terms and provisions of the purchase-money mortgage, and which provided that beneficiaries could advance amounts due from any other beneficiary who failed to comply with his obligations under the trust and in turn becomes entitled to a lien on the defaulting beneficiary's interest, a beneficiary's interest could not be foreclosed for failure to share in the trust expenses (although such failure could give rise to a claim by the trustee against the beneficiary's interest in the trust) where the beneficiary was not in default on his obligation to pay his share of the cost of purchasing the land. *Waters v Sundstrom* (1980, Fla App D2) 386 So 2d 54.

Footnotes

Footnote 16. § 11, *supra*.

Footnote 17. *Bank of America Nat. Trust & Sav. Asso. v Scully* (CA10) 92 F2d 97 (law of California); *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871; *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485; *Commercial Casualty Ins. Co. v Pearce*, 320 Ill App 221, 50 NE2d 434; *Rossmann v Marsh*, 287 Mich 580, 283 NW 696, *affd on reh* 287 Mich 720, 286 NW 83; *Darling v Buddy*, 318 Mo 784,

1 SW2d 163, 58 ALR 493; Re Winter, 133 NJ Eq 245, 31 A2d 769; Rhode Island Trust Co. v Copeland, 39 RI 193, 98 A 273.

Annotation: 156 ALR 105, 107.

In such cases, recovery cannot be had against the shareholders on the ground that they were the undisclosed principals of the trustees. Greco v Hubbard, 252 Mass 37, 147 NE 272.

Footnote 18. Re Conover, 295 Ill App 443, 14 NE2d 980.

Footnote 19. Greco v Hubbard, 252 Mass 37, 147 NE 272.

Footnote 20. Bank of America Nat. Trust & Sav. Asso. v Scully (CA10) 92 F2d 97 (law of California); Rand v Morse (CA8) 289 F 339 (law of Missouri); Goldwater v Oltman, 210 Cal 408, 292 P 624, 71 ALR 871; Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485; First Nat. Bank v Chartier, 305 Mass 316, 25 NE2d 733; Neville v Gifford, 242 Mass 124, 136 NE 160.

Annotation: 156 ALR 105, 112.

Where the trustees are the mere agents of the shareholders, the latter are liable as principals on the contracts of the former. Brown v Bedell, 263 NY 177, 188 NE 641, reh den 264 NY 453, 191 NE 510, motion den 264 NY 513, 191 NE 541; Byrnes v Chase Nat. Bank, 225 App Div 102, 232 NYS 224, affd 251 NY 551, 168 NE 423.

The fact that the shareholders or beneficiaries exercise their control through a managing agent, or the like, does not relieve them of liability as partners. Bernesen v Fish, 135 Cal App 588, 28 P2d 67.

Footnote 1. See Liquid Carbonic Co. v Sullivan, 103 Okla 78, 229 P 561.

Footnote 2. Burk-Waggoner Oil Asso. v Hopkins, 269 US 110, 70 L ed 183, 46 S Ct 48 (applying law of Texas); Weber Engine Co. v Alter, 120 Kan 557, 245 P 143, 46 ALR 158; Ing v Liberty Nat. Bank, 216 Ky 467, 287 SW 960 (in which the court said: "It is a well-settled rule in this state that these unincorporated syndicates are simply partnerships and that each member of the syndicate is liable personally for the debts of the syndicate"); Means v Limpia Royalties (Tex Civ App) 115 SW2d 468, error dismd.

Annotation: 156 ALR 105.

Footnote 3. Hayes Motor Truck Wheel Co. v Wolff, 175 Wis 501, 185 NW 512.

Footnote 4. Hollis v O. A. Steiner Tire Co. 122 Okla 190, 247 P 66.

Footnote 5. Weber Engine Co v Alter, 120 Kan 557, 245 P 143, 46 ALR 158.

Footnote 6. Feldman v Seay (Tex Civ App) 291 SW 350.

Footnote 7. Green v La Rue Oil Asso. (Tex Civ App) 272 SW 623.

A transfer of his shares prior to the time when a debt was incurred by the trust relieves a shareholder of any personal liability for the debt which the law would impose upon him as a shareholder. *Adams v Texhoma Oil & Ref. Co.* (Tex Civ App) 262 SW 139.

Footnote 8. *Adams v Texhoma Oil & Ref. Co.*, *supra*.

Footnote 9. *Houston Finance Corp. v Stewart* (Tex Civ App) 7 SW2d 644.

Footnote 10. See *Houston Finance Corp. v Stewart*, *supra*.

Footnote 11. *Rhode Island Hospital Trust Co. v Copeland*, 39 RI 193, 98 A 273.

§ 35 Liability for torts

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The beneficiary of an ordinary trust is not personally liable to third persons for torts committed by the trustee. 12 But in determining the liability of the shareholders of a Massachusetts or business trust in tort, the courts seem to apply the same tests and principles as in cases involving liability on contract. The "control test" has been applied in this connection, and it has been held that the shareholders are personally liable for the torts of the trust where they are vested with the ultimate and effectual control over the business and property of the trust. 13 This liability, it is to be noted, depends upon the power of control, and not upon the actual exercise of the power. 14 A fortiori, shareholders in a business trust may become liable for the torts or fraud of the managing trustee, where they participate in or authorize them to be done. 15

Footnotes

Footnote 12. See *Trusts* (1st ed § 492).

See *Liquid Carbonic Co. v Sullivan*, 103 Okla 78, 229 P 561, for example of a statute expressly providing that beneficiaries of an express trust shall not be liable for any act, omission, or liability of the trustees.

Footnote 13. *Marchulonis v Adams*, 97 W Va 517, 125 SE 340.

Annotation: 156 ALR 113.

And see *Roller v Madison*, 172 Ky 693, 189 SW 914, in which the association was referred to as a joint-stock company, and it is not clear whether or not it was operating under a trust arrangement.

Footnote 14. *Marchulonis v Adams*, 97 W Va 517, 125 SE 340.

Footnote 15. *Piff v Berresheim*, 405 Ill 617, 92 NE2d 113, wherein shareholders who

authorized a trustee having full knowledge of the title to convey certain lands of the business trust, including two lots for which a purchaser had previously paid in full but which had never been conveyed to him, were held liable to the purchaser for his damages as participants in the fraud upon the purchaser.

§ 36 Nature and degree of control sufficient to impose liability

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Under the "control" test, the character of an organization as a true trust or a partnership, for the purpose of determining the personal liability of shareholders, depends generally upon the powers vested in the shareholders by the trust instrument, rather than upon the powers actually exercised by them. 16 The fact that the agreement on its face provides for managers, and not for trustees, is significant on, but not conclusive of, the question whether the instrument creates a true trust or a partnership or agency. 17

The determination of the question whether the shareholders have such effectual control of the organization as will render them personally liable generally depends upon no single element of control, but upon a combination of factors. 18 Circumstances held insufficient to impose partnership liability on shareholders include the mere power of the shareholders to hold meetings; 19 occasional conferences, about the affairs of the trust, between the trustees and a shareholder who has no power of control; 20 the appointment by the trustees of an advisory board of shareholders, where the trustees do not relinquish control over the affairs of the trust; 1 and the right to fix or control the minimum sale price of lots vested by the declaration of trust in the shareholders. 2

As a general rule, the reservation to the shareholders of a business trust of the power to elect trustees at stated intervals and to fill vacancies among the trustees resulting from death, resignation, or expiration of term of office, does not alone transform the organization into a partnership, under the "control" test, so as to render the shareholders personally liable for the debts of the trust. 3 And the same has been held true of the power to elect trustees in combination with other powers reserved to the shareholders. 4 The vesting of power in the shareholders to remove or replace trustees has been said not to convert a business trust into a partnership, 5 even in combination with the powers to amend the trust instrument and to terminate the trust. 6 However, it has been stated, obiter, that if the trustees are subject to removal by the shareholders and are dependent upon them for election, the ultimate control of the organization rests in the shareholders, so as to render them liable as partners. 7 And the power in the shareholders to elect and remove trustees, combined with such other powers as that of amending or terminating the trust, has been held to give the shareholders such control as to characterize the trust as a partnership. 8

The mere reservation to the shareholders of a business trust of the power to amend the trust instrument does not, of itself, convert the organization into a partnership so as to render the shareholders liable for the debts 9 or the torts of the trust. 10 And the power to terminate the trust has been held not to give the shareholders such control over the affairs of the trust as will render them liable for its debts, 11 even in combination with

the power to remove trustees, 12 or with other powers reserved to the shareholders. 13 However, the power to amend the trust instrument or to terminate the trust, in addition to other powers reserved to the shareholders, has been held to render them liable as partners for the debts of the trust. 14

Footnotes

Footnote 16. § 11, *supra*.

Footnote 17. *Brown v Bedell*, 263 NY 177, 188 NE 641, reh den 264 NY 453, 191 NE 510, motion den 264 NY 513, 191 NE 541.

Annotation: 156 ALR 114.

However, a provision of the trust agreement that the subscribers irrevocably nominate and constitute the managers their agents and attorneys to do and perform all things necessary to carry out the contract does not necessarily indicate a relationship of partners or principal and agent, so as to render the shareholders liable for the debts of the trust, where the instrument as a whole indicates an intention to create a business trust. *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Footnote 18. For example, an organization was held a partnership where the declaration of trust provided for annual meetings of the shareholders and authorized them to share with the trustees in the management of the trust business, to elect trustees annually, to amend the trust instrument, to terminate the trust, and to restrict the power of the trustees with respect to the issuance of additional shares under certain circumstances. *Liquid Carbonic Co. v Sullivan*, 103 Okla 78, 229 P 561 (under statute expressly authorizing the creation of an express trust to carry on and conduct any lawful business designated in the trust instrument).

The power of control was vested in the shareholders, so as to render them liable for the torts of the trust, where the trust instrument provided for annual meetings of the shareholders for the election of trustees, and for special meetings called for special purposes, authorized increase or reduction in the number of the shares with the consent of the shareholders, required the consent of the shareholders as a condition of the right of the trustee to mortgage or pledge the property of the trust, empowered the shareholders to terminate the trust before the expiration of the term provided in the trust instrument, and authorized them to amend or alter the trust instrument in any particular, except with regard to the exemption of the trustees, officers, and shareholders from personal liability. *Marchulonis v Adams*, 97 W Va 517, 125 SE 340.

Footnote 19. *Levy v Nellis*, 284 Ill App 228, 1 NE2d 251; *Rhode Island Hospital Trust Co. v Copeland*, 39 RI 193, 98 A 273.

However, shareholders who are vested with the power to hold meetings, to give binding instructions to the trustees in any manner not inconsistent with the trust instrument, and to amend the bylaws governing the trust, are individually liable for the debts of the trust. *Morehead v Greenville Exch. Nat. Bank* (Tex Civ App) 243 SW 546.

Footnote 20. *Greco v Hubbard*, 252 Mass 37, 147 NE 272.

Footnote 1. *Krey Packing Co. v Hitchings* (Mo App) 18 SW2d 123.

Footnote 2. *Rossman v Marsh*, 287 Mich 580, 283 NW 696, affd on reh 287 Mich 720, 286 NW 83.

But it is otherwise where the shareholders are also vested with the general supervision and management of the project and with the power to determine what property shall be sold and what improvements constructed. *Bank of America Nat. Trust & Sav. Asso. v Scully* (CA10) 92 F2d 97 (law of California).

Footnote 3. *Gutelius v Stanbon* (DC) 39 F2d 621 (law of Florida); *Levy v Nellis*, 284 Ill App 228, 1 NE2d 251.

Annotation: 156 ALR 116.

Footnote 4. *Levy v Nellis*, supra.

Footnote 5. *Downey Co. v Whistler*, 284 Mass 461, 188 NE 243, involving liability of successor trustees as partners.

Footnote 6. *Rhode Island Hospital Trust Co. v Copeland*, 39 RI 193, 98 A 273.

Footnote 7. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871 (arguendo, in limiting *Old River Farms Co. v Roscoe Haegelin Co.* 98 Cal App 331, 276 P 1047).

Footnote 8. *First Nat. Bank v Chartier*, 305 Mass 316, 25 NE2d 733 (shareholders given the power to elect officers and directors at annual elections, to remove any officer and fill the vacancy thus created, to hold annual meetings, and with the approval of the board of directors, to amend the trust instrument); *Neville v Gifford*, 242 Mass 124, 136 NE 160 (shareholders vested with the power to hold meetings, increase or diminish the number of trustees, remove trustees, fill vacancies, modify the trust, or terminate the trust at any time); *Feldman v American Dist. Teleg. Co.* (Tex Civ App) 257 SW 929 (power in the shareholders to amend the trust agreement and to elect the trustees).

Annotation: 156 ALR 117.

Footnote 9. *Levy v Nellis*, 284 Ill App 228, 1 NE2d 251 (wherein the court said: "While this power of the beneficiaries enables them to take over control and so points toward a partnership, it is not enough, standing alone, to balance the provisions of the declaration which indicate a trust."); *Re Winter*, 133 NJ Eq 245, 31 A2d 769.

Footnote 10. *Marchulonis v Adams*, 97 W Va 517, 125 SE 340.

Footnote 11. *Cox v Hickman*, 8 HL Cas 268, 11 Eng Reprint 431.

And see 23 *Columbia L Rev* 423, 437.

Footnote 12. *Rhode Island Hospital Trust Co. v Copeland*, 39 RI 193, 98 A 273.

Footnote 13. Where the trust instrument otherwise vests the trustees with absolute

management and control of the trust property and business, provisions thereof requiring the consent of two-thirds of the shareholders as a condition of the power of the trustees to mortgage trust property, to amend the trust agreement, and giving the shareholders the power to terminate the trust, by a two-thirds vote, were held not to confer upon them that degree of ultimate control which would convert the organization into a partnership rather than a trust or render the shareholders liable for the debts of the trust. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

Footnote 14. *Whitman v Porter*, 107 Mass 522 (where the trust instrument provided that property was to be conveyed to one of the subscribers in trust, that three officers and three trustees, to be chosen annually, were to have the entire management and control of the trust property and business, that the business was to continue so long as a majority of the subscribers determined, and that the trust property might be sold whenever a majority in number and value so decided); *Hollister v McCamey*, 115 Tex 49, 274 SW 562 (power in the shareholders to amend the declaration of trust and to authorize an increase in the capital stock).

Annotation: 156 ALR 119.

§ 37 Provisions of trust instrument or contract negating or limiting liability

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Stipulations affecting the personal liability of shareholders for debts or liabilities of business trusts are frequently found in the trust instruments. It is sometimes expressly provided that the shareholders shall not be personally or individually liable for the debts or liabilities incurred by the trustees or on contracts made by the latter on behalf of the trust, or that persons dealing with the trustees shall look for payment or satisfaction of their demands only to the property and assets of the trust, or that in every contract or obligation executed by the trustees they shall insert a stipulation exempting the shareholders from personal liability, and referring to the trust instrument. 15 It is generally held that a provision of a trust instrument that persons dealing with the trustees shall look only to the trust fund and property, and that the shareholders shall not be personally liable, is not contrary to law or public policy. 16

In a jurisdiction where the shareholders of a business trust are held personally liable for the debts of the trust, irrespective of the question of power of control, a provision of the trust instrument purporting to exempt them from liability has been held ineffectual, at least in the absence of notice to the creditor of the provision. 17 According to this view, the members of such a trust cannot confer immunity upon themselves by their own contract. 18

In a jurisdiction following the doctrine that a business trust is, in legal contemplation, a partnership in the nature of a joint-stock company, notwithstanding that exclusive control is vested in the trustees, it has been held that a provision of the trust instrument purporting to exempt the shareholders from liability for the debts incurred by the trustees on behalf of the trust is invalid and ineffectual, where there is no compliance with a

statute relating to the formation of limited partnerships, with respect to a creditor who dealt with the trustees with knowledge of the terms of the trust instruments but without expressly agreeing to look only to the assets of the trust. 19

Footnotes

Footnote 15.

Annotation: 156 ALR 119.

Practice Aids: –Trust instrument provisions as to character of organization, or negating partnership relation. 3 Am Jur Legal Forms 3:1, 3:12, 3:111.

–Trust instrument provisions that shareholders shall not be personally liable for trust obligation. 3 Am Jur Legal Forms 3:1, 3:110, 3:111.

Footnote 16. Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485; McCarthy v Parker, 243 Mass 465, 138 NE 8; Darling v Buddy, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Annotation: 156 ALR 120.

Footnote 17.

Annotation: 156 ALR 122.

The liability of shareholders, notwithstanding provisions purporting to exempt them from personal liability, is predicated on the theory that such an organization is, in the contemplation of the law, a corporation, that in order to form a corporation, statutes relating thereto must be complied with, and that the laws regulating corporations and protecting the public cannot be circumvented by a trust instrument purporting to exempt members from personal liability. Weber Engine Co. v Alter, 120 Kan 557, 245 P 143, 46 ALR 158.

Footnote 18. Linn v Houston, 123 Kan 409, 255 P 1105.

Footnote 19. Thompson v Schmitt, 115 Tex 53, 274 SW 554, followed in Victor Ref. Co. v City Nat. Bank, 115 Tex 71, 274 SW 561.

Annotation: 156 ALR 123.

§ 38 --Effect of notice or lack of notice

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Where shareholders would otherwise be personally liable for the debts of the trust, it has been held, in the cases in which the question of notice has been considered, that a provision of the trust instrument purporting to exempt them from such liability does not

relieve them of liability to creditors having no notice of such provision. 20 On the other hand, it is generally 1 held that persons dealing with the trustees or officers of a business trust with notice of a provision of the trust instrument purporting to exempt the shareholders from personal liability for any debt or liability incurred by the trustees, or on any contract made by them on behalf of the trust, cannot recover against the shareholders personally. 2 Thus, where the trust instrument contained provisions limiting the liability of the shareholders, they have been held not liable to an attorney who performed services for a business trust with knowledge of the restrictive provisions, 3 to a person who was put on inquiry as to the nature of the organization and the relationship of the parties connected therewith, 4 or on a contract made by the trustees with a person who was one of the organizers of the trust and who knew of the provisions of the trust agreement purporting to exempt the shareholders from personal liability. 5 Likewise, one who dealt with a business trust with actual notice of provisions of the trust instrument purporting to exempt the shareholders from personal liability for the debts of the trust has been held to be estopped to maintain an action against such shareholders on a note executed by the trustees. 6 However, where all of the shareholders were trustees, so that the trustees and the beneficiaries were the same persons, constructive notice imputed to a creditor of the trust instrument purporting to exempt the shareholders and the trustees from personal liability and to bind only the trust estate for the obligations of the trust was held to be unavailing to exempt the shareholders-trustees from personal liability, in the absence of a contract to that effect. 7

Footnotes

Footnote 20. *Hunter v Winter*, 268 Ill App 487; *Ing v Liberty Nat. Bank*, 216 Ky 467, 287 SW 960.

Annotation: 156 ALR 120.

Persons employed by the executive committee of a trust, acting within the apparent scope of its powers, as agents for the beneficiaries, are not precluded from recovering their commission from the beneficiaries by a limitation in the trust agreement upon the liability of the beneficiaries, where such persons had no notice of such limitation. *Case v McConnell*, 5 Cal App 2d 688, 44 P2d 414.

In a number of cases in which it has been stated generally that shareholders were not liable for the debts of the trust where the trust instrument contained provisions exempting them from liability, there was no reference to the question of notice of such provisions on the part of the creditor. It appears in these cases, however, that the shareholders were not vested with any power of control over the trustees or the trust business. See, for instance, *Betts v Hackathorn*, 159 Ark 621, 252 SW 602, 31 ALR 847; *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871; *Henry G. Taussig Co. v Poindexter*, 224 Mo App 580, 30 SW2d 635; *Byrnes v Chase Nat. Bank*, 225 App Div 102, 232 NYS 224 affd 251 NY 551, 168 NE 423; *Rhode Island Hospital Trust Co. v Copeland*, 39 RI 193, 98 A 273. Annotation: 156 ALR 121.

Footnote 1. In Texas, it is held that mere notice on the part of a person dealing with a business trust of provisions of the trust instrument purporting to exempt the shareholders from personal liability does not preclude him from recovering against shareholders, in the absence of an agreement on his part to that effect. *Thompson v Schmitt*, 115 Tex 53, 274

SW 554, followed *Victor Ref. Co. v City Nat. Bank*, 115 Tex 71, 274 SW 561; *Sessums v Citizens' Nat. Bank* (Tex Civ App) 72 SW2d 403. However, even in this jurisdiction the circumstances under which a creditor deals with the trustees, with notice of such a provision of the trust instrument, may give rise to an implied agreement that the shareholders shall not be liable. See *Dayle L. Smith Oil Co. v Continental Supply Co.* (Tex Civ App) 268 SW 489. Annotation: 156 ALR 126, 127.

Footnote 2. *Farmers & M. Nat. Bank v Anderson*, 216 Iowa 988, 250 NW 214; *McCarthy v Parker*, 243 Mass 465, 138 NE 8; *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493; *Roberts v Aberdeen-Southern Pines Syndicate*, 198 NC 381, 151 SE 865, 71 ALR 885.

Annotation: 156 ALR 124, 125.

Footnote 3. *McCarthy v Parker*, 243 Mass 465, 138 NE 8.

Footnote 4. *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Footnote 5. *Dunning v Gibbs*, 213 Ky 81, 280 SW 483.

Footnote 6. *Roberts v Aberdeen-Southern Pines Syndicate*, 198 NC 381, 151 SE 865, 71 ALR 885.

Footnote 7. *Enochs & Flowers, Ltd. v Roell*, 170 Miss 44, 154 So 299.

§ 39 --Sufficiency of notice

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A mere reference to the declaration of trust or a recital that the contract is made by the trustees pursuant thereto has been held to be sufficient to charge the contracting party with notice of a provision of the declaration purporting to exempt the shareholders from personal liability. 8 The statement by an officer of the trust, at the time of entering into a contract on behalf of the trust, that the organization was not a corporation and that he "thought" it was a partnership, has been held to be sufficient to put the other contracting party upon inquiry as to the nature of the organization and the relationship of the members thereof. 9 However, the fact that the president of the creditor bank was one of the organizers of the trust has been held not to charge the bank with notice of limitations in the trust instrument upon the personal liability of the shareholders. 10

The question whether persons dealing with a business trust are charged with notice of trust instrument stipulations relieving shareholders of personal liability by reason of recordation of the trust instrument is discussed elsewhere. 11

Footnotes

Footnote 8. Where a note executed by trustees recited that the undertaking was by the trustee as such under a certain declaration of trust, and not otherwise, and the declaration of trust exempted the individual shareholders from liability on any contract or undertaking of the trustee, it has been held immaterial, as regards the liability of shareholders on the note, whether or not the plaintiff examined the declaration of trust or knew of its contents, since the provision in the note required him to do so or to take the hazard of not doing it. *Bank of Topeka v Eaton* (CC) 100 F 8 affd (CA1) 107 F 1003, cert den 183 US 697, 46 L ed 395, 22 S Ct 933.

Footnote 9. *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Footnote 10. *Ing v Liberty Nat. Bank*, 216 Ky 467, 287 SW 960.

Footnote 11. § 16, supra.

§ 40 --Contractual limitations, recitals, and references

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Generally, and even in a jurisdiction holding ineffectual a mere provision of a trust instrument purporting to exempt shareholders from personal liability for the debts of the trust, it is competent for the trustees and persons dealing with them to stipulate for the exemption of the shareholders from liability. Where the creditor agrees that the shareholders shall not be personally liable, no recovery can be had against them. 12 Such an agreement is valid and binding, and violates no public policy. 13 And a statute describing the manner of the formation of limited partnerships does not invalidate such an agreement. 14

It is not necessary, to exempt the shareholders from liability, that the agreement to this effect be expressly stated. The agreement and understanding to this effect may be "implied in fact" from the circumstances. 15 And parol evidence is admissible to show an agreement or understanding between the contracting parties that shareholders shall not be personally liable on an obligation executed by the officers of the trust. 16

In other jurisdictions, a mere reference in a contract to the trust instrument has been held sufficient to exempt shareholders from personal liability on the contract, where the trust instrument contained a provision to the effect that the shareholders should not be liable. 17

§ 40 --Contractual limitations, recitals, and references [SUPPLEMENT]

Case authorities:

Provision in loan agreement between business trust and debtor, by terms of which debtor had specifically agreed that it would look only to the property of the trust for

enforcement of any claims against the trust and that the individual shareholders would not be liable for such claims, was valid and not against public policy. *Loomis Land & Cattle Co. v Diversified Mortg. Investors* (1976, Tex Civ App 12th Dist) 533 SW2d 420, writ ref n r e.

Footnotes

Footnote 12. *Farmers' State Bank & T. Co. v Gorman Home Refinery* (Tex Com App) 3 SW2d 65; *Victor Ref. Co. v City Nat. Bank* (Tex Civ App) 263 SW 622, affd 115 Tex 71, 274 SW 561.

Annotation: 156 ALR 127, 128.

Footnote 13. *Shelton v Montoya Oil & Gas Co.* (Tex Com App) 292 SW 165, wherein the shareholders in question were also trustees.

However, in a jurisdiction which treats business trusts as partnerships, a provision of a contract of employment, by which the employee of the trust took notice of the provisions of the trust instrument exempting the shareholders from liability and agreed that for all debts or damages he would look only to the property and assets of the trust, was held to be within the rule prohibiting contracts purporting to exempt a master's liability to his servant for negligence, and hence against public policy and void. *Fisheries Co. v McCoy* (Tex Civ App) 202 SW 343.

Footnote 14. *Industrial Lumber Co. v Texas Pine Land Asso.* 31 Tex Civ App 375, 72 SW 875, wherein the court said: "The statute merely confers a power. It does not limit or destroy any common-law right. We are aware of no rule either of law or public policy which forbids the making of such a contract."

Footnote 15. *Farmers' State Bank & T. Co. v Gorman Home Refinery* (Tex Com App) 3 SW2d 65; *Shelton v Montoya Oil & Gas Co.* (Tex Com App) 292 SW 165 (where creditor first sought assurances of personal liability on part of shareholders and trustees, and when refused, accepted a note of the trust secured by stock certificates containing stipulation against personal liability); *McVey v United Timber & Kaolin Asso.* (Tex Civ App) 270 SW 572 (where creditor was attorney who had prepared the trust instrument and hence was familiar with clauses stipulating against personal liability of trustees and shareholders); *Dayle L. Smith Oil Co. v Continental Supply Co.* (Tex Civ App) 268 SW 489 (wherein creditor made sale in reliance on apparent financial status and prospects of the trust rather than in belief shareholders would be individually liable).

Annotation: 156 ALR 128.

Footnote 16. *Shelton v Montoya Oil & Gas Co.* (Tex Com App) 292 SW 165; *George v Hall* (Tex Civ App) 262 SW 174.

Footnote 17. *Bank of Topeka v Eaton* (CC) 100 F 8, affd (CA1) 107 F 1003, cert den 183 US 697, 46 L ed 395, 22 S Ct 933.

Annotation: 156 ALR 129.

Shareholders are not liable on a note executed by the trustees, purporting to exempt them from liability and referring to a trust instrument containing a provision that the sharers should not be liable, where they have no power of control. *Levy v Nellis*, 284 Ill App 228, 1 NE2d 251.

D. Rights and Liabilities Inter Se

§ 41 Generally

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Where only the rights of shareholders and trustees among themselves are involved, the court will, as far as possible, give effect to the provisions of the trust instrument. 18 As between the parties to the trust instrument, a provision therein exempting the shareholders from personal liability is valid and binding. 19 Such a provision is binding upon the shareholders, who are charged with knowledge thereof, 20 and the same is true as between the shareholders and an officer 1 or trustee 2 of such a trust. The trustees cannot, for their own benefit or protection, assert the liability of shareholders, where such liability results from the failure of the trustees to perform their duty to insert in a contract made by them a provision exempting the shareholders from liability. 3

It has been indicated that where the trust is treated as a partnership, the claim of one shareholder against the others, as partners, can be asserted only in an accounting proceeding, 4 and that until there has been an accounting and settlement of the partnership affairs, a shareholder cannot recover against other shareholders on a contract between the former and the trust, especially where the trust instrument expressly exempts shareholders from personal liability. 5

Where the organization is, in legal contemplation, a partnership, the several shareholders sustain to each other a fiduciary relation, which is violated by the acts of one shareholder in making a secret profit from a transaction which is ostensibly between a third person and the trust. 6 And in a case involving a trust of this character, it was held that three corporations, which owned the majority of the shares of the trust, could not, against the objection of the minority shareholders, authorize at a shareholders' meeting held pursuant to the trust instrument the sale and conveyance of all the trust property to such majority shareholders. 7 However, there is authority for the view that the shareholders of a business trust do not bear any contractual or fiduciary relationship among themselves. 8 Also, it is competent for the trust instrument to provide against any fiduciary relationship as between shareholders. 9

Footnotes

Footnote 18. *Hossack v Ottawa Development Asso.* 244 Ill 274, 91 NE 439.

Footnote 19. *Barnett v Cisco Bkg. Co.* (Tex Civ App) 253 SW 339.

It is competent for the parties to the trust instrument to contract as to their liability interest. *State ex rel. Great American Home Sav. Inst. v Lee*, 288 Mo 679, 233 SW 20.

Footnote 20. *Hardee v Adams Oil Asso.* (Tex Civ App) 254 SW 602.

Persons becoming shareholders in a business trust on the faith of a guaranty executed in the name of the trust by a shareholder have been held to be bound by a provision of the bylaws of the trust exempting shareholders from personal liability. *Burton v Ross* (Tex Com App) 292 SW 207.

However, one who accepted stock in the trust in part payment for merchandise sold by him to the trust is not precluded, as a shareholder, from holding other shareholders liable for the debt, by provisions of the trust instrument purporting to exempt shareholders from personal liability, on the theory that at the time the debt was created the creditor was himself a shareholder in the trust, where, in fact, such creditor had no knowledge of the contents of the declaration of trust. *Feldman v Seay* (Tex Civ App) 291 SW 350.

Footnote 1. *Oden v Bone* (Tex Civ App) 263 SW 640, holding that the manager of the trust could not recover against the shareholders on a note held by the manager for a loan made to the trust.

Footnote 2. Since shareholders are bound by the provisions of the trust instrument, and are charged with notice thereof, there can be no recovery by them against the trustees individually, on a promissory note executed by them on behalf of the trust, where the trust instrument expressly exempts the trustees, as shareholders, from personal liability. *George v Hall* (Tex Civ App) 262 SW 174.

Footnote 3. *Barnett v Cisco Bkg. Co.* (Tex Civ App) 253 SW 339.

Footnote 4. *Brodage v Greenwood* (Tex Civ App) 261 SW 453.

Footnote 5. *Hardee v Adams Oil Asso.* (Tex Civ App) 254 SW 602.

Footnote 6. *Howe v Chmielinski*, 237 Mass 532, 130 NE 56.

Footnote 7. *Flint v Codman*, 247 Mass 463, 142 NE 256.

Footnote 8. *Krensky v De Swarte*, 335 Ill App 435, 82 NE2d 168.

Footnote 9. *Krensky v De Swarte*, *supra*, holding that in the absence of fraud, a certificate holder may deal with the trust, and is not required to account to other certificate holders for a profit made in the course of such dealing.

§ 42 Contribution

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Where the shareholders of a business trust are personally liable for the debts of the trust, one of them who has been required to pay such a debt may enforce contribution from the other shareholders. 10 The estate of a deceased shareholder has been held liable for contribution on account of a debt incurred and paid after his death. 11 It would appear, however, that the liability of shareholders to contribute is only for that proportion of the debt represented by their proportionate interests in the trust. 12 And where contribution is sought for a judgment paid by a shareholder in another state, it has been held that shareholders who were not parties to that action are not concluded thereby. 13

The right to contribution may, of course, be affected by equities among the shareholders themselves. If their liability resulted from the personal fault or neglect of the shareholder seeking contribution, the other shareholders cannot be compelled to contribute. Thus, where the liability of a shareholder for a debt of the trust results from his failure to insert in a contract executed by him on behalf of the trust a provision exempting the shareholders from personal liability, as required by the trust instrument, he is not entitled to contribution from the other shareholders. 14

Footnotes

Footnote 10. *Phillips v Blatchford*, 137 Mass 510; *Whitman v Porter*, 107 Mass 522.

Annotation: 156 ALR 135.

Footnote 11. *Phillips v Blatchford*, 137 Mass 510 (under a provision of the trust instrument that the decease of a member should not dissolve the trust nor entitle his representative to take an accounting or other action in court against the trust or the trustees, and that such representatives should simply succeed to the right of the deceased to the shares, subject to the declaration of trust).

Footnote 12. *Carl v Shore* (Tex Com App) 299 SW 860, corrected and reh den (Tex Com App) 4 SW2d 965.

Footnote 13. *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Footnote 14. *Mims v Stephens County-Ranger Oil Co.* (Tex Civ App) 268 SW 1014.

V. TRUSTEES, OFFICERS, AND AGENTS

A. In General

§ 43 Generally; eligibility

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Generally speaking, and in the absence of statutory restrictions, any person may be a trustee of an express trust who is capable of confidence, of holding real and personal property, and of executing the trust. 15 Subject to the limitations placed upon its powers by its own charter or by statute, a corporation may hold property in trust and may act as trustee of a business trust. 16

The ownership of shares in the business trust does not disqualify one from becoming a trustee. 17 Indeed, some business trust instruments expressly provide that the trustees may own shares. 18 However, this rule is subject to the general principle that a sole beneficiary cannot be the sole trustee; and it has been held that where all of the shareholders in a business trust are trustees and all the trustees are shareholders, so that the two groups are composed of identical persons, there can be no valid trust. 19 However, this defect or disability is cured by the subsequent acquisition of shares by persons other than trustees. 20

§ 43 ----Generally; eligibility [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Footnotes

Footnote 15. See Trusts (1st ed §§ 115 et seq.).

Footnote 16. *Hossack v Ottawa Development Asso.* 244 Ill 274, 91 NE 439 (nonprofit corporation).

Annotation: 156 ALR 137.

In some instances banks have been named trustees. See *James Stewart & Co. v National Shawmut Bank* (CA1) 69 F2d 694, cert den 294 US 722, 79 L ed 1254, 55 S Ct 549; (Massachusetts); *Baker v Stern*, 194 Wis 233, 216 NW 147, 58 ALR 462 (trust company).

Footnote 17. *Commercial Casualty Ins. Co. v Pearce*, 320 Ill App 221, 50 NE2d 434; *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493; *Henry G. Taussig Co. v Poindexter*, 224 Mo App 580, 30 SW2d 635.

Footnote 18. See *Rhode Island Hospital Trust Co. v Copeland*, 39 RI 193, 98 A 273.

Practice Aids: –3 Am Jur Legal Forms 3:1, 3:73.

Footnote 19. *Enochs & Flowers v Roell*, 170 Miss 44, 154 So 299.

In such a situation, the legal and equitable titles to the property of the trust would come

together in the same persons which generally terminates a trust. See Trusts (1st ed § 88).

Footnote 20. Henry G. Taussig Co. v Poindexter, 224 Mo App 580, 30 SW2d 635.

§ 44 Status 1

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In the typical Massachusetts or business trust, title to the property is held by trustees, and the business and property of the concern are managed by them for the benefit of the shareholders. 2 In making contracts for the trust estate, in conducting its business, and in holding and managing its property, the trustees act as principals and not as agents or representatives of the shareholders. 3

The fact that the individuals having charge of the management of the business and property of the trust are designated "managers" does not prevent their being treated as trustees, 4 nor does the mere use of the term "trustees" necessarily fix the legal status of the persons to whom it is applied as trustees, as distinguished from partners. 5

§ 44 ----Status [SUPPLEMENT]

p 414, n 3–

Practice Aids: Answer denying status as trustee 5 Am Jur Pl & Pr Forms (Rev), Business Trusts, Form 4.

Footnotes

Footnote 1.

Practice Aids: –Provision of trust instrument as to title of trustees. 3 Am Jur Legal Forms 3:4.

–Trust instrument provision negating partnership relation. 3 Am Jur Legal Forms 3:1, 3:12.

–Denial that defendant is trustee of business trust. 20 Am Jur Pl & Pr Forms 20:792.

Footnote 2. §§ 1, 3, supra; § §§ 55, infra.

Footnote 3. Loring v United States (DC Mass) 80 F Supp 781; Palmer v Taylor, 168 Ark 127, 269 SW 996; Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485; Dolben v Gleason, 292 Mass 511, 198 NE 762; Darling v Buddy, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Annotation: 156 ALR 136.

"Contracts with regard to the rights and property affected by trusts are the contracts of the trustee. He, in person, is liable upon them. He is not acting as representative or agent of another. He is acting for himself, but with fiduciary obligations to others." Larson v Sylvester, 282 Mass 352, 185 NE 44.

Being himself a principal, the trustee has no principal. Taylor v Davis, 110 US 330, 28 L ed 163, 4 S Ct 147.

Unlike a corporation director who, if he acts apart from the board, may function as an officer or agent of the corporation, a trustee of a business trust acts in the single capacity of principal in performing the usual duties of a trustee. Loring v United States (DC Mass) 80 F Supp 781.

Footnote 4. Byrnes v Chase Nat. Bank, 225 App Div 102, 232 NYS 224 affd 251 NY 551, 168 NE 423.

In some trusts, however, the trustee merely holds the legal title to the trust property, and managers, designated in the trust instrument, carry on the affairs of the trust. Beilin v Krenn & Dato, 350 Ill 284, 183 NE 330.

Footnote 5. Continental Supply Co. v Adams (Tex Civ App) 272 SW 325.

§ 45 Designation or election; term of office

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The instruments creating business trusts usually name the original trustees, fix their term of office, and provide for the manner in which their successors shall be appointed or elected. In some instances it is provided that the trustees shall hold office for life and that upon the death of a trustee the survivors shall succeed to his title and duties. Often the surviving trustees or the shareholders are given the power to fill vacancies in the office of trustee. And many trust instruments limit the term of the trustees and provide for periodic elections of trustees. 6

Where the trustees and the shareholders are given concurrent power to appoint trustees to fill vacancies, the exercise of the power by either group deprives the other group of the power to make an appointment for that particular vacancy. 7 In such case, the appointment is deemed to take place at the time when they designate a successor, and not at the time when the appointee qualifies by formal acceptance of the office. 8

A court of equity has jurisdiction to entertain a suit to confirm the title of a duly elected or appointed trustee and to compel the cotrustees to recognize the legality of the plaintiff's claim to that office. 9

§ 45 ----Designation or election; term of office [SUPPLEMENT]

Practice Aids: Election of trustees–Filling vacancies. 4 Am Jur Legal Forms 2d § 51:51.

Election of trustees. 4 Am Jur Legal Forms 2d § 51:191.

Footnotes

Footnote 6.

Annotation: 156 ALR 138.

Practice Aids: –Provisions of trust instrument as to number, election, and term of office of trustees. 3 Am Jur Legal Forms 3:1.

Footnote 7. Lambach v Anderson, 228 Iowa 1173, 293 NW 505.

Footnote 8. Lambach v Anderson, supra.

Footnote 9. Lambach v Anderson, supra.

§ 46 Compensation

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Instruments creating business trusts usually make provision for the compensation of the trustees, 10 in which case the rights of the trustees with respect to their own compensation are governed by the terms of the trust instrument. 11 A provision in a trust instrument for the allowance of a certain percentage of the profits of the trust business as compensation to the trustee does not disqualify him from acting as trustee. 12 And under a trust instrument authorizing the trustees to receive such compensation for their services as they deem reasonable, it is not improper for them to pay themselves a reasonable commission on shares of the trust sold by them. 13 However, a provision of the trust instrument entitling the trustees to compensation from the trust estate does not give them a lien in receivership proceedings for the value of their services superior to that of a mortgage on trust property executed by them. 14

In the absence of a provision in the trust instrument fixing the compensation of the trustee of a business trust, he is entitled to reasonable compensation for his services, 15 and it has been held that an agreement will be implied to pay him a reasonable compensation out of the trust funds for services rendered by him to the trust. 16 What amounts to reasonable compensation depends, of course, upon all the circumstances, 17 and the fact that trustees or managers are also beneficiaries does not affect their claim for

services. 18

The compensation of trustees of a business trust who are performing the usual duties of such trustees has been held not subject to social security contributions, because the trustees cannot be deemed employees. 19

§ 46 ----Compensation [SUPPLEMENT]

Practice Aids: The cost of talent: How executives and professionals are paid and how it affects America, 107 Harv LR 1807 (1994)

–Based on gross income. 4 Am Jur Legal Forms 2d § 51:125.

–Based on net income. 4 Am Jur Legal Forms 2d § 51:126.

–Monthly salary. 4 Am Jur Legal Forms 2d § 51:127.

Compensation of trustees–By shares in trust. 4 Am Jur Legal Forms 2d §§ 51:123, 51:124.

Compensation of trustee. Real Estate Investment Trusts and Syndications 15 Am Jur Legal Forms 2d § 218:30.1.

Footnotes

Footnote 10.

Practice Aids: –3 Am Jur Legal Forms 3:1, 3:27-3:31.

Footnote 11. Todd v Ford, 92 Colo 392, 21 P2d 173.

In Mitchell v Ormond, 282 Mass 107, 184 NE 471, a provision of the trust instrument fixing the salary of the trustee was held to have been abrogated by an amendment of the declaration of trust increasing the number of trustees and radically changing their duties.

Footnote 12. Walker v Close, 98 Fla 1103, 125 So 521, reh den 98 Fla 1125, 126 So 289. See Beltz v Griggs, 137 Kan 429, 20 P2d 510.

Annotation: 156 ALR 141.

A limitation of salaries to a certain percent of all moneys received by the trustees has been held to refer to gross income and not net income. Dunbar v Redfield, 7 Cal 2d 515, 61 P2d 744.

Footnote 13. Dunbar v Redfield, supra.

Footnote 14. Warburton v Perkins, 150 Md 304, 133 A 141.

Footnote 15. Mitchell v Ormond, 282 Mass 107, 184 NE 471.

Footnote 16. *Woodke v Procknow*, 238 Wis 422, 300 NW 173.

A provision of the trust agreement requiring the beneficiaries to pay the costs, charges, and expenses in connection with the management of the business has been held to render them liable to the managers of the business for a reasonable compensation for their services, although there was no specific provision for compensation to the managers. *Trust No. 5522 & Trust No. 5644, Bellehurst Syndicate v Commissioner of Internal Revenue* (CA9) 83 F2d 801 (California).

Footnote 17. *Todd v Ford*, 92 Colo 392, 21 P2d 173, holding that compensation received by a trustee was not unreasonable under the circumstances.

Where, starting with nothing, the trustees of a business trust having an issued capital of \$300,000, in the course of 12 years paid out in dividends about \$2,000,000 and accumulated physical assets worth about \$500,000, an average compensation paid to the three trustees, respectively, of \$1,200, \$962, and \$842 a month, was held to be reasonable. *Dunbar v Redfield*, 7 Cal 2d 515, 61 P2d 744.

Footnote 18. *Trust No. 5522 & Trust No. 5644, Bellehurst Syndicate v Commissioner of Internal Revenue* (CA9) 83 F2d 801 (California).

Footnote 19. *Loring v United States* (DC Mass) 80 F Supp 781, pointing out that trustees of a business trust are principals, not agents, and, even when acting individually, cannot be regarded as the agents of the trustees as a unit, since the requirement of unanimity negatives the right of the unit to control any one trustee.

§ 47 Right to reimbursement or indemnity

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The trust instrument may specifically provide as to the expenses and reimbursement of the trustees of a business trust. 20 And even in the absence of such a provision, the general principle of trusts, that a trustee is ordinarily entitled to reimbursement from the trust estate for all necessary and reasonable expenditures made in the execution of the trust, 1 is applicable to business or Massachusetts trusts. Where a trustee of such a trust has acted in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements and liabilities out of the trust estate in his hands, and for this purpose he is entitled to a credit for expenditures on his account. 2 So too, shareholders suing a trustee for an accounting for profits are chargeable with losses incurred by the trustee in good faith. 3 In order, however, to be entitled to reimbursement for expenses incurred on behalf of the trust estate, the trustee must make a definite showing of the amount and of the constituent items of his claim. 4

On the other hand, property of the trust estate cannot be used to reimburse trustees for losses or expenses incurred by them, unless they have exercised good faith and common prudence. 5 And they are not entitled to contribution or indemnity from the shareholders for a liability incurred by the trustees in violation of the trust instrument. 6 Thus, the

right of a trustee to reimbursement or indemnity is lost where his personal liability resulted from his failure to insert, as required by the trust instrument, a provision exempting the shareholders and trustees from personal liability. 7

Footnotes

Footnote 20.

Practice Aids: –3 Am Jur Legal Forms 3:1, 3:32, 3:33.

Footnote 1. See Trusts (1st ed § 514).

Footnote 2. Taylor v Davis, 110 US 330, 28 L ed 163, 4 S Ct 147; Austin v Parker, 317 Ill 348, 148 NE 19.

Annotation: 156 ALR 142.

Footnote 3. Maher v Landreth (CA5) 22 F2d 752.

Footnote 4. Consolidated American Royalty Corp. v Taliaferro (CA10) 78 F2d 802 (Oklahoma).

Footnote 5. Austin v Parker, 317 Ill 348, 148 NE 19.

Footnote 6. McFadden v Leeka, 48 Ohio St 513, 28 NE 874, in which the organization was held to be a partnership.

Footnote 7. Downey Co. v 282 Beacon Street Trust, 292 Mass 175, 197 NE 643 (coupled with failure to secure the concurrence of his co-trustee); Mims v Stephens County-Ranger Oil Co. (Tex Civ App) 268 SW 1014; Barnett v Cisco Bkg. Co. (Tex Civ App) 253 SW 339, holding that trustees, as sureties on a note executed for a trust without stipulation against shareholders' liability, cannot assert primary liability of shareholders.

Annotation: 156 ALR 142.

§ 48 Resignation, removal, or replacement; death or disability

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Although it is said that a trustee who has once accepted and entered upon the execution of an ordinary trust cannot resign or renounce the trust without the consent of the cestui que trust or of the court, the instrument creating the trust may give him the right to resign. Where the trust instrument gives trustees of a business trust the right to resign at will, they do not violate their duty by entering into a contract to sell their interest in the trust and to resign as trustees so that others may be elected trustees in succession. 8

The instrument of trust sometimes contains provisions permitting the removal or replacement of a trustee by the shareholders or other trustees. 9 A provision authorizing the removal of trustees by the shareholders is valid and effective, regardless of whether the organization is treated as a trust or a partnership. 10 And where the power of removal is conferred, it seems that a court will not, in the absence of fraud, review the action of the shareholders in removing a trustee at a meeting regularly called. 11 Nor may indirect means be taken to circumvent the provisions of the trust instrument governing the manner in which trustees may be removed. 12

Where the trust agreement provides that the trustees shall hold office until it becomes vacant on account of death, inability to act, or resignation, the trustees have no power to remove one of their number so long as he attends the meetings and does not resign. 13 But a court of equity has power to remove the trustees of a business trust upon a proper showing of fraud or unfitness, and to appoint other trustees in their stead, even though the trust instrument does not reserve to the shareholders the power to remove trustees. 14

It has been said, that the death of a trustee of a business trust ends his interests under the trust agreement. 15 Upon the death of the trustee of a business trust, and the failure of the proper persons to appoint his successor, a court of equity may appoint a successor with the same powers and duties as the original trustees, and the trustee thus appointed by the court takes title to the trust property, subject to the same conditions and equities to which it was subject in the hands of the original trustee. 16

§ 48 ----Resignation, removal, or replacement; death or disability [SUPPLEMENT]

Practice Aids: Removal of trustees. Business Trusts 4 Am Jur Legal Forms 2d § 51:78.1.

Footnotes

Footnote 8. Wright v Webb, 169 Ark 1145, 278 SW 355.

Annotation: 156 ALR 139.

Footnote 9.

Practice Aids: –Trust instrument provisions as to removal and replacement of trustees. 3 Am Jur Legal Forms 3:1, 3:69, 3:70.

Footnote 10. Douglass v Safe Deposit & T. Co. 159 Md 81, 150 A 37.

Annotation: 156 ALR 140.

Footnote 11. Inderwick v Snell, 2 Macn & G 216, 42 Eng Reprint 83.

Footnote 12. Thus, in Douglass v Safe Deposit & T. Co. 159 Md 81, 150 A 37, a pooling agreement was held to be invalid, insofar as it would permit the owners of a mere majority of the pooled shares, although constituting less than a majority of all the shares, to remove or replace a trustee, in violation of a provision of the trust instrument for such removal or replacement by the owners of a majority of the shares in the trust.

Footnote 13. Oklahoma Fullers Earth Co. v Evans, 179 Okla 124, 64 P2d 899.

Footnote 14. Phoenix Oil Co. v McLarren (Tex Civ App) 244 SW 830; Burnett v Smith (Tex Civ App) 240 SW 1007 (arguendo).

Footnote 15. Stewart v Solomon, 316 Pa 236, 175 A 498.

Footnote 16. Rossman v Marsh, 287 Mich 580, 283 NW 696, affd on reh 287 Mich 720, 286 NW 83.

B. Powers and Functioning

1. In General

§ 49 Generally

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The instrument creating a business trust is to be looked to in determining the powers and duties of the trustees. 17 In addition to the statement of the objects and purposes of the trust and the character of its business (which of itself indicates in broad outline the activities and duties of the trustees), such instruments usually contain special provisions defining these powers and duties in various degrees of particularity. 18

The powers of trustees of a business trust are limited to those conferred by the trust instrument 19 and those necessarily implied therefrom, 20 and in order to bind the trust estate the trustees must act within the scope of the powers thus conferred. 1 A person dealing with the trustees of a business trust, knowing them to be such, is bound to ascertain the extent of their power, 2 and, having knowledge of their actual authority, cannot rely upon any apparent powers. 3

The fact that certain ventures undertaken by the trustees were not successful is no indication that the trustees exceeded their authority therein. 4

§ 49 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

President. 4 Am Jur Legal Forms 2d § 51:145.

Vice-presidents. 4 Am Jur Legal Forms 2d § 51:146.

Necessity of good faith of trustees—Presumption in favor of grant of power to trustees.
Real Estate Investment Trusts and Syndications 15 Am Jur Legal Forms 2d § 218:30.3.

Footnotes

Footnote 17. The trust instrument is the best evidence by which to prove the power of the trustees. *Morriss v Finkelstein* (Mo App) 127 SW2d 46.

Footnote 18. See *Rhode Island Hospital Trust Co. v Copeland*, 39 RI 193, 98 A 273; *Reeves v Powell* (Tex Civ App) 267 SW 328.

Annotation: 156 ALR 144.

Practice Aids: —Provisions of trust instrument as to powers and functions of trustees. 3 Am Jur Legal Forms 3:1, 3:44-3:79.

—Trust instrument provision as to sufficiency of trustees' notices to shareholders. 3 Am Jur Legal Forms 3:106.

Footnote 19. *Bomeisler v M. Jacobson & Sons Trust* (CA1) 118 F2d 261 cert den 314 US 630, 86 L ed 505, 62 S Ct 61 (Massachusetts).

Footnote 20. *Gutelius v Stanbon* (DC Mass) 39 F2d 621 (involving law of Florida; express authority to mortgage carries with it power to sign and deliver obligations of the trust, to secure which the mortgage is given); *Walker v Close*, 98 Fla 1103, 125 So 521, 126 So 289 (power to make contracts for sale of trust lands implied from purposes of trust); *Jesseph v Carroll*, 126 Wash 661, 219 P 429 (delegation of formal execution of mortgage securing debt).

Practice Aids: —Trust instrument provisions as to implied powers. 3 Am Jur Legal Forms 3:1, 3:47.

Footnote 1. *Sykes v Parker*, 250 Ill App 299; *West Side Oil Co. v McDorman* (Tex Civ App) 244 SW 167.

The manager of a business trust is charged with knowledge of the contents of the declaration of trust under which the business is operated. *Oden v Bone* (Tex Civ App) 263 SW 640.

Footnote 2. *De Witt v Cabanne* (CA3) 2 F2d 322; *Downey Co. v Whistler*, 284 Mass 461, 188 NE 243; *Horowitz v State Street Trust Co.* 283 Mass 53, 186 NE 74.

Footnote 3. *Rand v Farquhar*, 226 Mass 91, 115 NE 286.

Footnote 4. *Dunbar v Redfield*, 7 Cal 2d 515, 61 P2d 744.

§ 50 Manner of functioning by trustees; unanimous, joint, or individual action

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The general rule that where there are cotrustees of an ordinary trust, they all form but one collective trustee and must execute the discretionary duties of the office in their joint capacity, 5 applies to the trustees of a business trust, who constitute a board and must act as a unit, in the absence of a provision to the contrary in the trust instrument. 6 It has been held that the trustees can act only as a board assembled and not through the individuals who happen to compose such board, 7 unless the trust instrument provides otherwise. 8 However, the trust instrument may authorize action by a majority or by a specified number of the trustees. 9 And it has been held that the trustees may delegate to one of their number certain duties vested by the trust instrument in the trustees generally; 10 that the trustees may constitute one of their number the president and general manager of the trust, with power and authority to execute and hypothecate notes; 11 and that authorization of a single trustee to enter into a contract, under a trust instrument providing that the majority of three trustees should rule, may be established or shown indirectly and by the conduct of the parties. 12

Under a trust instrument expressly authorizing action by one trustee in connection with certain matters, and providing for action by "the trustees" in other cases, the participation of all the trustees has been held necessary to bind the trust estate on a contract not relating to a matter on which a single trustee is authorized to act. 13 One dealing with a single trustee with knowledge that his authority is limited is bound at his peril to ascertain the extent of the trustee's authority. 14 And a provision of a trust instrument excusing persons dealing with the trustees from the necessity of inquiring into the authority of the latter has been held not to validate a contract made by a single trustee, without some explanation of the failure of the other trustees to join in the contract or an authorization or ratification thereof by them. 15

Trust instrument provisions with regard to the officers and agents of a business trust, and the delegation of authority to them or to an executive committee of the trustees, are discussed in the following section. 16

§ 50 ----Manner of functioning by trustee; unanimous, joint, or individual action [SUPPLEMENT]

Practice Aids: Monthly meetings; quorum; action. 4 Am Jur Legal Forms 2d § 51:91.

Footnotes

Footnote 5. See Trusts (1st ed § 296).

Footnote 6. Williard v Campbell Oil Co. 77 Mont 30, 248 P 219.

The trustees are not merely agents who act independently one of another. They constitute a board and they can act only as a unit in the disposition of any business of the trust which requires the exercise of judgment or discretion. Gordon Campbell Petroleum Co.

v Gordon Campbell-Kevin Syndicate, 75 Mont 261, 242 P 540.

Footnote 7. Williard v Campbell Oil Co. 77 Mont 30, 248 P 219, wherein the attempted approval by an individual trustee in another state of a contract made by disqualified trustees was held not to give any validity to the contract.

Footnote 8. Under a trust instrument expressly providing that it shall not be necessary for the trustees to assemble formally for the purpose of conducting the affairs of the trust or exercising their powers, they may act and vote by telephone. Lambach v Anderson, 228 Iowa 1173, 293 NW 505, appointment of trustee to fill vacancy.

Practice Aids: –Trust instrument provisions as to meetings of trustees and manner of functioning. 3 Am Jur Legal Forms 3:1, 3:34-3:36, 3:40.

Footnote 9. See Home Lumber Co. v Hopkins, 107 Kan 153, 190 P 601, 10 ALR 879.

Where the trust instrument provides for action by a majority of the three trustees, one trustee, acting alone and without authorization or ratification of the other trustees, cannot bind the trust estate by his contract. Downey Co. v Whistler, 284 Mass 461, 188 NE 243; Horowitz v State Street Trust Co. 283 Mass 53, 186 NE 74.

Footnote 10. Martin v Security Nat. Bank (Tex Civ App) 257 SW 645.

Footnote 11. Martin v Security Nat. Bank, supra, trust instrument empowered the trustees to deal with and use the trust properties and moneys, to manage and conduct the trust in any manner that they deemed fit, to execute and make all agreements and instruments, and to do anything else properly incident to the trust purposes.

Annotation: 156 ALR 145.

Footnote 12. De Witt v Cabanne (CA3) 2 F2d 322, holding that the question of such authorization of a single trustee is for the jury and not for the court.

Footnote 13. Sykes v Parker, 250 Ill App 299.

Footnote 14. Rand v Farquhar, 226 Mass 91, 115 NE 286.

Footnote 15. Horowitz v State Street Trust Co. 283 Mass 53, 186 NE 74.

Footnote 16. § 51, infra.

§ 51 Delegation of powers; appointment of officers and agents 17

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Where the trustees of a business trust are charged with the duty to manage and control the

trust business, they cannot divest themselves of that duty. 18 Thus, where absolute control and management of the trust property and business is vested in the trustees, it has been held that they cannot appoint a general manager to control the affairs of the trust to the exclusion of the trustees themselves. 19 On similar principle, power vested in a designated officer of the trust to make contracts for the sale of trust lands does not authorize him to delegate to another the power to do so. 20 Of necessity, however, the trustees may ordinarily delegate ministerial and nondiscretionary duties to others and may employ agents and servants for the performance of acts of this nature. 1 Thus, after arranging the terms of a loan the trustees may delegate to an attorney in fact the formal execution of a mortgage securing the debt. 2 In this regard the powers of the trustees may be broadened by provisions of the trust instrument. 3 For example, the trust instrument may authorize the trustees to create a board of directors or an executive committee to exercise certain designated powers of the trustees in the management of the affairs of the trust. 4

It has been said that trustees cannot, without the consent of shareholders, appoint agents to represent the latter; however, the shareholders may subsequently ratify or approve an unauthorized appointment of such an agent so as to be bound by his acts. 5

§ 51 ----Delegation of powers; appointment of officers and agents [SUPPLEMENT]

Practice Aids: Authorization to delegate powers. 4 Am Jur Legal Forms 2d § 51:108.

Advisory contract. 15 Am Jur Legal Forms 2d § 218:44.

Footnotes

Footnote 17.

Practice Aids: –Provisions of trust instrument as to delegation of authority by trustees and as to officers and agents of trust. 3 Am Jur Legal Forms 3:1, 3:3, 3:57, 3:59, 3:60, 3:84.1, 3:97-3:102.

Footnote 18. Phoenix Oil Co. v McLarren (Tex Civ App) 244 SW 830.

Footnote 19. Phoenix Oil Co. v McLarren, supra, holding that trustees were entitled to mandatory injunction against one whom they had attempted to appoint general manager, requiring the latter to turn over to the trustees the books, money, and other personal property belonging to the trust.

Footnote 20. See Spotswood v Morris, 12 Idaho 360, 85 P 1094.

Footnote 1. Byrnes v Chase Nat. Bank, 225 App Div 102, 232 NYS 224, affd 251 NY 551, 168 NE 423.

Footnote 2. Jesseph v Carroll, 126 Wash 661, 219 P 429.

Footnote 3. Horgan v Morgan, 233 Mass 381, 124 NE 32.

Footnote 4. See Peterson v Hopson, 306 Mass 597, 29 NE2d 140, 132 ALR 1.

Practice Aids: –Provision authorizing appointment of executive committee. 3 Am Jur Legal Forms 3:72.

Footnote 5. *Hines v United States* (CA7) 90 F2d 957, cert den 302 US 756, 82 L ed 584, 58 S Ct 283.

§ 52 Ratification or acquiescence by trustees

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The trustees may bind the trust by their ratification of an unauthorized act on behalf of the trust. 6 Thus, a contract within the authority of the trustees to make may be adopted by the trustees or a majority of them, although it was not properly executed or was made without formal authority, 7 and it has been held that the ratification may be by acquiescence and need not be by formal act at a meeting. 8 Further, ratification by the other trustees of acts of a single trustee can supply the unanimity required by the trust instrument of the acts of the trustees, 9 and such ratification may be inferred from knowledge of a course of dealing and failure to object to it. 10

Footnotes

Footnote 6. *National Surety Co. v Anacostia Finance Corp.* 58 App DC 207, 26 F2d 985.

Annotation: 156 ALR 147.

Footnote 7. *Rand v Farquhar*, 226 Mass 91, 115 NE 286.

Footnote 8. *West Side Oil Co. v McDorman* (Tex Civ App) 244 SW 167, although the trust instrument contemplated action by the trustees at regular meetings.

Footnote 9. *Bomeisler v M. Jacobson & Sons Trust* (CA1) 118 F2d 261, cert den 314 US 630, 86 L ed 505, 62 S Ct 61 (Massachusetts); *Cabanne v De Witt* (CA3) 10 F2d 504 (New Jersey).

Footnote 10. *Bomeisler v M. Jacobson & Sons Trust* (CA1) 118 F2d 261, cert den 314 US 630. 86 L ed 505, 62 S Ct 61 (Massachusetts).

Although the trust instrument limited the powers and duties of the secretary-treasurer and the bylaws required the contract to be executed in the name of the president, vice president, or trustees, the trust was held to be bound by an oil-drilling contract executed by the secretary-treasurer, where it was shown that he acted as the general manager of the trust and that the other trustees knew of that fact and acquiesced therein. *Banner Oil & Gas Co. v Gordon* (Tex Civ App) 235 SW 945.

§ 53 Knowledge or dereliction of trustees as imputable to trust

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The knowledge and inaction of the very trustees whose wrongful acts constitute the basis of a suit by other trustees cannot be relied upon as laches barring such suit. 11 Nor do knowledge acquired by shareholders prior to their election as trustees, and their inaction prior to that time, constitute such laches as would preclude them, after their election as trustees, from maintaining an action on behalf of the trust estate. 12 And the trust has been held not to be charged with the knowledge of a trustee with respect to an unrecorded mortgage on property sold by him to the trust. 13

The right of a trustee to recover as the representative of the shareholders and for their benefit has been held not to be affected by his misconduct or fraud in his individual or private capacity, although his conduct would preclude him from recovering for his own benefit. 14

Footnotes

Footnote 11. *Williard v Campbell Oil Co.* 77 Mont 30, 248 P 219, wherein the court said: "The doctrine of laches has no application when the ones upon whom the duty of prosecuting the action devolves were themselves the wrongdoers."

Annotation: 156 ALR 147.

Footnote 12. *Williard v Campbell Oil Co.*, supra.

Footnote 13. *Lowman v Guie*, 130 Wash 606, 228 P 845, holding based upon general principles of agency.

Footnote 14. *Wichita Royalty Co. v City Nat. Bank*, 127 Tex 158, 89 SW2d 394, modg (Tex Civ App) 74 SW2d 661, reh den 127 Tex 184, 93 SW2d 143.

2. Particular Powers and Functions

§ 54 Making contracts and incurring debts, generally

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In the performance of their primary duty to hold and manage the property of the trust, the

trustees of a business trust may incur debts and make or ratify contracts 15 binding on themselves personally, and instruments creating such trusts sometimes authorize the trustees to bind the trust estate thereon. 16

The authority to enter into a particular contract may depend upon a construction of the trust instrument. 17 But a provision of the trust agreement prohibiting expenditures of over a certain sum without the approval of the trustees has been held not to be binding on third parties or creditors without notice thereof. 18

§ 54 ----Making contracts and incurring debts, generally [SUPPLEMENT]

Practice Aids: Limitation on operating expenses of adviser. 15 Am Jur Legal Forms 2d § 218:22.

Footnotes

Footnote 15. As to ratification or acquiescence, see § 52, supra.

Footnote 16. California Nat. Bank v El Dorado Lime & Minerals Co. 207 Cal 676, 279 P 775.

Footnote 17. See generally § 15, supra.

A trust instrument empowering the trustees to deal generally in hides has been held to authorize them to enter into future contracts involving hides. Bomeisler v M. Jacobson & Sons Trust (CA1) 118 F2d 261, cert den 314 US 630, 86 L ed 505, 62 S Ct 61 (Massachusetts).

Practice Aids: –Provisions of trust instrument as to making and execution of contracts and documents by trustees. 3 Am Jur Legal Forms 3:8, 3:41, 3:42, 3:75.

Footnote 18. Stitzinger v Truitt, 81 Cal App 502, 253 P 971.

§ 55 Acquisition, administration, and disposition of trust property

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Ownership of the property of the enterprise by the trustees is one of the principal features distinguishing business trusts from partnerships and other forms of organization. 19 Indeed, it may well be a prerequisite to the formation of a true business trust. 20 In any event, the trustees are generally vested with the legal title to the trust property, 1 and in determining the nature and validity of the title to trust property, the trust agreement must be taken into consideration. 2

A deed to a trust has been held not to be invalid because the grantee was designated by

the name of the trust without naming the trustees, where the trustees were parties to the trust agreement and could thus be identified, 3 although an early authority has questioned whether a business trust is such a legal entity as can take a grant of land eo nomine. 4

The trustees may acquire and hold title to property on behalf of the trust estate, even in a jurisdiction denying the right of the shareholders or trustees to relieve themselves of personal liability for the debts of the trust. 5 And the retention by the cestuis que trustent of the power to remove a trustee, to fill vacancies among the trustees, and to direct or control the action of the trustees, has been held not to invalidate the title of the trustees, at least where the cestuis que trustent have never exercised such powers. 6

It has been said that if a business trust has acquired property which the law of the state does not permit such an organization to hold, the matter is the concern of the properly constituted state official and cannot be availed of by one who has conveyed property to the trustees in exchange for shares of the trust. 7

Trustees are affected with notice to their predecessors in office regarding defects in title. 8

Footnotes

Footnote 19. See *Liquid Carbonic Co. v Sullivan*, 103 Okla 78, 229 P 561.

Footnote 20. See *Brown v Bedell*, 263 NY 177, 188 NE 641, revg 238 App Div 812, 262 NYS 926, which affd 148 Misc 550, 265 NYS 262, reh den 264 NY 453, 191 NE 510, motion den 264 NY 513, 191 NE 541.

Footnote 1. *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485; *Reffon Realty Corp. v Adams Land & Bldg. Co.* 128 Md 656, 98 A 199; *Morriss v Finkelstein* (Mo App) 127 SW2d 46.

Annotation: 156 ALR 150.

Footnote 2. *Hart v Seymour*, 147 Ill 598, 35 NE 246.

Practice Aids: –Provisions of trust instrument as to title and powers of trustees with regard to trust property. 3 Am Jur Legal Forms 3:1, 3:4, 3:39, 3:44-3:46.

Footnote 3. *Hodgkiss v Northland Petroleum Consolidated*, 104 Mont 328, 67 P2d 811.

Footnote 4. *German Land Asso. v Scholler* 10 Minn 331, Gil 260.

Footnote 5. *Fitch v United Royalty Co.* 143 Kan 486, 55 P2d 409; *Beltz v Griggs*, 137 Kan 429, 20 P2d 510.

Footnote 6. *Hart v Seymour*, 147 Ill 598, 35 NE 246.

Footnote 7. *Fitch v United Royalty Co.* 143 Kan 486, 55 P2d 409.

Footnote 8. *Bisbee v Mackay*, 215 Mass 21, 102 NE 327.

It is doubtful whether trustees would be charged with the knowledge of one of their number who sold property to the trust, of the existence of a mortgage on the property, since the interests and dealings of such trustee are antagonistic to the interests of the trust. See *Lowman v Guie*, 130 Wash 606, 228 P 845.

§ 56 --Leases and encumbrances

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In the case of an ordinary trust, the power to lease trust property may be implied as a necessary or proper incident to the express powers and duties conferred upon the trustee, 9 and there would appear to be no reason why this principle should not be applicable to a business trust. Instruments creating this type of trust frequently contain provisions expressly authorizing the trustees to lease property of the trust and to obtain property under lease. 10 While ordinarily the term of a lease should not extend beyond the limits placed on the duration of the trust, 11 it has been held that where the trustees are vested with full power to sell, convey, and lease the trust property, they may lease such property beyond the term limited for the duration of the trust. 12

Instruments creating business trusts frequently contain provisions expressly authorizing the trustees to execute mortgages of trust property to secure debts of the trust estate. 13 It has been said in a case involving a business trust that a trustee cannot create a lien on the trust estate in favor of a creditor, without express authority in the trust instrument. 14 However, under principles applicable to trusts generally, the power to mortgage the trust estate may be implied, in the absence of an express provision to the contrary, where it is reasonable and necessary for the execution of the trust. 15 But clearly a trustee has no power to mortgage real property of the trust estate to secure his personal indebtedness growing out of a transaction independent of the trust. 16

§ 56 --Leases and encumbrances [SUPPLEMENT]

Practice Aids: Subjecting trust property to mortgage or deed of trust. 4 Am Jur Legal Forms 2d § 51:61.

Footnotes

Footnote 9. See *Trusts* (1st ed § 471).

Footnote 10.

Annotation: 156 ALR 153.

While the creation of a trust and the conveyance of land to trustees for the purpose of a

farming and ranching business do not authorize them to execute oil or mining leases, the power to make such leases may be included, as a separate power of attorney, in the trust instrument. *Crabb v Commissioner of Internal Revenue* (CA5) 119 F2d 772, remanded on reh (CA5) 121 F2d 1015 (Texas).

Practice Aids: –Trust instrument authorizing lease of trust property. 3 Am Jur Legal Forms 3:1, 3:44.

Footnote 11. See *Trusts* (1st ed § 472).

Footnote 12. *Powell v Hammon Consol. Gold Fields*, 8 Alaska 153, lease of gold-mining claims for a term of 12 years held valid, although trust was limited to 5 years.

Footnote 13. See *Daries v Hart*, 214 Iowa 1312, 243 NW 527.

Practice Aids: –Trust instrument authorizing mortgage of trust property. 3 Am Jur Legal Forms 3:1, 3:44, 3:49.

Footnote 14. *Austin v Parker*, 317 Ill 348, 148 NE 19.

Footnote 15. See *Trusts* (1st ed § 478).

Footnote 16. *Fourth Nat. Bank v Memorial Park*, 181 Okla 574, 75 P2d 887.

§ 57 --Sales and conveyances

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Generally the trustees of business trusts are given the power to make contracts for the sale of trust lands, 17 which need not be conferred in direct or express terms, but may be implied from the purposes of the trust. 18 The trustees, in whom title and control are vested, can convey a good and marketable title to real property belonging to the trust estate, 19 and apparently may sell such property at private sale rather than by public auction. 20 However, subsequent purchasers are charged with notice of limitations contained in the trust instrument upon the power of the trustees with respect to the conveyance of trust property. 1

Generally, where title to trust real property is vested in the trustees, other officers of the trust cannot sell or convey the property. 2 But where contracts for the sale of land are made in the adopted name of the trust, by the duly designated managers thereof, the contracts are not subject to the objection that the real vendors are the trustees, that they are undisclosed principals, and that hence the contracts are unenforceable. 3

Trustees may be compelled to specifically perform a contract for the sale of an interest in trust real estate, by making a conveyance thereof. 4

§ 57 --Sales and conveyances [SUPPLEMENT]

Practice Aids: Sale of trust property. 4 Am Jur Legal Forms 2d § 51:62.

Footnotes

Footnote 17. West Side Oil Co. v McDorman (Tex Civ App) 244 SW 167. And see Reffon Realty Corp. v Adams Land & Bldg. Co. 128 Md 656, 98 A 199.

Annotation: 156 ALR 152.

Practice Aids: –Trust instrument authorizing sale or disposition of trust property. 3 Am Jur Legal Forms 3:1, 3:44, 3:46, 3:50.

Footnote 18. Walker v Close, 98 Fla 1103, 125 So 521, reh den 98 Fla 1125, 126 So 289.

Footnote 19. Reffon Realty Corp. v Adams Land & Bldg. Co. 128 Md 656, 98 A 199.

Footnote 20. Asher v Teter, 314 Ill App 200, 40 NE2d 803.

Footnote 1. Page v Natural Gas & Fuel Co. (CA8) 35 F2d 462, holding also that a provision of a trust instrument vesting in the trustee the sole power of alienating and conveying the property of the trust "for value" does not authorize him to donate such property to others, to sacrifice it in a manner contrary to his fiduciary obligation to the beneficiaries of the trust, or to dispose of it otherwise than for their benefit.

Footnote 2. Ward v Davis, 2 Sandf (NY) 502 holding that directors, as distinguished from trustees, had no power to dedicate trust lands to the public); Willis v Greiner (Tex Civ App) 26 SW 858 (holding that a contract entered into by the president and secretary of the trust for the sale of land of the trust was not binding).

Annotation: 156 ALR 152.

However, in W. C. Tyrell Trust v Lovell, (Tex Civ App) 27 SW2d 142, mod on other grounds (Tex Com App) 30 SW2d 301, a sale of trust lands by the general manager of the trust, who was its alter ego and exercised complete authority and control over the trust, was held to be a sale by the trust itself.

Footnote 3. Beilin v Krenn & Dato, 350 Ill 284, 183 NE 330.

Footnote 4. West Side Oil Co. v McDorman (Tex Civ App) 244 SW 167, holding that specific performance may be required of the trustees although the contract was originally made irregularly and not at any formal meeting of the trustees, where it was subsequently ratified by the trustees.

§ 58 Making and issuing evidences of indebtedness

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Trustees of business trusts may, of course, execute bills and notes binding upon themselves personally, and are sometimes expressly given the power to execute such paper binding upon the trust estate. 5 Such power may also be implied from the trust instrument. For instance, a declaration of trust empowering the trustees to mortgage trust property necessarily carries with it the power to sign and deliver obligations of the trust, to secure which the mortgage is given. 6

The failure to comply with a statute requiring that the trust instrument be recorded has been held not to deprive the trustees of the power, conferred upon them by the terms of the trust, to execute promissory notes. 7

Footnotes

Footnote 5. *Daries v Hart*, 214 Iowa 1312, 243 NW 527.

Annotation: 156 ALR 150.

Practice Aids: –Provisions of trust instrument as to issuance of bills and notes and as to contracts for payment of money. 3 Am Jur Legal Forms 3:1, 3:44, 3:52, 3:76.

Footnote 6. *Gutelius v Stanbon* (DC) 39 F2d 621 (involving law of Florida).

Footnote 7. *Gutelius v Stanbon*, *supra*.

§ 59 Compromise and settlement of claims

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Trust instruments often authorize the trustees to compromise claims or demands of or against the trust estate. Under a business trust agreement empowering the trustees to compromise any claims, they may compromise and settle claims or actions against the trust based on torts of the trustees from which the trust estate derived a substantial benefit, and may use trust funds in settlement of such claims. 8

Footnotes

Footnote 8. *Alphonzo E. Bell Corp. v Bell View Oil Syndicate*, 46 Cal App 2d 684, 116 P2d 786, involving trust instrument authorizing the trustees to develop and operate oil wells, to exercise exclusive management and control of the trust estate, and to employ counsel to prosecute, defend, or settle actions and to compromise or refer to arbitration

any claims in favor of or against the trust.

Annotation: 156 ALR 150.

§ 60 Assessments

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Instruments creating business trusts sometimes contain provisions authorizing assessments against shareholders. A trustee may maintain an action against the members of the trust to recover assessments made by the trustee against the members, where the assessments are reasonable and necessary and were made in accordance with the trust agreement. 9 But power vested in the trustees of a business trust to make certain assessments against shareholders and to require them to pay the assessments does not empower the trustees to forfeit stock of a shareholder not paying such an assessment, and such a forfeiture is void in the absence of some authority therefor in the trust instrument. 10 In any event, in order to effect a valid forfeiture of shares in a business trust for nonpayment of calls or assessments made by the trustees, they must comply strictly with the provisions of the trust instrument with respect to notice to the shareholders. 11

Footnotes

Footnote 9. *Hudson v Outram*, 203 Ky 78, 261 SW 847.

Annotation: 156 ALR 131.

Footnote 10. *Durkee v Stringham*, 8 Wis 1.

Footnote 11. *Morris v Metalline Land Co.* 164 Pa 326, 30 A 240, later app 166 Pa 351, 31 A 114.

C. Duties and Liabilities

1. To the Trust and Shareholders

§ 61 Generally; fiduciary relationship

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The relationship between the trustees and beneficiaries of a business trust is comparable to the one existing between the directors of a corporation and the corporation itself, but is more confidential in character. 12 In essence it is a fiduciary relationship, regardless of whether the organization is classed as a pure trust or as a partnership with respect to the rights of outsiders, 13 and the trustees owe a fundamental duty to act for the promotion of the interests of the shareholders. 14 Acts of a trustee contrary to the best interests of the shareholders are not absolutely void, but voidable at the option of the beneficiaries. 15

The fiduciary relationship existing between the trustees and the beneficiaries of a business trust imposes upon the trustees a duty to act for the beneficiaries, and not for themselves in antagonism to the interests of the beneficiaries. 16 Accordingly, trustees must manage the assets of the trust for the benefit and advantage of the shareholders, and not with an eye to their own personal advantage or profit. 17 A trustee of a business trust may not profit by any transactions in relation to the trust estate at the expense of the beneficiaries, 18 nor is he entitled to derive any profit out of the trust, except as lawful compensation. 19 He has no right to dispose of, 20 or to encumber, 1 or to use, 2 trust property for his own personal benefit, nor may he speculate on the possibilities of property of the trust at the expense of the trust. 3 The trustee of a business trust is impliedly prohibited from purchasing on his individual account property necessary for the business of the trust or for carrying out the purposes for which it was organized. 4 He may not act for strangers adversely to the interests of the trust. 5

The principle by which a trustee is disabled from profiting personally at the expense of his trust does not apply to a transaction by which trustees of a business trust acquire for themselves the shares of other shareholders. 6 And trustees cannot be compelled to account for the proceeds realized from a sale of their own interests in a business trust, legally sold by them in connection with their agreement to resign as trustees. 7

§ 61 ----Generally; fiduciary relationship [SUPPLEMENT]

Practice Aids: Financial institution directors: mitigating risks of liability in shareholder actions, 109 Bank LJ 336 (1992).

Massachusetts or business trust. 88 ALR3rd 704.

Complaint in action by shareholders for accounting by trustees. 5 Am Jur Pl & Pr Forms (Rev), Business Trusts, Form 1.

Limitation of liability—Reliance on experts. 15 Am Jur Legal Forms 2d § 218:24.

Footnotes

Footnote 12. Gordon Campbell Petroleum Co. v Gordon Campbell-Kevin Syndicate, 75 Mont 261, 242 P 540.

Footnote 13. *Haskell v Patterson*, 165 Ark 65, 262 SW 1002; *Culp v Robey* (Tex Com App) 299 SW 846, revg (Tex Civ App) 294 SW 647, later app *Brown v Robey* (Tex Civ App) 27 SW2d 590.

Annotation: 156 ALR 154, 177.

An officer of a business trust vested with the sole management and control of its affairs owes to the trust the utmost good faith. *Haines v Bankers' Petroleum & Ref. Co.* (Tex Civ App) 273 SW 940.

Footnote 14. *Page v Natural Gas & Fuel Co.* (CA8) 35 F2d 462.

Practice Aids:—Provisions of trust instrument as to general duties of trustees. 3 Am Jur Legal Forms 3:80.

Footnote 15. *Siedletz v Griffith*, 18 Cal 2d 227, 114 P2d 598.

Such an act, being voidable only, may be either affirmed or repudiated by the beneficiary, but a stranger to the relationship between the trustee and the beneficiaries and to the question of title as between them cannot assert the invalidity of the act of a trustee in acquiring property as agent for a third person. *Siedletz v Griffith*, supra.

Footnote 16. *Beedle v Campbell* (CA8) 100 F2d 798, cert den 307 US 631, 83 L ed 1514, 59 S Ct 835 (Missouri).

Footnote 17. *Greer Invest. Co. v Booth* (CA10) 62 F2d 321, affg (DC) 52 F2d 857, app dismd in part (CA10) 62 F2d 1072.

Footnote 18. *Winn v Shugart* (CA10) 112 F2d 617 (New Mexico).

Footnote 19. *Beedle v Campbell* (CA8) 100 F2d 798, cert den 307 US 631, 83 L ed 1514, 59 S Ct 835.

Footnote 20. *Haskell v Patterson*, 165 Ark 65, 262 SW 1002.

Footnote 1. *Fourth Nat. Bank v Memorial Park*, 181 Okla 574, 75 P2d 887 (mortgaging trust property to secure trustee's personal debt).

Footnote 2. *Wichita Royalty Co. v City Nat. Bank*, 127 Tex 158, 89 SW2d 394, reh den 127 Tex 184, 93 SW2d 143, holding that a bank having actual or constructive notice that the trustee was commingling the funds of the trust with his own account at the bank, and was using the commingled fund for his personal purposes, was liable to the trust for the sums thus misused.

Footnote 3. *Vestal v Moore*, 167 Ark 192, 266 SW 948.

Footnote 4. *Wofford v Twin City Brick & Tile Co.* 184 Ark 162, 41 SW2d 1079. To the same effect is *Haskell v Patterson*, 165 Ark 65, 262 SW 1002.

He cannot elect to make a good bargain for himself, when, by fidelity to his trust, he could make the same bargain for the benefit of the shareholders. *Oil Fields Corp. v*

Dashko, 173 Ark 533, 294 SW 25, cert den 275 US 548, 72 L ed 419, 48 S Ct 85, reh den (US) 72 L ed 1016, 48 S Ct 206.

Footnote 5. Siedletz v Griffith, 18 Cal 2d 227, 114 P2d 598, stating that the trustee of a trust engaged in the business of mining has no right to locate a mining claim as agent of a third person and for the latter's benefit.

Footnote 6. Donnelly v Consolidated Invest. Trust (CA1) 99 F2d 185.

Footnote 7. Wright v Webb, 169 Ark 1145, 278 SW 355.

§ 62 Care and skill required; liability for negligence or misconduct

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Generally, the measure of the care and diligence required of a trustee is such as would be exercised by a man of ordinary prudence and skill in the management of his own estate; he is not an insurer. 8 These principles apply to the measure of care and skill required of the trustee of a business trust. 9 While ignorance on the part of the trustees of a business trust of the scope of their duties or of the legal requirements connected with their office is no excuse for their failure to discharge their duties with reasonable skill, prudence, and judgment, 10 when trustees act according to their best judgment and in good faith, they should be protected though they make some trifling mistake in doubtful matters. 11

The trustees of a business trust are liable for losses resulting from their wilful breach of trust or diversion of trust funds, 12 and for funds of the trust used by them for purposes other than trust purposes, 13 and may be liable to an accounting for their improper dealing with trust property. 14 However, there is no such liability where the loss to the trust is not due to any fault or negligence on the part of the trustee. 15 And it has been held that the inaction of a trustee does not constitute a breach of his duty to the members or shareholders, where, by the trust instrument, he has no authority to act without the consent of the majority of the shareholders. 16 But the failure of trustees to insert in contracts made by them a provision exempting shareholders from personal liability has been said to subject the trustees to liability for any loss sustained by the shareholders as a result thereof. 17

An officer of a business trust, vested with the sole management and control of its affairs, is liable to the trust for loss or damage resulting to it from his negligence and fraud. 18

Trustees are not estopped to maintain an action against former trustees, based on improper dealings by the latter with trust property, where there was nothing of any nature to show either knowledge of or assent to the acts of the defendants. 19

Footnotes

Footnote 8. See Trusts (1st ed §§ 322, 414).

Footnote 9. Ashley v Winkley, 209 Mass 509, 95 NE 932.

Footnote 10. Ashley v Winkley, 209 Mass 509, 95 NE 932.

Footnote 11. Downey Co. v 282 Beacon Street Trust, 292 Mass 175, 197 NE 643.

Annotation: 156 ALR 155.

Footnote 12. Digney v Blanchard, 226 Mass 335, 115 NE 424, holding that a trustee has no authority to erect or repair houses upon land belonging to others, under a provision of the trust instrument authorizing the erection and repair of buildings "upon land belonging to" the trust, and the use of trust funds for those purposes constitutes a wrongful diversion thereof.

A former trustee is liable to the present trustees of a business trust for wrongful diversion of trust funds. Digney v Blanchard, *supra*.

Footnote 13. Wichita Royalty Co. v City Nat. Bank, 127 Tex 158, 89 SW2d 394, modg (Tex Civ App) 74 SW2d 661, reh den 127 Tex 184, 93 SW2d 143.

Footnote 14. § 107, *infra*.

Footnote 15. Beedle v Campbell (CA8) 100 F2d 798, cert den 307 US 631, 83 L ed 1514, 59 S Ct 835 (Missouri).

Footnote 16. Hogg v Hoag (CC) 107 F 807, affd (CA2) 154 F 1003.

Footnote 17. Barnett v Cisco Bkg. Co. (Tex Civ App) 253 SW 339.

Footnote 18. Haines v Bankers' Petroleum & Ref. Co. (Tex Civ App) 273 SW 940, holding also that such an officer cannot escape liability to the trust for the consequences of his negligence and fraud, even if the organization is treated as a partnership, on the ground that there must be an accounting among the members of the partnership, or on the ground that the trust instrument exempted the shareholders from personal liability.

Footnote 19. Haskell v Patterson, 165 Ark 65, 262 SW 1002.

§ 63 Trustee dealing individually with trust or shareholders

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While transactions between the trustee of a business trust and the beneficiaries are not prohibited, and sometimes are expressly authorized by trust instruments, 20 such transactions are subject to close scrutiny and courts of equity will set them aside on slight grounds. 1 In his dealings with the beneficiaries, the trustee is held to the highest degree of candor and frankness. He must not only be strictly truthful in all his

representations, but must not remain silent concerning any matter of which he has knowledge that would throw light upon the trust estate. 2

The manager of a business trust, in making a loan to the trust, is charged with knowledge of the provisions of the trust instrument. 3

A deed of trust executed in good faith by trustees to secure the payment of a loan for the benefit of the trust, negotiated by a part of the trustees on their individual responsibility, is not absolutely void. 4

A trustee of a business trust, in the presentation and consideration of his individual claim against the trust estate, cannot vote as a trustee upon the approval of the claim, if his vote is necessary to secure favorable action. 5

Footnotes

Footnote 20. See *Cohen v United States Trust Securities Corp.* 311 Mass 152, 40 NE2d 282.

Footnote 1. *Winn v Shugart* (CA10) 112 F2d 617 (New Mexico).

Annotation: 156 ALR 160.

The acts of trustees of a business trust in purchasing for full value, in the name of a corporation which they controlled, notes of the trust secured by a mortgage on trust property, after having failed to procure a renewal thereof, were held to constitute a breach of their duty, and the property thus acquired by them was held to be impressed with a constructive trust in favor of the other beneficiaries, on payment by the latter of their portion of the price paid for the property. *Beedle v Campbell* (CA8) 100 F2d 798, cert den 307 US 631, 83 L ed 1514, 59 S Ct 835 (Missouri).

Footnote 2. *Winn v Shugart* (CA10 NM) 112 F2d 617.

Footnote 3. *Oden v Bone* (Tex Civ App) 263 SW 640.

Footnote 4. *McCallen v Mogul Producing & Ref. Co.* (Tex Civ App) 257 SW 918 (at least in the absence of a verified pleading setting up lack of authority in the trustees).

Footnote 5. *Gordon Campbell Petroleum Co. v Gordon Campbell-Kevin Syndicate*, 75 Mont 261, 242 P 540, holding that where the trust instrument required that two of the three trustees act in order to bind the trust, action taken by two trustees in approving a claim submitted by one of the trustees on behalf of a corporation which was merely an alias under which such trustee conducted his private business, against the trust, was invalid, and did not afford the basis of any action on an account stated, based on the approval by such trustees.

To the same effect is *Williard v Campbell Oil Co.* 77 Mont 30, 248 P 219, involving a contract for the extension of an agreement between the trust and a corporation in which one of the trustees was interested.

§ 64 --Sale of trustees' property to trust

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Where complete disclosure is made to the shareholders, the trustees of a business trust may sell to the trust, for shares therein, property acquired by them prior to the organization of the trust, even though at that time the persons who later became trustees had agreed on the organization of the trust and upon the principal provisions of the trust agreement. ⁶ However, a trustee is liable to an accounting to the trust for profits wrongfully made by him from a transfer of property to the trust, through misrepresentations as to the cost of the property. ⁷ And fraud on the part of the promoters and trustees of a business trust in grossly misrepresenting the value of a lease transferred to the trust in exchange for its stock and cash has been held to be a ground for a suit by shareholders to cancel the transfer of the lease, to rescind their contracts for the purchase of shares, and to recover the price paid for the shares. ⁸

Footnotes

Footnote 6. *Dunbar v Redfield*, 7 Cal 2d 515, 61 P2d 744.

Annotation: 156 ALR 161.

Footnote 7. *Vestal v Moore*, 167 Ark 192, 266 SW 948.

Footnote 8. *Webb v Shea*, 149 Ark 406, 232 SW 602.

In such a case, the trustee is not entitled to credit for the expense of an improvement erected on the leasehold estate, since, upon the cancellation of the transfer to the trust, the benefit of the improvement will inure to the trustee, to whom the lease reverts. *Webb v Shea*, *supra*.

§ 65 Rights in property or benefits acquired by trustees

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Where a trustee of a business trust acquires a debt or claim against the trust estate, or acquires an outstanding title to trust property, the purchase inures to the benefit of the trust estate. ⁹ Similarly, any profit made by trustees out of the trust ordinarily inures to the benefit of the beneficiaries. ¹⁰ Thus, trustees who accept a new lease in substitution for one owned by the trust estate are liable to an accounting to the shareholders for the proceeds realized and wrongfully retained. ¹¹

Where trustees of a business trust acquire in their own individual names or on their personal account property necessary or appropriate for the business or purposes of the trust, the property will be treated as being held in trust for the benefit of the shareholders, upon their payment of the purchase price. 12 And the same principle has been applied to property acquired by the trustees for the benefit of a third person. 13 However, the trust has been held to have no right to recover an oil lease which the trustee, in violation of his duty under the trust instrument, took in his own individual name, and transferred to another, as against a bona fide purchaser of the lease for value and without notice of the claim of the trust. 14

Footnotes

Footnote 9. Where some of the trustees of a business trust purchased in the name of a corporation controlled by them the mortgage notes of the trust, after the failure of the trustees to procure a renewal of the notes, the purchase by such trustees of the trust property upon foreclosure of the mortgage was held to be impressed with a trust in favor of the other beneficiaries of the trust, and each of the beneficiaries was held to have a right to share in the benefits of the purchase on foreclosure upon payment of his share of the consideration. *Beedle v Campbell* (CA8) 100 F2d 798, cert den 307 US 631, 83 L ed 1514, 59 S Ct 835 (Missouri).

However, the right of the shareholders to share in the benefits of such a purchase depends upon their payment of their proportionate share of the purchase price, and the right may be lost by their failure to assert the same in an appropriate proceeding. *Beedle v Campbell*, supra.

Footnote 10. *Beedle v Campbell*, supra.

Footnote 11. *Skinner v Cromwell* (CA10) 40 F2d 241, later app (CA10) 62 F2d 432, cert den 289 US 754, 77 L ed 1498, 53 S Ct 785 (Oklahoma).

Footnote 12. *Wofford v Twin City Brick & Tile Co.* 184 Ark 162, 41 SW2d 1079; *Haskell v Patterson*, 165 Ark 65, 262 SW 1002, followed *Oil Fields Corp. v Dashko*, 173 Ark 533, 294 SW 25, cert den 275 US 548, 72 L ed 419, 48 S Ct 85, reh den (US) 72 L ed 1016, 48 S Ct 206.

Annotation: 156 ALR 159.

Footnote 13. *Siedletz v Griffith*, 18 Cal 2d 227, 114 P2d 598 (arguendo).

Footnote 14. *Oil Fields Corp. v Dashko*, 173 Ark 533, 294 SW 25, cert den 275 US 548, 72 L ed 419, 48 S Ct 85, reh den (US) 72 L ed 1016, 48 S Ct 206, wherein it appeared that the trust instrument was recorded in one county, but not in the county where the leased property was situated.

2. To Third Persons

§ 66 Generally

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Since the primary function of a business trust is to carry on commercial activity rather than to foster and preserve an estate for the beneficiaries, 15 the question of the liability of trustees to third persons occupies a position of more importance in cases involving business trusts than in cases of ordinary trusts. 16

The liability of trustees of business trusts to third persons may be affected by statute, 17 or by a contractual stipulation exempting the trustees from personal liability on contracts made by them on behalf of the trust. 18 Also, it is possible for a creditor, by his own action, to forfeit the right to enforce the personal liability of a trustee of a business trust, 19 and a creditor may be estopped to assert the individual liability of trustees. 20

Footnotes

Footnote 15. § 8, supra.

Footnote 16.

Annotation: 156 ALR 162.

Footnote 17. See *Liquid Carbonic Co. v Sullivan*, 103 Okla 78, 229 P 561, the statute providing that liability to third persons for any acts, omissions, or obligation of the trustees of an express trust shall extend to the whole of the trust estate, but that "no personal liability shall attach to the trustee . . . for any such act, omission or liability."

Footnote 18. § 69, infra.

Footnote 19. *Wm. Lindeke Land Co. v Kalman*, 190 Minn 601, 252 NW 650, 93 ALR 1393, holding that where a landlord, with knowledge that a trustee had resigned, entered into a valid agreement with the other trustees for a reduction of rent without consulting the trustee who had resigned, the lessor had surrendered the lease as to such trustee, and could not recover against him for rents due thereunder.

Footnote 20. *Continental Supply Co. v Robertson*, 166 Ark 52, 265 SW 659 (unreasonable delay, by creditor asserting claim, after trustees made a final settlement of the affairs of the trust and disposed of all its assets).

§ 67 Debts and contracts

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The well-settled principle, applicable to trusts generally, that a trustee is personally liable on obligations incurred by him as trustee, 1 applies to business trusts. In the absence of a stipulation or agreement to the contrary, the trustees of a business trust are personally liable for debts incurred and on contracts made by them on behalf of the trust. 2 The fact that a person contracts as a trustee of a business trust does not relieve him from personal liability, nor restrict his liability to the amount of the trust estate, unless he stipulates to that effect. 3 Nor does the enactment of a statute providing that a business trust may be sued in an action at law for debts or liabilities incurred by the trustees have the effect of relieving the trustees of their personal liability. 4 However, a trustee contracting for the benefit of the trust may avoid individual liability by stipulating that he is not to be personally responsible and that the other party is to look solely to the trust estate. 5

Trustees are clearly liable on a contract made by them in their individual capacity, 6 or on a contract purportedly made on behalf of the trust, but which was unauthorized. 7

Footnotes

Footnote 1. See Trusts (1st ed § 347).

Footnote 2. *Betts v Hackathorn*, 159 Ark 621, 252 SW 602, 31 ALR 847 (goods sold and delivered to the trust); *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871 (in the absence of an express or implied agreement with the creditor to the contrary); *Slatt v Thomas*, 95 Colo 382, 36 P2d 459 (unless they are specifically exempted from liability in the contract); *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485; *McClaren v Dawes Electric Sign & Mfg. Co.* 86 Ind App 196, 156 NE 584; *Linn v Houston*, 123 Kan 409, 255 P 1105; *Tebaldi Supply Co. v Macmillan*, 292 Mass 384, 198 NE 651; *Dolben v Gleason*, 292 Mass 511, 198 NE 762; *Byrnes v Chase Nat. Bank*, 225 App Div 102, 232 NYS 224, affd 251 NY 551, 168 NE 423; *J. P. Webster & Sons v Utopia Confectionery* (Tex Civ App) 254 SW 123.

Annotation: 156 ALR 162.

"When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him." *Taylor v Davis* (*Taylor v Mayo*) 110 US 330, 28 L ed 163, 4 S Ct 147.

In *Re Winter*, 133 NJ Eq 245, 31 A2d 769, affd 136 NJ Eq 112, 40 A2d 648, the court thus laid down the rule: "A trustee is personally liable on the contracts which he makes as trustee, unless, from the terms of the contract itself, or from the surrounding circumstances it appears to have been the intention of the contracting parties to exempt the trustee from personal liability."

Footnote 3. *James Stewart & Co. v National Shawmut Bank* (CA1) 75 F2d 148 (Massachusetts).

The trustees are personally liable for the debts of the trust, even though the creditor knew of the trust organization and charged the goods for which the debt arose, to the trust in its assumed name. *Connally v Lyons*, 82 Tex 664, 18 SW 799.

Footnote 4. *Dolben v Gleason*, 292 Mass 511, 198 NE 762; *Tebaldi Supply Co. v Macmillan*, 292 Mass 384, 198 NE 651.

Footnote 5. § 69, *infra*.

Footnote 6. *Andrews v Horton*, 8 Cal App 2d 40, 47 P2d 496 (trustees held individually liable for a fee which they undertook to pay an attorney upon the settlement of an action against them individually).

Footnote 7. *Weissbrodt v H. W. Elmore & Co.* 262 Ill App 1.

§ 68 Torts 8

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The trustees of a business trust are personally liable for torts committed in conducting the business of the trust. 9 The trustees, as such, are liable for personal injuries or death resulting from the negligence of the employees of the trust, 10 regardless of whether the injured person is a stranger to the trust 11 or an employee. 12 However, while trustees may be liable for the torts of the trust as shareholders and partners where they own shares in the trust, it has been held that if the organization is a partnership, and not a true trust, because of the power of control vested in the shareholders, the trustees would be managing agents only, and not partners, and hence would not be liable for the torts of the trust unless they owned shares therein. 13

Footnotes

Footnote 8. As to the tort liability of the trust estate, see §§ 74 et seq., *infra*.

Footnote 9. *Sleeper v Park*, 232 Mass 292, 122 NE 315; *Fisheries Co. v McCoy* (Tex Civ App) 202 SW 343; *Marchulonis v Adams*, 97 W Va 517, 125 SE 340 (where the organization is a true trust, as distinguished from a partnership).

Annotation: 156 ALR 164, 165.

Footnote 10. See *Prinz v Lucas*, 210 Pa 620, 60 A 309.

Footnote 11. Trustees were held to be liable in damages for personal injuries sustained by a person who was examining a house belonging to the trust with a view of renting it,

where the negligence of the trustees caused the injury. *Sleeper v Park*, 232 Mass 292, 122 NE 315.

The liability of trustees for the negligence of a janitor employed by the trustees in a building owned and operated by the trust, resulting in personal injuries to the plaintiff, was recognized in *Falardeau v Boston Art Students' Asso.* 182 Mass 405, 65 NE 797 (arguendo).

Footnote 12. *Fisheries Co. v McCoy* (Tex Civ App) 202 SW 343.

Footnote 13. *Marchulonis v Adams*, 97 W Va 517, 125 SE 340.

§ 69 Agreement with creditors as to immunity or liability of trustees; indication of representative capacity

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The trustees of a business trust may, by contractual stipulation, exempt themselves from personal liability on contracts made by them on behalf of the trust. 14 Such an agreement against personal liability on a contract is valid, and is not illegal or contrary to public policy, 15 and creditors who stipulate against the personal liability of trustees or agree to look solely to the trust estate cannot recover against the trustees in their individual capacity. 16 The protection of such an express stipulation will not be denied to the trustees because they failed to execute properly a contract within their authority. 17

An agreement against personal liability on the part of the trustees may be inferred where the trust instrument contains a provision exempting the trustees from liability, 18 and the intention of the contracting parties to exempt the trustees from personal liability may be established by the surrounding circumstances or by extrinsic evidence, in connection with the contract itself. 19 However, the mere fact that, by statute, a person contracting with trustees of a business trust could maintain an action against the trust does not create a presumption that such person accepted the trust rather than the trustee as the party liable. 20 Notwithstanding a provision of the trust instrument exempting trustees from personal liability for the debts of the trust, they may assume liability for such debts by agreement with the creditor. 1 And it appears that a trustee whose liability is restricted to the trust property may become liable in tort to one who enters into a contract with him on the faith of such property, for the failure to use reasonable care and diligence in safeguarding the property. 2

Language of the contract indicating that the trustees intend to be bound as trustees, and not individually, is sometimes sufficient to relieve the trustees of personal liability. 3 In this connection, exemption of the trustee from personal liability has been accomplished by language indicating his representative capacity coupled with an express disclaimer of personal liability, 4 or with constructive notice on the part of the other contracting party of provisions of the trust instrument exempting the trustee from

personal liability. 5 However, in the case of an ordinary contract, as distinguished from negotiable instruments, a signature as "trustee," or a description of a party to the contract as "trustee," does not constitute an agreement that the trustee is to be exempted from personal liability or that the contracting party is to look to the trust estate alone for payment, and does not relieve the trustees of liability. 6

The liability of fiduciaries, including trustees of business trusts, on bills and notes under the provisions of the Negotiable Instruments Law and Uniform Commercial Code as affected by the form of signature or manner in which the authority is executed, and as affected by the lack of authority where that is the case, 7 is treated in an earlier article. 8

§ 69 ----Agreement with creditors as to immunity or liability of trustees; indication of representative capacity [SUPPLEMENT]

p 431, n 2-

Practice Aids: Complaint in federal court action against trustees for tort committed in conducting trust business. 5 Am Jur Pl & Pr Forms (Rev), Business Trusts, Form 3.

Footnotes

Footnote 14. Dolben v Gleason, 292 Mass 511, 198 NE 762; Shelton v Montoya Oil & Gas Co. (Tex Com App) 292 SW 165, affg (Tex Civ App) 272 SW 222 (in which the trustees were also shareholders). And see Ballentine v Eaton, 297 Mass 389, 8 NE2d 808.

Annotation: 156 ALR 165.

Footnote 15. Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485; Pennsylvania Co. v Wallace, 346 Pa 532, 31 A2d 71, 156 ALR 1; Shelton v Montoya Oil & Gas Co. (Tex Com App) 292 SW 165.

Footnote 16. Taylor v Davis (Taylor v Mayo) 110 US 330, 28 L ed 163, 4 S Ct 147; Goldwater v Oltman, 210 Cal 408, 292 P 624, 71 ALR 871; Schumann-Heink v Folsom, 328 Ill 321, 159 NE 250, 58 ALR 485; Carr v Leahy, 217 Mass 438, 105 NE 445; Wm. Lindeke Land Co. v Kalman, 190 Minn 601, 252 NW 650, 93 ALR 1393; Pennsylvania Co. v Wallace, 346 Pa 532, 31 A2d 71, 156 ALR 1.

Annotation: 156 ALR 165, 166.

A trustee is not liable on a contract made in the name of the trust estate and containing a provision expressly exempting trustees from personal liability and referring to a trust instrument which contains a similar exemption. Carpenter v Elmer R. Sly Co. 109 Cal App 539, 293 P 162.

Where the trust instrument provided that persons dealing with trustees should look only to the property of the trust for their payment and the contract named the trustees as such, "but not individually," as parties to the contract, and provided that the contractor

should look only to the funds and property of the trust for payment, and not to the trustees or stockholders personally, such trustees were held not to be personally liable on the contract. *Rand v Farquhar*, 226 Mass 91, 115 NE 286.

Footnote 17. *Rand v Farquhar*, *supra* (contract signed by two rather than three trustees).

The fact that trustees failed to insert in a promissory note a stipulation exempting the trustees and shareholders of the trust from personal liability, pursuant to the requirement of the trust agreement that they insert in every written contract a stipulation to that effect, does not place them in the position of having executed the note without authority so as to render them personally liable on the note, notwithstanding the indication therein of their representative capacity. *Charles Nelson Co. v Morton*, 106 Cal App 144, 288 P 845.

Footnote 18. *Pennsylvania Co. v Wallace*, 346 Pa 532, 31 A2d 71, 156 ALR 1 (trustees held not liable for deficiency after foreclosure of mortgage on trust property where mortgagee had notice that it was dealing with a Massachusetts trust, and required the trust instrument containing a provision negating personal liability of the trustees to be recorded as a part of the loan transaction, and the trial court found that the loan was not made on the basis of personal liability of the trustees).

Footnote 19. *Hamilton v Young*, 116 Kan 128, 225 P 1045, 35 ALR 496; *Wm. Lindeke Land Co. v Kalman*, 190 Minn 601, 252 NW 650, 93 ALR 1393; *Re Winter*, 133 NJ Eq 245, 31 A2d 769, *affd* 136 NJ Eq 112, 40 A2d 648.

Annotation: 156 ALR 168.

Footnote 20. *Larson v Sylvester*, 282 Mass 352, 185 NE 44.

Footnote 1. *American Min. & Smelting Co. v Converse*, 175 Mass 449, 56 NE 594.

Footnote 2. *James Stewart & Co. v National Shawmut Bank* (CA1) 69 F2d 694, *cert den* 294 US 722, 79 L ed 1254, 55 S Ct 549, holding that a trustee owes to one contracting with the trust a legal duty to exercise due care in properly managing the trust property so as to prevent loss thereof, even though the contract limited the trustee's liability to trust property only, and the trust instrument imposed no obligation on the trustee to any but the shareholders.

Footnote 3. *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485 (provision of a contract by trustees of a business trust that it was executed "not individually but as trustees to bind the trust estate"); *Levy v Nellis*, 284 Ill App 228, 1 NE2d 251 (insertion of the words, "as trustees," of the trust, a reference to the trust instrument, and the addition of the words, "and not individually").

Annotation: 156 ALR 169.

Where the trustee clearly indicates in the contract that he executed the same in a representative capacity, on behalf of the trust, his liability thereon is not affected by the use of the word "I" in the body of the instrument. *Dunning v Gibbs*, 213 Ky 81, 280 SW 483.

Footnote 4. *Shoe & Leather Nat. Bank v Dix*, 123 Mass 148.

Extrinsic evidence has been held to be admissible to show the intention of the contracting parties as to the exemption of trustees from personal liability on a contract executed on behalf of the trust, in the trust name, by themselves, with the word "trustees" opposite their names. *Re Winter*, 133 NJ Eq 245, 31 A2d 769, affd 136 NJ Eq 112, 40 A2d 648.

Footnote 5. See *James Stewart & Co. v National Shawmut Bank* (CA1) 75 F2d 148.

Footnote 6. *Taylor v Davis*, 110 US 330, 28 L ed 163, 4 S Ct 147; *Austin v Parker*, 317 Ill 348, 148 NE 19; *Tebaldi Supply Co. v Macmillan*, 292 Mass 384, 198 NE 651 (arguendo); *Dolben v Gleason*, 292 Mass 511, 198 NE 762.

Annotation: 152 ALR 169.

The mere fact that a person contracting with the trustee of a business trust knew that the latter was acting as trustee has been held not to give rise to a contract that the contracting party is to look to the trust estate for payment, or that the trustee is not to be personally liable. *Larson v Sylvester*, 282 Mass 352, 185 NE 44.

Footnote 7. For the general discussion of the authority of trustees of a business trust to make and issue negotiable instruments, see § 58, *supra*.

Footnote 8. See 11 Am Jur 2d, Bills and Notes §§ 552 et seq.

§ 70 Trust instrument provisions as to liability of trustees

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A provision of a trust instrument exempting the trustees from personal liability is valid and not contrary to public policy. 9 However, such a provision is not effective as against a person contracting with or extending credit to the trustees without notice of the provision. In the absence of an agreement on his part relieving the trustees of personal liability, they are liable to a creditor without notice, notwithstanding such a provision of the trust instrument. 10 It has been said that the trustees cannot, in a contract between themselves, such as a declaration of trust, shield themselves from the liability which the law imposes on them for the debts of the trust. 11

A provision of the trust instrument making it the duty of the trustees to insert in every written contract a stipulation that neither the trustees nor the cestuis que trust shall be personally liable on the contract, and that persons contracting with the trustees shall look only to the property of the trust for payment, does not relieve the trustees from personal liability on contracts made by them for the benefit of the trust, where the contracts contain no stipulation against such personal liability, and the contracting party had no notice of the provision. 12 Such provision has been held to have the effect of merely conferring on the trustees the power or privilege of releasing themselves from personal liability or of limiting their liability, and consequently they are not exempted from liability unless they insert a stipulation to that effect in the contract in question. 13

Footnotes

Footnote 9. *Carpenter v Elmer R. Sly Co.* 109 Cal App 539, 293 P 162; *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485.

Practice Aids: –Trust instrument provisions as to personal liability or nonliability of trustees. 3 Am Jur Legal Forms 3:1, 3:81-3:84.

Footnote 10. *Dickinson v Butt* (Ark) 278 SW 19; *Betts v Hackathorn*, 159 Ark 621, 252 SW 602, 31 ALR 847; *Review Printing & Stationery Co. v McCoy*, 276 Ill App 580; *Linn v Houston*, 123 Kan 409, 255 P 1105; *Walker v Hatfield* (Mo App) 17 SW2d 357.

Annotation: 156 ALR 172.

Footnote 11. *Dickinson v Butt* (Ark) 278 SW 19.

Footnote 12. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871; *Review Printing & Stationery Co. v McCoy*, 291 Ill App 524, 10 NE2d 506; *McClaren v Dawes Electric Sign & Mfg. Co.* 86 Ind App 196, 156 NE 584; *Dolben v Gleason*, 292 Mass 511, 198 NE 762.

Annotation: 156 ALR 173.

Footnote 13. *Review Printing & Stationery Co. v McCoy*, 276 Ill App 580.

§ 71 --Effect and sufficiency of notice

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The personal liability of the trustees of a business trust may be limited by provisions to that effect in the declaration of trust, if known and agreed to by all the parties affected. 14 And it has been held that persons who deal with such trustees, with notice of a provision of the trust instrument purporting to exempt the trustees from personal liability on account of the debts and contracts of the trust, cannot recover against the trustees individually on such debts or contracts. 15

A person contracting with a trustee of a business trust may be charged with notice of provisions of the declaration of trust limiting or negating personal or individual liability on the part of the trustee, although such person has never actually seen the trust instrument and does not have actual notice of its contents. 16 However, notice to the creditor of provisions of the trust instrument against personal liability of the trustees is not established by the facts that he contracted with the trustees of a business trust in its adopted name, that goods were delivered to it in that name, and that invoices were sent in that name. 17 And persons contracting with the trustees are not necessarily chargeable

with notice of provisions of the trust instrument purporting to limit the liability of the trustees, even though the trust instrument is recorded. 18

§ 71 --Effect and sufficiency of notice [SUPPLEMENT]

Practice Aids: Limitation of liability—Express exculpatory clauses in instruments. 15
Am Jur Legal Forms 2d § 218:23.

Footnotes

Footnote 14. *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

Annotation: 156 ALR 174.

Footnote 15. *James Stewart & Co. v National Shawmut Bank* (CA1) 75 F2d 148 (Massachusetts); *State v Thomas*, 209 NC 722, 184 SE 529.

Trustees are not individually liable on a contract with one who not only knew of a provision in the trust instrument purporting to exempt the trustees from personal liability, but was one of the organizers of the trust and signed the instrument containing this provision. *Dunning v Gibbs*, 213 Ky 81, 280 SW 483.

Trustees are not individually or personally liable on contracts executed by them on behalf of the trust estate, where, during the negotiation of the contract, the trust instrument, containing a provision that the trustee should not be liable, was exhibited to the representative of the contracting party, and he was informed that the organization was a business trust. *Commercial Casualty Ins. Co. v Pearce*, 320 Ill App 221, 40 NE2d 434.

A person selling goods to a business trust with full knowledge of the character of the concern and with notice of the provisions of the declaration of trust to the effect that persons contracting with the trustees should look only to the trust funds or property, and that the trustees and shareholders should not be personally liable therefor, cannot recover therefor against the trustees personally. *H. Kramer & Co. v Cummings*, 225 Ill App 26.

One accepting a check executed by a trustee, with notice of a provision exempting the trustee from personal liability, will be held to have impliedly stipulated that he would look to the trust estate, and not to the trustee, for payment. *O'Connell v Horwich*, 284 Ill App 554, 1 NE2d 231.

Footnote 16. *James Stewart & Co. v National Shawmut Bank* (CA1) 75 F2d 148, where the form of the contract showed that it was made solely on the business of the trust, the trustee executed it in its capacity as trustee, and the opening clause of the contract stated that it was made with the trustees of the trust, under a declaration of trust bearing a certain date and recorded in a designated place.

But one suing a trustee on a contract is not required to negative knowledge on his part of a provision of the trust instrument purporting to exempt the trustees from liability. *Review Printing & Stationery Co. v McCoy*, 276 Ill App 580.

Footnote 17. *Review Printing & Stationery Co. v McCoy*, supra, in which the name of the trust was "McCoy Directory Company".

Footnote 18. See *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871.

The filing of a copy of a declaration of trust in the public recorder's office does not constitute constructive notice to the public of provisions therein limiting the liability of the trustees, where the instrument is not such a document as the law requires to be filed for record. *Hunter v Winter*, 268 Ill App 487.

Generally as to the effect of recording of a trust instrument, see § 16, supra.

3. Rights and Liabilities of Trustees Inter Se; Liability for Acts of Other Trustees

§ 72 Individual rights and liabilities of trustees inter se

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As among themselves, the trustees of a business trust do not occupy the relationship of partners. 19 While a provision of the trust instrument exempting the trustees from personal liability may constitute a contract as between the trustees, precluding one of them from recovering against another on account of a trust indebtedness, such a provision does not prevent a trustee who has been relieved of his liability as such from recovering against the other trustees on an indebtedness not contracted directly between the trust and the trustee, but assigned to the trustee after his release from liability as such. 20

A trustee may, in a proper case, maintain a suit to compel his cotrustees to recognize his position as trustee. 1

Footnotes

Footnote 19. *Stewart v Solomon*, 316 Pa 236, 175 A 498.

Annotation: 156 ALR 178.

Footnote 20. *Dickinson v Butt* (Ark) 278 SW 19.

Footnote 1. See *Lambach v Anderson*, 228 Iowa 1173, 293 NW 505.

§ 73 Liability for acts or defaults of cotrustees, predecessors, or successors

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The trustee of a business trust is not responsible for the acts or misconduct of a cotrustee in which he has not joined, to which he has not consented, and which he has not aided or made possible by his own neglect. 2 One trustee cannot be held liable on a debt incurred in the name of the trust by a cotrustee, merely because the latter incurred the obligation in such a way as to render himself personally liable. 3 And in the absence of something other than the mere relationship of cotrustees, one trustee of a business trust cannot bind his cotrustees by representations that the latter will be responsible for obligations incurred by the former. 4 This principle does not, however, excuse a trustee from liability where the wrongs committed by his cotrustee were made possible by the former's neglect and his failure to inform himself concerning the various business transactions involved in the execution of the trust, and by his surrender of the control of the trust affairs to his cotrustee or to a dominant shareholder. 5

The trustees of a business trust have been held not to be liable on an unratified contract entered into by one trustee, their predecessor in office, and the contract was not binding on the trust, where the trust instrument required the concurrence of two trustees in such matters. 6 Nor can a trustee be held liable for acts of the trustor of which the trustee had no knowledge, in connection with a matter on which, by the terms of the trust instrument, the trustee had the right to rely on the statement of the trustor. 7

Footnotes

Footnote 2. *Ashley v Winkley*, 209 Mass 509, 95 NE 932.

Footnote 3. *Plum v Siekmann*, 135 Neb 101, 280 NW 264.

A cotrustee is not liable on a promissory note signed by one trustee in the name of the trust, by himself as president of the trust, even though the trustee executing the note would be personally liable thereon. *Uihlein v Budd*, 252 Ill App 487.

Footnote 4. *Plum v Siekmann*, 135 Neb 101, 280 NW 264.

Footnote 5. *Ashley v Winkley*, 209 Mass 509, 95 NE 932.

Footnote 6. *Downey Co. v Whistler*, 284 Mass 461, 188 NE 243.

Footnote 7. *Dibblee v Title Ins. & T. Co.* 55 Cal App 2d 286, 130 P2d 775.

VI. LIABILITY OF TRUST ESTATE, AND AVAILABILITY OF TRUST PROPERTY, TO CREDITORS

§ 74 Generally

In the absence of statute or of a provision to the contrary in the contract or in the trust instrument, the property of a business trust cannot be subjected to the claims of persons dealing with the trustees, by the ordinary writs and processes in an action at law. 8 Under these circumstances the courts have refused to hold the trust estate liable by implication because of benefits received by it under a contract between a trustee and a third person. 9 And where the trustees are personally liable for a debt, it has been held that the trust property cannot be reached by execution or attachment so as to prefer the creditors over other creditors in settlement of the trust. 10 Under some circumstances, however, creditors of the trust may resort to equity to reach trust property. 11

The trustees acting within their authority may, by contract express or implied, create a lien on trust property to secure the performance of a contract entered into in behalf of the trust, and such lien will be enforced. 12 Also, the trust estate has been held to be liable for the torts of its employees 13 and for torts committed by the trustees in carrying on the business of the trust, where the trust estate received part of the fruits of the wrongful acts. 14

The trust estate cannot ordinarily be directly reached by a creditor of an individual shareholder. The interest of a shareholder being personalty and not real estate, the levy of an execution on real estate, title to which is held by the trustees, on a judgment against a shareholder individually, creates no lien on the trust property. 15

Footnotes

Footnote 8. *Hussey v Arnold*, 185 Mass 202, 70 NE 87; *Bartley v Andrews*, 208 App Div 702, 202 NYS 227.

Annotation: 156 ALR 83.

In the absence of a stipulation to that effect, the trust estate is not bound by or liable on a contract entered into by the trustees for the benefit of the estate, and a trustee cannot charge the trust estate, even by his contract, without express authority in the trust instrument. *Austin v Parker*, 317 Ill 348, 148 NE 19.

But where all the legal and equitable interests are merged in the trustee, so that the trust becomes a mere form, the property has been held to be subject to the claim of an individual creditor of the trustee. *Cunningham v Bright*, 228 Mass 385, 117 NE 909.

Footnote 9. *Austin v Parker*, 317 Ill 348, 148 NE 19.

Footnote 10. *Hussey v Arnold*, 185 Mass 202, 70 NE 87.

Footnote 11. §§ 75, 76, *infra*.

Footnote 12. *Industrial Lumber Co. v Texas Pine Land Asso.* 31 Tex Civ App 375, 72 SW 875.

Footnote 13. *Prinz v Lucas*, 210 Pa 620, 60 A 309, action for wrongful death against the trustees, "sued as trustees, trading as John Lucas and Co.," under a trust instrument exempting the trustees from personal liability on account of the negligence or misconduct of the agents or employees of the trust.

Footnote 14. A business trust engaged in operating oil wells and developing oil properties is liable in an action based on the acts of its trustees in removing oil from adjoining properties. *Alphonzo E. Bell Corp. v Bell View Oil Syndicate*, 46 Cal App 2d 684, 116 P2d 786.

Footnote 15. *Pittsburg Wagon Works' Estate*, 204 Pa 432, 54 A 316. See also *Clagett v Kilbourne* 1 Black (US) 346, 17 L ed 213, where the company had the attributes of a business trust but was treated as a partnership in the nature of a joint-stock company.

§ 75 Effect of stipulations regarding liability

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The right of persons dealing with a business trust to resort to the property of the trust estate for satisfaction of their claims may depend upon stipulations for liability of the trust estate, or against the personal liability of trustees or beneficiaries, expressed in the trust instrument or in the contract between the trustees and such third person. Where the trust instrument exempts the trustees from personal liability and provides that persons having claims against the trust shall look to the trust estate for payment, 16 it has been held that such persons are entitled to proceed in equity to recover therefor out of the trust estate. 17 However, a trust instrument provision requiring the trustees in every written contract to stipulate against the personal liability of trustees and beneficiaries and to give notice of their capacity as trustees has been held not to render the trust estate liable on an implied contract for benefits received by it from a contract between a trustee and a third person. 18

The view has been expressed that a provision in a contract between trustees and a third person that the former shall not be personally liable and that the latter shall look only to the trust estate gives such person the right to reach the trust property. 19 However, such a contract stipulation as required by the trust instrument has been held not to create a lien in favor of the contracting party upon the trust lands in the hands of a purchaser thereof, in the absence of a provision in the contract expressly creating such a lien or showing, in the light of the surrounding circumstances, that the parties intended that such a lien should exist. 20

Footnotes

Footnote 16.

Practice Aids: –3 Am Jur Legal Forms 3:1, 3:82.

Footnote 17. Rothbart v Metropolitan Trust Co. 307 Ill App 271, 30 NE 183.

Footnote 18. Austin v Parker, 317 Ill 348, 148 NE 19.

Footnote 19. See Industrial Lumber Co. v Texas Pine Land Asso. 31 Tex Civ App 375, 72 SW 875.

Footnote 20. Industrial Lumber Co. v Texas Pine Land Asso., supra, wherein the court said that instead of creating a lien on the trust property, such a provision merely gives direction to any execution which might be issued on a judgment against the trust or its members.

Bonds issued by a Massachusetts trust, although payable to bearer, have been held not to be negotiable instruments, for the purpose of determining the title of one who procured them in good faith from a thief, where the bonds contained a provision that the trustees should not be personally liable thereon. Lorimer v McGreevy, 229 Mo App 970, 84 SW2d 667.

§ 76 Trustee's right to indemnity or reimbursement as available to creditors

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The principle governing trusts generally, that where a trustee becomes liable to a person in the course of the discharge of his duties, and satisfaction of the demand cannot be had against the trustee personally, the creditor may, by a proceeding in equity, be substituted to the position of the trustee, and may subject the trust property to the satisfaction of his demand to the extent that the trustee would be entitled to exoneration, indemnity, or reimbursement from the trust estate, 1 applies with full force to Massachusetts or business trusts. 2 In order that this principle may be invoked, however, it must be shown that the trustee has a right to indemnity or reimbursement out of the trust funds, 3 and the trust estate can be reached under this doctrine only where the estate is indebted to the trustee or would be required to pay the trustee if he paid the claim, and the trustee is insolvent or a nonresident. 4 And in order to enforce the payment of a note on this theory, out of the estate to which the trustees could resort for indemnity, the plaintiff must show that the note was made by the trustees in the course of their duty as such. 5 But where the personal liability of a trustee resulted from his violation of the declaration of trust in the manner of executing a contract, he was held to have no right to reimbursement out of the trust fund, and hence the persons to whom he became liable on the contract were held to have no right to reach the trust fund on the theory of being substituted to the rights of the trustee, notwithstanding the facts that the trustee received no benefit from his wrong and that the benefits from the transaction accrued to the trust. 6

Footnotes

Footnote 1. See Trusts (1st ed § 348).

Footnote 2. Mayo v Moritz, 151 Mass 481, 24 NE 1083. And see Austin v Parker, 317 Ill 348, 148 NE 19 (arguendo).

Where a trustee has honestly incurred personal liability within the scope and for the benefit of his trust, creditors for such liability may reach the trust property by being substituted for the trustee and standing in his place to the extent that the trustee is entitled to be indemnified. Downey Co. v 282 Beacon Street Trust, 292 Mass 175, 197 NE 643.

Footnote 3. Downey Co. v 282 Beacon Street Trust, supra.

Footnote 4. Austin v Parker, 317 Ill 348, 148 NE 19.

Footnote 5. Frost v Thompson, 219 Mass 360, 106 NE 1009.

Footnote 6. Downey Co. v 282 Beacon Street Trust, 292 Mass 175, 197 NE 643.

VII. REGULATION

§ 77 Generally

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The power of the states to regulate business trusts in various respects is settled. 7 No unreasonable discrimination arises from a statute which regulates the activities of business trusts as distinguished from traditional kinds of trusts, 8 and the right of a business trust to do business within a state as a legal entity may be conditioned upon its compliance with the laws governing such organizations. 9 However, it has been held that the sale of its own shares by a business trust does not constitute doing business within the meaning of regulatory statutes. 10

The applicability to business trusts of statutes relating to carrying on business under a fictitious or assumed name is discussed elsewhere herein. 11

§ 77 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Case authorities:

A Massachusetts business trust having its principal place of business in New York was held not to have engaged in activities within Florida sufficient to render it amenable to the filing requirements of Florida statutes requiring a business trust organized for the purpose of transacting business within the state to file a copy of the declaration of trust

with the department of state, where it appeared that an application for a loan was made in New York, all pertinent negotiations were carried on in the state of New York, the loan was closed in the state of New York, all documents, including the mortgage, mortgage note, and construction loan agreement, were executed in New York, the mortgage note specifically provided for the application of the laws of the state of New York, and the place of performance was in New York, but where the security for the loan was property located in Florida, and the mortgage, which was executed in the state of New York, was recorded in Florida. *Your Constr. Center, Inc. v Dominion Mortg. & Realty Trust (Dominion)* (1975, SD Fla) 402 F Supp 757.

Footnotes

Footnote 7. *Hemphill v Orloff*, 277 US 537, 72 L ed 978, 48 S Ct 577; *Swartz v Sher*, 344 Mass 636, 184 NE2d 51.

Annotation: 156 ALR 179.

It has been said that voluntary unincorporated associations in the nature of business trusts do not fall within that class of natural rights which is above the power of the legislature. *Opinion of Justices*, 266 Mass 590, 165 NE 904, 63 ALR 952.

As early as 1909, the legislature of Massachusetts required the trustees of business trusts to file copies of the trust instrument with the commissioner of corporations and with the clerk of the town or city of the usual place of business. See *Larson v Sylvester*, 282 Mass 352, 185 NE 44.

Footnote 8. *Re Girard*, 186 Cal 718, 200 P 593, pointing out that the business to be done by the business trust was of a character making it subject to regulation just as in the case of corporations, to which the regulatory law was principally directed.

Footnote 9. *Coleman v McKee*, 162 Ark 90, 257 SW 733.

In a jurisdiction regarding certain types of business trusts as being in the nature of a partnership or joint-stock company, they may be required to comply for some purposes, with the statutes relating to limited partnerships. *Thompson v Schmitt*, 115 Tex 53, 274 SW 554.

Footnote 10. *Home Lumber Co. v Hopkins*, 107 Kan 153, 190 P 601, 10 ALR 879.

Footnote 11. § 18, *supra*.

§ 78 Under statutes relating to corporations generally

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Business trusts have frequently been held to be subject to statutory regulations of corporations and to provisions aimed primarily at corporations. A state has the power to include such trusts within the definition of "corporations." 12 Accordingly, business trusts have been held to be "corporations" within the meaning of statutes requiring corporations to file reports and pay fees. 13 They have been regulated as corporations under general constitutional provisions that the term "corporation" should include all associations and joint-stock companies "having powers and privileges not possessed by individuals or partnerships," 14 and by virtue of constitutional and statutory provisions that the term "corporation" should be construed to include all associations and joint-stock companies having any powers or privileges of corporations not possessed by individuals or copartnerships. 15 However, a business trust has been held not to be a "corporation" within the meaning of a statute regulating corporations and defining the term to include all joint-stock companies or associations having any powers or privileges not possessed by individuals or partnerships. 16

A business trust has been held to have the right to do business as a building and loan association without becoming incorporated, under a statute expressly authorizing "any unincorporated association of individuals" to carry on such business, subject to certain regulations. 17 And a statutory prohibition against the operation of a cemetery for profit by a corporation has been held ineffective to bar a business trust from so doing, under a statute expressly authorizing a trust to acquire, hold, and deal in real estate, and to carry on any lawful business and, generally, to do any lawful act in relation to the trust property which an individual owning such property absolutely might do. 18 Further, it has been held that a business trust does not come within the prohibition of a statute imposing penalties on corporations for holding real estate in a manner forbidden by the state constitution. 19

Persons who convey land to a business trust, receiving in consideration of the transfer shares in the trust which are not, as a matter of judicial determination, valueless, and who permit the trust to enter upon the land and spend considerable sums of money in its development, have been held estopped to subsequently assert the invalidity of their deed on the alleged ground that the trust was in fact a corporation and had failed to comply with the statutes requiring the granting of a certificate of incorporation before doing business. 20

§ 78 ----Under statutes relating to corporations generally [SUPPLEMENT]

Case authorities:

Under a business trust act incorporating a provision that business trusts should be subject to all applicable provisions of law governing domestic and foreign corporations in many specified particulars except to the extent that such corporation provisions were inconsistent with the specific provisions of the business trust act, a statute excusing a foreign corporation from qualifying to do business within the state, if its only activity in the state was the lending of money and dealing in security interests, also exempted from registration a foreign business trust whose only activity within the state was the making of secured loans. *Gilmer v Kansas City West Land Co.* (1977) 1 Kan App 2d 509, 571 P2d 36.

Footnotes

Footnote 12. As stated by the court in *Hemphill v Orloff*, 277 US 537, 72 L ed 978, 48 S Ct 577: "Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment."

Footnote 13. *Neddeau v United Petroleum*, 251 Mich 673, 232 NW 202.

Annotation: 156 ALR 180.

Footnote 14. *Home Lumber Co. v Hopkins*, 107 Kan 153, 190 P 601, 10 ALR 879, involving regulations concerning right of corporations to do business within the state.

Business trusts have, among other powers and privileges not possessed by individuals or partnerships, those of continuous existence and exemption from personal liability. They enjoy practically all the advantages of ordinary corporations, and no reason is apparent why they should not be subjected to the same obligations and regulations. *Harris v United States Mexico Oil Co.* 110 Kan 532, 204 P 754, error dismd 260 US 694, 67 L ed 467, 43 S Ct 11, cert den 260 US 720, 67 L ed 480, 43 S Ct 11.

Footnote 15. *Rubens v Costello*, 75 Ariz 5, 251 P2d 306; *Reilly v Clyne*, 27 Ariz 432, 234 P 35, 40 ALR 1005 (statutory restrictions placed on corporations).

Footnote 16. *Manufacturers' Finance Trust v Collins*, 227 Mo App 1120, 58 SW2d 1004.

Footnote 17. *State ex rel. Great American Home Sav. Inst. v Lee*, 288 Mo 679, 233 SW 20.

Footnote 18. *New York Casualty Co. v Day*, 185 Okla 581, 95 P2d 95.

Footnote 19. *State ex rel. Combs v Hopping Invest. Co. (Okla)* 269 P2d 997.

Footnote 20. *Edwards v Belknap*, 66 Idaho 639, 166 P2d 451, wherein the court pointed out that if the organization was a corporation in law, the grantors dealt with it as such, and if a common-law trust represented by trustees, the grantors dealt with individuals sui juris; and that in either case they would be estopped.

§ 79 Under statutes relating to foreign corporations

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A business trust seeking to carry on business in a state other than that in which it was organized, as an entity clothed with peculiar rights and privileges not possessed by individuals or partnerships, may be subjected to the conditions, such as the procurement of a certificate of authority, which are usually imposed upon foreign corporations. 1

Treating a foreign business trust as a foreign corporation for the purpose of such regulations does not violate any constitutional rights of the trust or of the members thereof. 2 Specifically, such legislation does not violate the privileges and immunities clause of the United States Constitution. 3 Furthermore, the fact that by the constitution and statutes of the state where a trust was organized, it would not be deemed a corporation, has been held to be without significance in determining the applicability to the trust of local statutes and constitutional provisions relating to foreign corporations. 4

A business trust organized in another state has been held to be a foreign corporation and subject to the regulations imposed by statute upon foreign corporations doing business in the state, 5 and also subject to the same penalties as foreign corporations for failure to observe such regulations. 6 However, the view has been expressed that since a statute requiring foreign corporations to comply with certain regulations and prohibiting them from maintaining actions unless they have done so is rigorous, if not penal, in character, it will not be construed so as to be applicable to a business trust unless the intention so to apply it is clearly manifested in the statute. 7 Moreover, some courts have taken the position that business trusts are not subject to statutory regulations of foreign corporations, 8 even under a definition of the term "corporation" as including all joint-stock companies or associations having any powers or privileges not possessed by individuals or partnerships. 9

Footnotes

Footnote 1. *Hemphill v Orloff*, 277 US 537, 72 L ed 978, 48 S Ct 577.

Footnote 2. *Hemphill v Orloff*, *supra*.

Footnote 3. *Hemphill v Orloff*, 238 Mich 508, 213 NW 867, 58 ALR 507, *affd* 277 US 537, 72 L ed 978, 48 S Ct 577.

Declaring a business trust to be a corporation does not unconstitutionally abridge the privileges or immunities of any citizen or deprive anyone of property without due process of law, or of the equal protection of the laws. *State ex rel. Colvin v Paine*, 137 Wash 566, 243 P 2, 247 P 476, 46 ALR 165.

Footnote 4. *Harris v United States Mexico Oil Co.* 110 Kan 532, 204 P 754, error dismd 260 US 694, 67 L ed 467, 43 S Ct 11, cert den 260 US 720, 67 L ed 480, 43 S Ct 11.

Footnote 5. *Hemphill v Orloff*, 238 Mich 508, 213 NW 867, 58 ALR 507, *affd* 277 US 537, 72 L ed 978, 48 S Ct 577, where a constitutional provision defined the term "corporation" as including all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships, and the statute provided that the term "corporations" should include all associations, partnership associations, and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships, under whatever term or designation they might be defined and known in the state where organized.

Annotation: 156 ALR 183.

It was stated in *Michigan Trust Co. v Herpolsheimer*, 256 Mich 589, 240 NW 6, that

the case of *Hemphill v Orloff*, 238 Mich 508, 213 NW 867, 58 ALR 507, affd 277 US 537, 72 L ed 978, 48 S Ct 577, "stripped of surplus verbiage," merely holds that a common-law trust organized in another state was amenable to a statute regulating the right of foreign corporations to do business in the state, under the statutory definition of the term "corporations" as used in the statute.

In *Harris v United States Mexico Oil Co.* 110 Kan 532, 204 P 764, error dismd 260 US 694, 67 L ed 467, 43 S Ct 11, cert den 260 US 720, 67 L ed 480, 43 S Ct 11, it was held that a business trust was subject to service of process by publication, under a statute providing for such service upon foreign corporations, in view of a constitutional definition of the term "corporation" as including all associations and joint-stock companies "having powers and privileges not possessed by individuals or partnerships."

Footnote 6. *Hemphill v Orloff*, 238 Mich 508, 213 NW 867, 58 ALR 507, affd 277 US 537, 72 L ed 978, 48 S Ct 577, involving disability to sue on causes of action arising out of unauthorized business.

Footnote 7. *Burgoyne v James*, 156 Misc 859, 282 NYS 18, affd without op 246 App Div 605, 284 NYS 977.

Footnote 8. *Powell v Hammon Consol. Gold Fields*, 8 Alaska 153.

Footnote 9. *Manufacturers' Finance Trust v Collins*, 227 Mo App 1120, 58 SW2d 1004, wherein the court, in holding that a business trust organized in another state was not required to comply with a local statute relating to foreign corporations, which defined the term "corporation" as including "all joint-stock companies or associations having any powers or privileges not possessed by individuals or partnerships," took the position that the parties, by contract, could not confer upon themselves any rights or privileges not possessed by individuals or partnership.

§ 80 Under blue sky laws and securities acts

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Statutes regulating the issuance and sale of securities, commonly known as "blue sky laws," are generally construed as applying to Massachusetts or business trusts and as requiring such organizations to comply therewith as a condition of the right to sell their shares. 10 Some such securities acts, or blue sky laws, are specifically made applicable to business trusts, 11 and particular language of other acts has been construed to include business trusts. Thus, the shares of a business trust have been held subject to regulation under blue sky laws applicable in terms to an investment company, 12 or an "issuer" of securities, 13 or generally to any person, firm, association, company, or corporation selling securities or offering them for sale. 14

A blue sky law applying to business trusts and excepting from its operation testamentary

trusts and trusts created by judicial decree is not, for that reason, unconstitutionally discriminatory. 15 Such a statute, construed by the court as applying to a business trust, is not therefore an unconstitutional abridgment of the right to own property and to contract freely with reference thereto. 16 Under a blue sky law providing for the licensing of "investment companies" and "dealers," by the bank commissioner, a Massachusetts or business trust organized in another state has been held to be entitled to a license, and the refusal of the commissioner to issue the license on the ground that the law did not authorize such an organization or recognize the legal existence thereof was held to be erroneous. 17 However, a different view has been taken in a jurisdiction in which a business trust is regarded as a corporation. 18

Under particular circumstances or with regard to certain transactions, blue sky provisions may not apply to a business trust. 19 Thus, in view of another statute requiring a permit from the supervisor of building and loan associations, after his approval of the plan of business, as a condition of the right of an unincorporated association to carry on the business of a building and loan association, a business trust proposing to engage in such business was held not to be required to comply with the blue sky law relating to corporations generally. 20

§ 80 ----Under blue sky laws and securities acts [SUPPLEMENT]

Practice Aids: On the same side of the table: is Investment Company Act Rule 17d-1 partly invalid?, 20 Sec Reg LJ 115 (1992).

Footnotes

Footnote 10. *State v Cosgrove*, 36 Idaho 278, 210 P 393; *King v Commonwealth*, 197 Ky 128, 246 SW 162, 27 ALR 1159; *People v Clum*, 213 Mich 651, 182 NW 136, 15 ALR 253; *Pennicard v Coe*, 124 Or 423, 263 P 920 (under statute defining "dealer" as one engaged in selling stock, stock certificates, membership certificates, or securities of whatever kind or character, and providing that any person, partnership, corporation, or association offering its own securities for sale should be considered a dealer within the meaning of the act).

Annotation: 156 ALR 186.

In *Reilly v Clyne*, 27 Ariz 432, 234 P 35, 40 ALR 1005, the court said: "We think the courts are practically unanimous in holding the Massachusetts trust amenable to the requirements and exactions of the above statutes, commonly known as the Blue Sky Laws. The aim of the courts has been to carry out the manifest intention of the statutes, of preventing the public from being imposed upon by questionable and unsound financial schemes of fortune dreamers and dishonest promoters, and to reach all get-rich-quick schemes offering to the general public their stocks and securities, under whatever name they may choose to act. The injury and opportunity for imposition are no less when the purveyor of such stocks and securities is a trust of the Massachusetts type than when it is a corporation, copartnership, company, or association. Such a trust certainly falls within the evil intended by the lawmakers to be prevented as much as any other organization engaged in the business of selling stocks and securities to the public."

Because of a supposition that such organizations were not subject to blue sky laws, the adoption of such statutes in the several states stimulated the creation of Massachusetts trusts. *Hemphill v Orloff*, 238 Mich 508, 213 NW 867, 58 ALR 507, *affd* 277 US 537, 72 L ed 978, 48 S Ct 577.

Footnote 11. *Agnew v Daugherty*, 189 Cal 446, 209 P 34; *Re Girard*, 186 Cal 718, 200 P 593.

Footnote 12. *King v Commonwealth*, 197 Ky 128, 246 SW 162, 27 ALR 1159; *People v Clum*, 213 Mich 651, 182 NW 136, 15 ALR 253.

Footnote 13. *Kinross v Cooper*, 224 Ill App 111.

Footnote 14. *Wagner v Kelsoe*, 195 Iowa 959, 193 NW 1, so holding without determining whether a business trust was technically a corporation, voluntary association, investment company, common-law trust, joint adventure, or profit-sharing scheme.

Footnote 15. *Re Girard*, 186 Cal 718, 200 P 593.

Footnote 16. *King v Commonwealth*, 197 Ky 128, 246 SW 162, 27 ALR 1159.

Footnote 17. *Coleman v McKee*, 162 Ark 90, 257 SW 733, the statute defining "investment company," such as was entitled to the license, as every person, corporation, copartnership, company, or association organized in the state or elsewhere, whether incorporated or unincorporated, which should sell or negotiate for the sale of any contract, stock, bonds, or other securities issued by such person, corporation, or association.

Footnote 18. On the ground that a business trust came within the constitutional definition of "corporation," the Washington court has upheld the act of the secretary of state in refusing to consider the application of a business trust for a permit to sell its securities and shares in the state, since the trustees were assuming corporate powers without complying with the laws relating to corporations, and the organization was illegal and had no legal standing. *State ex rel. Range v Hinkle*, 126 Wash 581, 219 P 41.

Footnote 19. The shares of a common-law trust formed by the members of a club to save the property of the club from a mortgage foreclosure, which shares were subscribed by members of the club, were held to come within the exemption in the Blue Sky Law of "securities of a corporation when sold or distributed by it among its stockholders without the payment of any commission or expenses to agents, solicitors or brokers, and without incurring any liability for expenses whatsoever, in connection with the distribution thereof." *Blomgren v Cowley*, 282 Ill App 166.

It seems that under the California statute discussed in *Bernesen v Fish*, 135 Cal App 588, 28 P2d 67, no permit is necessary for the issuance of certificates to the original founders of the trust, as compensation for property conveyed to the trust.

Footnote 20. *State ex rel. Great American Home Sav. Inst. v Lee*, 288 Mo 679, 233 SW 20.

§ 81 --Consequences of, and who may assert, violation of statute

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A trustee's sale of shares in a business trust without a permit from the corporation commissioner as required by the state securities act, under circumstances amounting to fraud, has been held to be absolutely void. 1 However, as regards the rights of a bona fide purchaser for value of real property from the trustees, the failure of the trust to obtain a permit required by the blue sky law does not invalidate a conveyance to the trustees or the conveyance by them. 2

While creditors of a business trust may attack the validity of securities issued by it in violation of a blue sky law, mere strangers may not. 3 A person contracting for shares of such a trust can raise the question of the failure of the trust to comply with the blue sky law, the principle that ultra vires transactions of corporations may be questioned by the state only not being applicable in such a case. 4 Such a trust cannot recover on a negotiable instrument given for the purchase price of shares sold in violation of the blue sky law, 5 and a person purchasing shares from a trust which sold them in violation of the blue sky law may recover back the purchase price paid therefor. 6 In such a case the subscriber is not in pari delicto, 7 and the defense that the purchaser of the shares was in pari delicto is not available against an action or counterclaim for the purchase price of shares illegally sold, since the blue sky laws are intended for the special protection of such persons. 8

Footnotes

Footnote 1. Barrett v Gore, 88 Cal App 372, 263 P 564.

Annotation: 156 ALR 190.

Footnote 2. Beltz v Griggs, 137 Kan 429, 20 P2d 510. To the same effect, see Fitch v United Royalty Co. 143 Kan 486, 55 P2d 409.

Footnote 3. Julian v Schwartz, 16 Cal App 2d 310, 60 P2d 887.

A defendant in an action by a foreign business trust, in order to rely upon the failure of the trust to comply with the Blue Sky Law of the state of its origin, must plead the statute. Morriss v Finkelstein (Mo App) 127 SW2d 46.

Footnote 4. Reilly v Clyne, 27 Ariz 432, 234 P 35, 40 ALR 1005.

Footnote 5. Since the contract by the trust to sell shares, without complying with the statute, was illegal and in violation of law, it was held that it was incapable of ratification, and that the purchaser was not estopped to set up the violation of law as a defense to an action by the trust on a note given for the purchase price of shares. Reilly v Clyne, supra.

A check given for the purchase price of an interest in shares of a business trust which has failed to incorporate before engaging in business, as required under mandatory constitutional provisions defining corporations as inclusive of all associations having powers or privileges of corporations not possessed by individuals or copartnerships, is given for an illegal consideration, and payment cannot be enforced as between the parties to the instrument. *Rubens v Costello*, 75 Ariz 5, 251 P2d 306.

Footnote 6. *Reilly v Clyne*, 27 Ariz 432, 234 P 35, 40 ALR 1005; *Barrett v Gore*, 88 Cal App 372, 263 P 564; *Landwehr v Lingenfelder* (Mo App) 249 SW 723.

Annotation: 156 ALR 191.

Footnote 7. *Landwehr v Lingenfelder*, supra; *Schmidt v Stortz*, 208 Mo App 439, 236 SW 694.

Footnote 8. *Reilly v Clyne*, 27 Ariz 432, 234 P 35, 40 ALR 1005, in which the statute made the act of selling securities without complying with the statute a misdemeanor, but imposed no penalty upon one purchasing such securities.

§ 82 --Federal securities acts

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The Federal Securities Act of 1933⁹ and other related federal legislation¹⁰ clearly include business trusts within their operation.¹¹ Thus, the Federal Securities Act of 1933 specifically includes within its provisions trusts in which the beneficial interests are evidenced by "securities,"¹² and it is clear that shares in a business trust are securities within the meaning of this federal act.¹³

The Securities and Exchange Commission is not precluded from exercising the power conferred upon it by statute¹⁴ to set terms and to condition its approval to a petition for delisting a security from an exchange, merely because such terms would give the shareholders of a business trust the right to vote upon a matter as to which they have no voting rights under the instrument of trust.¹⁵

§ 82 --Federal securities acts [SUPPLEMENT]

p 442, n 12–15 USC § 80a- 2(35) has been redesignated 80a-2(36).

Footnotes

Footnote 9. 15 USC §§ 77a et seq.

Footnote 10. See the Trust Indenture Act of 1939 (15 USC §§ 77aaa et seq.); the Federal Securities Exchange Act of 1934 (15 USC §§ 78a et seq.); the Public Utility Holding Company Act of 1935 (15 USC §§ 79 et seq.); and the Investment Companies and Advisers Act (15 USC §§ 80a-1 et seq.).

Footnote 11.

Annotation: 156 ALR 180, 188.

Generally as to the federal securities acts, see Securities Regulation.

Footnote 12. See 15 USC § 77b(1).

For similar definitions in the related acts mentioned above, see 15 USC §§ 77ccc(16); 78c(10); 79b(16); 80a-2(35).

Footnote 13. See *Securities & Exch. Commission v Jones* (DC) 12 F Supp 210, affd (CA2) 79 F2d 617, revd on other grounds 298 US 1, 80 L ed 1015, 56 S Ct 654.

Footnote 14. 15 USC § 78l(d).

Footnote 15. *Shawmut Asso. v Securities & Exch. Com.* (CA1) 146 F2d 791.

VIII. TAXATION

A. In General

§ 83 Generally

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The motive in forming a business trust is generally not considered by the courts in determining its validity, and it has been held that a business trust is not rendered illegal because of the fact that it was formed for the express purpose of reducing or avoiding taxation. 16 But although the business trust once enjoyed certain tax advantages as compared to corporations, a factor which contributed largely to the rapid spread of this organization as a vehicle of commercial endeavor, the general trend of legislation in recent years has been to minimize or remove entirely any such advantage inherent in the business trust. A significant exception to this trend has been the enactment, in 1960, of certain sections of the Internal Revenue Code, entitled "Real Estate Investment Trusts," 17 which may well result in renewed interest in the business trust, because of income tax advantages offered to shareholders in associations of this nature which invest in real estate and choose to qualify under the act. 18 In some states where the use of the business trust has been restricted or precluded, legislation has been adopted 19 or

proposed to enable such associations to take advantage of the tax-saving features of these federal statutes. 20

§ 83 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Footnotes

Footnote 16. § 6, supra.

Footnote 17. 26 USC §§ 856-858.

Footnote 18. See generally Income Taxes.

Footnote 19. Such legislation has been enacted in Texas, for example.

Footnote 20. See 40 Tex L Rev 886 (June 1962).

§ 84 Taxation as partnership or corporation, generally

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Where, because of the power control vested in the shareholders, a business trust is in legal contemplation a partnership, its property has been held to be taxable according to the statute relating to the taxation of the property of partnerships. 1 However, where the title to trust property and the exclusive management of its business are vested in trustees, free from any control by the shareholders, and the rights of shareholders are limited to each receiving his share of the profits during the continuation of the trust, and of the corpus upon the termination of the trust, the organization is held to be a true trust, and not to be taxable as a partnership under such a tax statute. 2

A business trust has been held not to be subject to a tax on all moneyed or stock corporations deriving an income or profit from their capital or otherwise, 3 or to a tax imposed upon the "capital stock" of all companies "incorporated" by or under the law of the state or "incorporated" by any other state and doing business in the taxing state. 4 However, the definition of the term "corporation" in the taxing statute may be so framed as to include business trusts. Thus, a business trust has been held subject to state income tax as a corporation rather than as an individual, where the statute defined "corporations" as including associations and the constitution defined corporations as including all associations having any power or privileges not possessed by individuals. 5

Footnotes

Footnote 1. *Williams v Boston*, 208 Mass 497, 94 NE 808.

Annotation: 156 ALR 193.

The personal property of a business trust was held to be taxable under a statute providing for the taxation of the property of partnerships, in *Ricker v American Loan & T. Co.* 140 Mass 346, 5 NE 284.

Footnote 2. *Williams v Milton*, 215 Mass 1, 102 NE 355.

Footnote 3. *Hoey v Coleman* (CC) 46 F 221 (New York).

Footnote 4. *Gregg v Sanford* (CA3) 65 F 151 (Pennsylvania).

Footnote 5. *Oklahoma-Texas Trust v Oklahoma Tax Com.* 197 Okla 114, 168 P2d 607.

§ 85 Franchise or excise tax

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A statute imposing a franchise tax on corporations and defining the term "corporations" as including any business conducted by trustees wherein interest or ownership is evidenced by certificates or other written instruments is not unconstitutional. 6 So too, a state legislature has been deemed to have the power to impose a tax upon business trusts, as such, for the privilege of doing business within the state, and to provide that such tax shall be measured by the net income of the trust. 7 On the other hand, since a business trust has its origin in the common-law right of the parties to enter into a contract and does not spring from a franchise granted by the state, it has been held that constitutional authority to levy excises upon "commodities," a term including corporate franchises, does not empower the legislature to impose an excise tax upon business trusts measured by the value of the shares. 8

The trustees of a business trust are liable for sales taxes duly levied against the trust. 9

Footnotes

Footnote 6. *City Bank Farmers Trust Co. v Graves*, 272 NY 1, 3 NE2d 612, 108 ALR 333.

Annotation: 108 ALR 364, s. 144 ALR 1100, 166 ALR 1477.

Where, in the apportionment of corporate franchise taxes between state and local governments, the state's share is determined by the percentage of corporate stock held by nonresidents, and all of the stock upon which the tax is levied is held by the trustees of a business trust, it has been held that the residence of the trustees rather than of the shareholders of the trust will govern the division. *Commissioner of Corps. & Taxation*

v Springfield, 321 Mass 31, 71 NE2d 593, holding further that the fact that unanimous action of all the trustees, resident and nonresident alike, would be required to sell or convey any of the property of the trust, does not affect this result.

Footnote 7. Koenig v Johnson, 71 Cal App 2d 739, 163 P2d 746.

The definition of business trust in the statute imposing such tax as including every arrangement whereby property is conveyed to trustees associated together with similar or greater powers than directors of a corporation does not indicate that such tax shall not apply to an organization having only a single trustee, if otherwise within the statute. Koenig v Johnson, supra.

For the purposes of such a statute, the term "doing business" means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit. Koenig v Johnson, supra.

Footnote 8. Opinion of Justices, 266 Mass 590, 165 NE 904, 63 ALR 952.

Annotation: 156 ALR 192.

The fact that the legislature has enacted regulations governing such trusts is held not to constitute this method of doing business a franchise or privilege from the government so as to subject such trusts to an excise. Opinion of Justices, supra.

The feature of transferability of interests of members of a business trust cannot be called a commodity subject to a special excise. Gleason v McKay, 134 Mass 419.

Footnote 9. The amount of sales tax duly levied by the state board of equalization upon a retailer which is a business trust is a claim on which the trustees are personally liable under the general rule that trustees of such trusts are personally liable for the obligations of their trusts except when specifically exempted, either expressly or by implication. People v Sischo, 31 Cal App 2d 345, 87 P2d 862.

§ 86 Taxation of shares or dividends

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The shares in a business trust have been held not to be taxable as "stocks in a moneyed corporation." 10 A state cannot, under the due process clause of the Fourteenth Amendment, tax as investments or intangible property of a resident of the state transferable certificates of beneficial interest under a declaration of trust entitling the holder to a proportionate share of the rents derived from specified parcels of real estate in other states and to a share in the proceeds of any sale of the property, although the trustee holds the property free from control by certificate holders, and the latter have no voice in the management of the property. 11 A certificate of shares in a business trust organized in another state, the res of which consisted of real property located in the other state, has been held not to be a "security," subject to an intangible personal property tax,

but rather a muniment of title to an equitable interest in the trust property, and therefore not taxable. 12 And where a business trust was formed to deal in mineral lands and leases, with absolute control vested in the trustee, and the holders of the trust certificates were entitled merely to receive such profits as were paid to them, "unaffected by any such relation as that of partnership or joint-stock associations," it was held that the individual interests of the beneficiaries were not subject to taxation under a statute providing that all property, whether real or personal, in the state, and all moneys, credits, investments and bonds, stocks, joint-stock companies, or otherwise, should be subject to taxation. 13 However, dividends from a business trust have been held taxable under a state income tax statute providing that the term "dividends" should mean all dividends derived from stocks, whether paid to its shareholders in cash or in property of the corporation, and defining corporations as including "corporations, joint-stock companies, associations or common-law trusts organized or conducted for profit." 14

Inheritance, estate, and succession taxes on shares in business trusts are treated in another article. 15

Footnotes

Footnote 10. *Hoadley v Essex County*, 105 Mass 519, holding that the organization was in the nature of a partnership and was not a corporation.

Footnote 11. *Senior v Braden*, 295 US 422, 79 L ed 1520, 55 S Ct 800, 100 ALR 794 (invalid as a tax upon an interest in land outside the state).

Footnote 12. *Narragansett Mut. F. Ins. Co. v Burnham*, 51 RI 371, 154 A 909.

Footnote 13. *Greene County v Smith*, 148 Ark 33, 228 SW 738. The court held that the phrase, "or otherwise," was to be construed in accordance with the rule of *ejusdem generis*, pointed out that the beneficiaries under the declaration of trust were not stockholders in any corporation or joint-stock company, and stated that the instrument disclosed a purpose not to create any "artificial entity separate and apart from the real owners."

Footnote 14. *Ellinger v Tax Commission*, 229 Wis 71, 281 NW 701.

Footnote 15. See *Inheritance, Estate, and Succession Taxes* (Rev ed § 286).

B. Federal Taxes

§ 87 Generally

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A large amount of litigation has arisen, under the provision of the federal revenue acts

that "the term 'corporations' includes associations, joint-stock companies, and insurance companies," involving the question of what constitutes an "association" within the meaning thereof. 16 This inquiry usually arises in connection with the question whether an association is subject to federal income taxation on the same basis as a corporation, 17 in view of the definition of a "corporation," for the purposes of the Internal Revenue Code, as including "associations, joint-stock companies, and insurance companies." 18 Business trusts are generally taxable under the Internal Revenue Code, 19 being usually included in the term "association," for the purposes of federal taxation, 20 and being specifically mentioned in the Treasury Regulations as included, where they are created for the purpose of engaging in business for profit. Yet there are instances where trusts which come literally within the usual definitions of business trusts have been held not to constitute "associations," for the purposes of these acts. The nature of a business trust for this purpose is determined by different tests from those applicable in other situations. 1

A finding by the Board of Tax Appeals that a trust is not engaged in business in such a manner as to be an "association" within the revenue acts has been held not to be conclusive on appeal. 2

Sums paid by trustees of a business trust to a state as income taxes on dividends paid by the trust to shareholders in the state, pursuant to a trust instrument providing for the payment of taxes on dividends out of the surplus or net profit of the trust, are not deductible by the trust as ordinary and necessary business expenses, in computing its federal income tax, where the trust was under no obligation to make the payments except out of earnings or profits. 3

An act of Congress imposing a stamp tax upon the issuance of certificates of stock of an "association, company, or corporation," has been held to apply to certificates of shares issued by a Massachusetts trust organized to engage in the business of manufacturing textiles. 4 And the federal stamp tax was held to be payable on a conveyance made by trustees of a business trust to a new trust formed as a part of a consolidation. 5

Footnotes

Footnote 16. Generally, see *Income Taxes* (1st ed § 162).

Footnote 17. See 26 USC § 11.

Footnote 18. 26 USC § 7701(a)(3).

Footnote 19. *Peoples Sav. Bank v Stoddard*, 359 Mich 297, 102 NW2d 777, 83 ALR2d 344.

Footnote 20. A business trust is included in a federal tax on corporations, under 26 USC § 7701(a)(3), defining the term "corporation" as including "associations, joint-stock companies, and insurance companies," and a provision (26 USC § 7701 (a)(4)) that the "term 'domestic' when applied to a corporation or partnership means created or organized in the United States." *Hecht v Malley*, 265 US 144, 68 L ed 949, 44 S Ct 462.

Footnote 1. §§ 88 et seq., *infra*.

Footnote 2. Commissioner of Internal Revenue v Vandegrift Realty & Invest. Co. (CA9) 82 F2d 387.

Footnote 3. Eastern Gas & Fuel Associates v Commissioner of Internal Revenue (CA1) 128 F2d 369.

Nor are such payments deductible as taxes "imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder," since the term "interest" relates to a tax upon the ownership of stock and not upon the income derived therefrom. Eastern Gas & Fuel Associates v Commissioner of Internal Revenue, supra.

Footnote 4. Malley v Bowditch (CA1) 259 F 809, 7 ALR 608.

Such a tax is not unconstitutional as discriminating against business organizations which do, and in favor of those which do not, issue certificates of shares. Malley v Bowditch, supra.

Footnote 5. Carpenter v White, (CA1) 80 F2d 145, cert den 297 US 720, 80 L ed 1005, 56 S Ct 598 (Massachusetts).

§ 88 Tests for determining whether trust is "association"

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Various tests have been applied by the courts in determining whether a business trust is an "association" subject to federal taxes under the Internal Revenue Code. The most important single element to be considered in this respect is whether the enterprise is created for the transaction of business; all the other criteria are subordinate to this primary and paramount test. 6 The substance of the distinction between a nontaxable trust and a business trust which is taxable as an association lies in the intrinsic nature of the enterprise and the relation of the several associates thereto, rather than in the mere form of the association or in technical distinctions between corporations, partnerships, and the like. 7

It is now settled that the degree of control which the beneficiaries of a trust may exercise over the trustees or over the business or property of the trust is not determinative, and that a business trust may be an "association" although the trustees are free from the control of the beneficiaries. 8 Neither is mere size important in determining whether a trust is an association, taxable as a corporation under the revenue acts. 9 Indeed, it has been held that a trust may be an "association" under the statute, even though the certificates of beneficial interest are held by only one person, 10 or there is only one trustee. 11 The fact that the trust is engaged in a single enterprise or a limited number of operations does not necessarily prevent its being classed as an association within the statute. 12 The status of a trust under the laws of the state in which it operates does not determine whether or not it is an "association," for the purposes of the revenue acts. 13

The term "association," as used in the revenue act, does not require organization under a statute and is not limited to trusts having statutory privileges. 14 The fact that at the time the trust was organized the trustee did not know who would become shareholders does not exclude a business trust from the operation of the statute on the theory that in such a case there were no "associates." 15 Whether or not a trust amounts to an "association," within the meaning of the federal revenue acts, depends, in the final analysis, upon the facts and circumstances of each individual case. 16

Footnotes

Footnote 6. § 89, *infra*.

Footnote 7. *Equitable Trust Co. v Magruder* (DC) 37 F Supp 711.

Footnote 8. *Helvering v Coleman-Gilbert Associates*, 296 US 369, 80 L ed 278, 56 S Ct 285; *Helvering v Combs*, 296 US 365, 80 L ed 275, 56 S Ct 287; *Morrissey v Commissioner of Internal Revenue*, 296 US 344, 80 L ed 263, 56 S Ct 289; *Hecht v Malley*, 265 US 144, 68 L ed 949, 44 S Ct 462.

Annotation: 156 ALR 200.

Footnote 9. *Commissioner of Internal Revenue v Chase Nat. Bank* (CA2) 122 F2d 540, 144 ALR 1043.

Annotation: 156 ALR 200.

The fact that there is a small number of beneficiaries or shareholders does not exclude a trust from the operation of the acts. *Swanson v Commissioner of Internal Revenue*, 296 US 362, 80 L ed 273, 56 S Ct 283.

The fact that there is a large number of beneficiaries has been held to be immaterial. *Pennsylvania Co. v United States* (DC) 48 F Supp 969.

Footnote 10. *Lombard Trustees v Commissioner of Internal Revenue* (CA9) 136 F2d 22; *Ittleson v Anderson* (CA2) 67 F2d 323.

Footnote 11. *Brooklyn Trust Co. v Commissioner of Internal Revenue* (CA2) 80 F2d 865, cert den 298 US 659, 80 L ed 1384, 56 S Ct 680. And see *Merchants' Trust Co. v Welch* (CA9) 59 F2d 630.

Annotation: 156 ALR 201.

Where a business trust was created by an instrument executed by one who with his wife and sister had previously organized a corporation to take over his personal investments, and also by the wife and sister, to which all of them transferred their stock in the corporation in exchange for stock in the trust, which used corporation stock to purchase the assets of the corporation, in which trust instrument such person was named as sole trustee for life with absolute power to conduct the affairs of the trust and absolute discretion as to the declaration of dividends, to select a manager or managers,

and to increase its capital stock from time to time and to dispose of such increase as he should see fit, and further providing that the shareholders have no right or title to the trust property, cannot call for partition or dissolution of the trust, and are to be absolved from personal liability to creditors, and that the death of the beneficiary should not dissolve the trust, such trust is an association within the Internal Revenue Code so as to be taxable as a separate entity, although the wife and sister of the sole trustee each held but one of the 300,000 shares of its capital stock and he held all the rest. *Titus v United States* (CA10) 150 F2d 508, 162 ALR 991, cert den 326 US 773, 90 L ed 467, 66 S Ct 230.

Footnote 12. *Helvering v Combs*, 296 US 365, 80 L ed 275, 56 S Ct 287; *Monrovia Oil Co. v Commissioner of Internal Revenue* (CA9) 83 F2d 417; *Commissioner of Internal Revenue v Vandergrift Realty & Invest. Co.* (CA9) 82 F2d 387.

The fact that only one piece of property is included in the trust is of no importance. *Codman v United States* (DC) 30 F Supp 732.

Footnote 13. *Burk-Waggoner Oil Asso. v Hopkins*, 269 US 110, 70 L ed 183, 46 S Ct 48; *Commissioner of Internal Revenue v Fortney Oil Co.* (CA6) 125 F2d 995.

Annotation: 156 ALR 201.

Footnote 14. *Morrissey v Commissioner of Internal Revenue*, 296 US 344, 80 L ed 263, 56 S Ct 289; *Commissioner of Internal Revenue v Gibbs-Preyer Trusts* (CA6) 117 F2d 619.

Footnote 15. *Second Carey Trust v Helvering*, 75 App DC 263, 126 F2d 526, cert den 317 US 642, 87 L ed 517, 63 S Ct 34, followed in *Hare Trust v Helvering*, 75 App DC 267, 126 F2d 530, cert den 317 US 643, 87 L ed 518, 63 S Ct 35.

Footnote 16. *Keating-Snyder Trust v Commissioner of Internal Revenue* (CA5) 126 F2d 860; *Commissioner of Internal Revenue v Gibbs-Preyer Trusts* (CA6) 117 F2d 619.

Annotation: 156 ALR 200.

§ 89 --"Business" test

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The most important single element to be considered in determining whether a trust is an "association," so as to be taxable as a corporation under the Internal Revenue Code, is whether the enterprise is created for the transaction of business. All the other criteria are subordinate to this primary and paramount test. 17 The test is whether the trust is a business concern, and whether the shareholders or trustees, or both, are operating it in active business for profit. 18 Generally, only those trusts are taxed as "associations" which are engaged in doing business for profit or income. 19 The word "business,"

as used in this connection, connotes a commercial or industrial establishment or enterprise, as distinguished from "property," and means the activity, the energy, the capacity, and the opportunities by which results are reached. 20

A trust is not deemed to be engaged in business, within the meaning of this test, if its sole or principal object and activities are (1) the preservation of specified property; (2) the liquidation of a trust estate; or (3) distribution of income derived from another source. 1 The mere receipt of income by the trustee from trust property and the payment of charges and expenses does not constitute such "business" as will characterize a trust as an "association." 2

The type of organizations not intended to be included in the term "associations" for federal tax purposes are pure trusts—that is, trusts of traditional pattern under which property is conveyed by deed, will, or declaration for the benefit of named or described persons. 3 In determining whether a particular trust is a business trust, and hence taxable as an "association," its resemblance, in its powers and purposes, to a pure trust is relevant, but the mere presence of one or more of the elements usually attending a pure trust does not ipso facto characterize it as a pure trust, since some of the characteristics of such a trust may be adapted, under some circumstances, to a "business" purpose, as distinguished from a trust purpose. 4

§ 89 --"Business" test [SUPPLEMENT]

Case authorities:

Leased property constituted a business and caused trust to be treated as association taxed as corporation where leases gave trustee option to receive rent either in cash or in kind in form of oil pumped from land, and he always chose to receive payments in kind, which he then sold to Independent Oil Producers Agency pursuant to five-year renewable sale contract. *Bank of America Nat. Trust & Sav. Assn. v United States* (1974, DC Cal) 75-1 USTC ¶ 9292 (CA9 Cal) 552 F2d 876.

Footnotes

Footnote 17.

Annotation: 108 ALR 344, s. 144 ALR 1055, 1057, 166 ALR 1461, 1467; 156 ALR 203.

To permit a trust to be classified as an association for income tax purposes, it must (1) be initially created, or have been thereafter utilized, as a vehicle for carrying on a business enterprise, and it must (2) have characteristics, under its written structure or in its adopted mode of operation, resembling of a corporate organization. Both of these features are requisites; however, the first is the substantive element, and the second is simply one of supportive but not invariable form. *Nee v Main Street Bank* (CA8 Mo) 174 F2d 425, cert den 338 US 823, 94 L ed 500, 70 S Ct 69.

Footnote 18. *United States v Homecrest Tract* (CA9 Cal) 160 F2d 150; *Reinecke v Kaempfer* (CA7) 72 F2d 469, cert den 294 US 708, 79 L ed 1243, 55 S Ct 405; *Smith v Commissioner* (CA3) 69 F2d 911, cert den 293 US 561, 79 L ed 662, 55 S Ct 73.

Annotation: 156 ALR 203.

Footnote 19. Fidelity-Bankers Trust Co. v Helvering, 72 App DC 1, 113 F2d 14, cert den 310 US 649, 84 L ed 1415, 60 S Ct 1102.

There must be an engagement of capital in the transaction of business for profit. Pennsylvania Co. v United States (DC) 48 F Supp 972.

The term "association" is used in this connection to indicate a collection of persons who have united or joined together for some business purpose and who act together without a charter, but use methods and forms of corporate bodies in the prosecution of some business enterprise for profit. Cleveland Trust Co. v Commissioner (CA6) 115 F2d 481, cert den 312 US 704, 85 L ed 1137, 61 S Ct 809.

Footnote 20. Cleveland Trust Co. v Commissioner, supra.

A business trust holding the stock of a group of mining corporations, and furnishing them directional and policy-making services, has been held engaged in "business" for federal tax purposes. Reynolds v Hill (CA8 Minn) 184 F2d 294.

A business trust organized to conduct a general plumbing business, having continuity of existence, centralized management, and provision for transferable shares, has been held an association taxable as a corporation. Fowler v United States (DC Mo) 69 F Supp 528.

Footnote 1. Nee v Main Street Bank (CA8 Mo) 174 F2d 425, cert den 338 US 823, 94 L ed 500, 70 S Ct 69; Fidelity Bankers Trust Co. v Helvering, 72 App DC 1, 113 F2d 14, cert den 310 US 649, 84 L ed 1415, 60 S Ct 1102.

Annotation: 156 ALR 203, 204.

Footnote 2. Commissioner v Gibbs-Preyer Trusts (CA6) 117 F2d 619; Cleveland Trust Co. v Commissioner (CA6) 115 F2d 481, cert den 312 US 704, 85 L ed 1137, 61 S Ct 809 (stating that the mere receipt of income and its distribution amounts to no more than receiving the ordinary fruits arising from the ownership of property).

Footnote 3. Pennsylvania Co. v United States (CA3) 138 F2d 869, cert den 321 US 788, 88 L ed 1079, 64 S Ct 787.

In an ordinary trust, the beneficiaries are in no real sense "associated" in the conduct of the trust affairs, and consequently an ordinary trust does not become an "association" within the meaning of the revenue act. But where the creators of the trust, who are also beneficiaries, are using it to pool their common interests for the purpose of conducting a joint business enterprise for their own profit, the trust is not an ordinary trust, but merely and instrumentality used by the associates to obtain some corporate advantage for their business venture, and the beneficiaries are in reality the promoters of the business venture. Kilgallon v Commissioner (CA7) 96 F2d 337, cert den 305 US 622, 83 L ed 397, 59 S Ct 83.

Footnote 4. Pennsylvania Co. v United States, (CA3 Pa) 138 F2d 869, cert den 321 US 788, 88 L ed 1079, 64 S Ct 787.

§ 90 --Corporate similitude; use of corporate forms or procedures

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The inclusion of "associations" in the definition of the term "corporation" as used in the Internal Revenue Code 5 implies some resemblance between the two, but it is resemblance and not identity which is contemplated, and definitions are not to be pressed so far as to make formal procedure a controlling test. While use of corporate forms may furnish persuasive evidence of the existence of an "association," the absence of particular forms, or of the usual terminology of corporations, is not decisive. 6 The question of the taxability of a trust as an association does not turn merely upon technical differences between the trust and a corporation in respect of their organizational structures. The determinant is rather the approximation of corporate advantages by the use of a trust instead of a corporation. 7 It has been said regarding the corporate analogy that there should be a balancing of resemblances and contrasts, and effect given to the dominant functions and attributes of the organization. 8

In determining whether a trust amounts to an "association," within the meaning of the federal revenue acts, it is unimportant, or at least it is not controlling, that meetings are not held by the beneficiaries and that the trust has no office, place of business, seal, bylaws, or official name, 9 or that there are no formal meetings of trustees or directors, 10 or that their organization is of a loose and informal character. 11 The test of an association is not to be found in the mere form of the evidences or certificates of interest, or in any particular method of transfer, 12 and it is unimportant that no formal certificates of ownership were issued. 13 The name given to the evidences of interest or to the beneficiaries is unimportant. 14 Limitation of the beneficiary's liability is not a sine qua non of the corporate analogy, and the absence of such limitation does not necessarily preclude the status of "association." 15 And as continuity of organization is an attribute of trusts as well as of corporations, this feature is not sufficient in itself to characterize a trust as an "association." 16 The same is true of the existence of the right to transfer beneficial interests. 17

Footnotes

Footnote 5. 26 USC § 7701(a)(3).

Footnote 6. *Morrissey v Commissioner*, 296 US 344, 80 L ed 263, 56 S Ct 289.

Annotation: 156 ALR 201.

While the use of corporate forms by a trust, or the inclusion therein of other features similar to those of ordinary corporations, may furnish evidence that the trust is an "association," this is not a conclusive test. *United States v Davidson* (CA6) 115 F2d 799.

It is not essential to bring a trust within the definition of a corporation for federal tax purposes that the organization be identical in its structure and functionings to a corporation. *Commissioner v City Nat. Bank & T. Co.* (CA10) 142 F2d 771, cert den 323 US 764, 89 L ed 612, 65 S Ct 118, reh den 323 US 816, 89 L ed 649, 65 S Ct 187.

Footnote 7. *Pennsylvania Co. v United States* (CA3) 138 F2d 869, affg (DC) 48 F Supp 873, 875, cert den 321 US 788, 88 L ed 1079, 64 S Ct 787.

Footnote 8. *Commissioner v Brouillard* (CA10) 70 F2d 154, cert den 293 US 574, 79 L ed 672, 55 S Ct 85.

Footnote 9. *Helvering v Combs*, 296 US 365, 80 L ed 275, 56 S Ct 287;
Keating-Snyder Trust v Commissioner (CA5) 126 F2d 860.

Footnote 10. *Keating-Snyder Trust v Commissioner*, supra; *Tyson v Commissioner* (CA7) 68 F2d 584, cert den 292 US 657, 78 L ed 1505, 54 S Ct 865.

The significant resemblance between business trusts and corporations, for the purposes of these statutes, does not lie in the formality of meetings or records, but in the fact that by virtue of an arrangement for the conduct of the business of a joint enterprise the parties have secured centralized management through designated representatives. *Helvering v Coleman-Gilbert Associates*, 296 US 369, 80 L ed 278, 56 S Ct 285.

Footnote 11. *Tyson v Commissioner* (CA7) 68 F2d 584, cert den 292 US 657, 78 L ed 1505, 54 S Ct 865.

Footnote 12. *Nashville Trust Co. v Cotros* (CA6) 120 F2d 157, and on other grounds (CA6) 122 F2d 326, cert den 314 US 680, 86 L ed 544, 62 S Ct 181.

Footnote 13. *Commissioner v Fortney Oil Co.* (CA6) 125 F2d 995; *Sears, R. & Co. Employees' Sav. & P-S Pension Fund v Commissioner* (CA7) 45 F2d 506.

Footnote 14. *Monrovia Oil Co. v Commissioner* (CA9) 83 F2d 417.

Footnote 15. *Bert v Helvering*, 67 App DC 340, 92 F2d 491.

Where the trust has a governing directorate and carries on its business in a corporate-like form, it is an "association," within the revenue act, even though the liability of the shareholders is as in a partnership. *Helm & S. Syndicate v Commissioner* (CA9) 136 F2d 440.

Footnote 16. *Pennsylvania Co. v United States* (DC) 48 F Supp 969.

Footnote 17. *Pennsylvania Co. v United States*, supra.

§ 91 --Terms of trust instrument, or activities of trustees

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Although there is authority to the contrary in some of the earlier lower court decisions on the subject, 18 the Supreme Court of the United States has ruled that the character of a trust as an "association" for federal tax purposes is governed by the terms of the trust instrument, since the powers of the trustees can be exercised by them to the full extent therein permitted, 19 and that for the purpose of avoiding taxation as an "association" the parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted. 20 In other words, whether there is an association for the purpose of carrying on a business is to be determined from the trust instrument itself, from what could be done under the trust and not from what was actually done, 1 or what the parties to the instrument thought they could do. 2 The legal effect of the instrument is controlling as against the direct affirmations, disavowals, or protestations embodied in the instrument. So, the fact that the organization in question has consistently called itself a trust is of little or no significance in determining its true character under the revenue acts. 3 Moreover, where a trust has the characteristics as well as the powers of a business trust, it cannot escape taxation by the failure to exercise such powers during the taxing period, 4 or by declining to exercise them, 5 since the trustees could, if they choose, exercise them. 6

On the other hand, a consideration of what the trustees actually do is not necessarily inconsistent with the foregoing principles. 7 The actual activities of the trustees may be pertinent to show that the parties contemplated that the trust should engage in business in such manner that, if the purpose were expressed in the trust instrument, it would clearly be an "association" for the purpose of taxation, and that they adopted the trust form as a device to escape taxation. 8 Conversely, considering the terms of the trust instrument, 9 it would seem clear that if, on its face, the instrument describes an ordinary trust, such as is appropriate and customary for the conservation and distribution of an estate for the benefit of cestuis que trustent, and there is no purpose or power to engage in business specifically or "formally set forth in the trust instrument," 10 nor actual exercise of such powers by the trustees, the mere fact that the powers conferred upon the trustees may be sufficiently broad and general to include the power to engage in business to some extent will not convert the trust into an association within the meaning of the revenue act. 11 Moreover, if the trust instrument is ambiguous, the practical interpretation thereof by the parties, as exemplified by the actions of the trustees thereunder, may be examined for the purpose of ascertaining the true meaning of the instrument and the nature of the trust contemplated thereby. 12

Footnotes

Footnote 18.

Annotation: 156 ALR 204.

Footnote 19. *Morrissey v Commissioner*, 296 US 344, 80 L ed 263, 56 S Ct 289, holding a trust taxable as an association, notwithstanding the fact that the sale of real estate by the trust in question was made before the beginning of the tax year and that its remaining property was conveyed to a corporation in exchange for stock of the latter.

To a like effect, see *Marshall v Commissioner* (CA3) 111 F2d 935, cert den 311 US 658, 85 L ed 422, 61 S Ct 13.

Annotation: 156 ALR 205.

Footnote 20. *Helvering v Coleman-Gilbert Associates*, 296 US 369, 80 L ed 278, 56 S Ct 285.

To a like effect, see *Nee v Main Street Bank* (CA8 Mo) 174 F2d 425, cert den 338 US 823, 94 L ed 500, 70 S Ct 69. And see *United States v Hill* (CA10) 142 F2d 622; *Porter v Commissioner* (CA9) 130 F2d 276; *Keating-Snyder Trust v Commissioner* (CA5) 126 F2d 860; *Second Carey Trust v Helvering*, 75 App DC 263, 126 F2d 526, cert den 317 US 642, 87 L ed 517, 63 S Ct 34, followed *Hare Trust v Helvering*, 75 App DC 267, 126 F2d 530, cert den 317 US 643, 87 L ed 518, 63 S Ct 35.

Annotation: 156 ALR 205.

Whether a business trust is an association within the meaning of the Internal Revenue Code (26 USC § 7701(a)(3)) so as to be taxable as an entity separate from the sole beneficiary is to be determined from the four corners of the trust instrument and not from what the beneficiary may claim. *Titus v United States* (CA10) 150 F2d 508, 162 ALR 991, cert den 326 US 773, 90 L ed 467, 66 S Ct 230.

Footnote 1. *United States v Homecrest Tract* (CA9 Cal) 160 F2d 150; *Title Ins. & T. Co. v Commissioner* (CA9) 100 F2d 482.

Footnote 2. *Wholesalers Adjustment Co. v Commissioner* (CA8) 88 F2d 156.

The nature of the trust is to be determined, not by the "intentions" or expectations of the parties, as shown by parol testimony, nor, primarily, by the extent to which the powers created by the trust have been actually exercised, but by the purposes and potential activities as disclosed on the face of the instrument. *Sears v Hassett* (CA1) 111 F2d 961.

Footnote 3. *Tyson v Commissioner* (CA7) 68 F2d 584, cert den 292 US 657, 78 L ed 1505, 54 S Ct 865.

Annotation: 156 ALR 206.

Footnote 4. *Morrissey v Commissioner*, 296 US 344, 80 L ed 263, 56 S Ct 289.

The character of the association is determined from the instrument, and it is no defense to say that the managers did not exercise all the powers set forth in the declaration of trust. *Commissioner v City Nat. Bank & T. Co.* (CA10) 142 F2d 771, cert den 323 US 764, 89 L ed 612, 65 S Ct 118, reh den 323 US 816, 89 L ed 649, 65 S Ct 187. Annotation: 156 ALR 206.

Footnote 5. *Second Carey Trust v Helvering*, 75 App DC 263, 126 F2d 526, cert den 317 US 642, 87 L ed 517, 63 S Ct 34, followed *Hare Trust v Helvering*, 75 App DC 267, 126 F2d 530, cert den 317 US 643, 87 L ed 518, 63 S Ct 35.

Footnote 6. *Marshall v Commissioner* (CA3) 111 F2d 935, cert den 311 US 658, 85 L

ed 422, 61 S Ct 13.

Footnote 7. As stated in *Fidelity-Bankers Trust Co. v Helvering*, 72 App DC 1, 113 F2d 14, cert den 310 US 649, 84 L ed 1415, 60 S Ct 1102: "It is not necessary to assume from the recent decisions that the language of the trust instrument as to purpose will be conclusive in all cases, or that actual activities or unexpressed purposes always will be irrelevant. But when the expressed objectives and powers are appropriate to conducting a business enterprise, and all or most of them actually are carried out and exercised, the existence of an unexpressed intention not to engage in business cannot counteract their effect and amounts to no more than a misconception of the nature of the activity or an intention to escape taxation. There are circumstances in which the distinction of function is so shadowy that the technical arrangements entered into must be controlling, and that is true though the parties may not have understood them and their consequences fully, or had actual intentions which were contradictory."

Footnote 8. *Tyson v Commissioner* (CA7) 54 F2d 29.

Annotation: 156 ALR 207.

Footnote 9. *Commissioner v N. B. Whitcomb Coca-Cola Syndicate* (CA5) 95 F2d 596, followed *Commissioner v N. B. Whitcomb Money Syndicate* (CA5) 95 F2d 598.

Annotation: 156 ALR 205, 206.

Footnote 10. This is apparently the sense in which this language was used in *Helvering v Coleman-Gilbert Associates*, 296 US 369, 80 L ed 278, 56 S Ct 285.

Footnote 11.

Annotation: 156 ALR 205.

Footnote 12. *Halliday v Commissioner*, 38 BTA (F) 518.

IX. TERMINATION AND DISSOLUTION

§ 92 Generally

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Trust instruments frequently provide a stated term for which a business trust is to operate, or prescribe the conditions under which it shall terminate. 13 Thus, upon the happening of a certain event or the expiration of the term for which the trust is to continue, as in the case of trusts generally, the business trust will expire. 14 And where the instrument of trust provides for a definite period of existence, it may not be circumvented by the device of conveying the trust property to new trustees for a term longer than the residue of the

original term. 15

The members of a business trust may dissolve it in accordance with the trust instrument, 16 and may, upon proper grounds and where the circumstances warrant, 17 bring an action in equity to procure its dissolution. 18 A court of equity may, on a proper showing, decree the dissolution and liquidation of a business trust, prior to the time specified in the trust instrument for its termination. 19

A minority shareholder cannot, arbitrarily and without equitable grounds, demand the dissolution of the trust contrary to the terms of the trust instrument and before the objects of the trust have been accomplished. 20 Nor may a shareholder in a business trust, even though in legal contemplation it is regarded as a partnership, assert a partner's arbitrary right of dissolution to obtain a dissolution of the trust during its lifetime in a manner different from that provided for in the trust instrument. 1 And it has been held that a person who did not join in the trust agreement is not entitled to a decree setting aside or declaring void the agreement where to do so would result in injury to all of the parties. 2 But where a business trust falls within the constitutional definition of a corporation, the right of the state to terminate its activities for failure to comply with statutes regulating corporations has been recognized. 3

As a general rule, and unless the trust instrument so provides, the death of one or more shareholders of a business trust does not have the effect of dissolving or terminating the organization. 4 Nor will the acquisition of all of the shares of a Massachusetts trust by another such trust terminate or destroy the separate existence of the former trust. 5 The conveyance of the trust property by the trustees does not terminate their trusteeship with respect to duties remaining after such conveyance, 6 and the sale of the property of a business trust in foreclosure proceedings does not amount to a dissolution of the trust where a trustee purchases the property at the sale under such circumstances that it inured to the benefit of the original shareholders, especially where the business trust remains thereafter in charge of a receiver appointed by a court. 7

Frequently, the trust instrument provides that upon the expiration of the term of the trust the trustees shall wind up the affairs of the trust, liquidate its assets, and distribute the proceeds among the shareholders. 8 Where the trustees are given the power to terminate the trust at their discretion by dividing the trust fund among the shareholders, it has been held that they may not terminate it in another fashion. 9 Upon the termination of the trust, the functions and powers of the trustees as such come to an end, except for the purpose of winding up the business and distributing the remaining assets among the shareholders. 10

§ 92 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Termination on set date. 4 Am Jur Legal Forms 2d § 51:206.

Liquidator of trust. 4 Am Jur Legal Forms 2d § 51:207.

Duration and termination. 4 Am Jur Legal Forms 2d §§ 51:204, 51:205.

Footnotes

Footnote 13. § 21, *supra*.

Footnote 14. *Hauser v Catlett*, 197 Okla 668, 173 P2d 728.

Footnote 15. Neither trustees nor a court may compel objecting shareholders to accept shares in a new trust purporting to be created to operate for a period additional to that limited by the trust instrument, and to which the property of the former trust is conveyed by the original trustees, regardless of how advantageous it may be for other shareholders. *Hauser v Catlett*, *supra*.

Footnote 16. *Bryan v Seiffert*, 185 Okla 496, 94 P2d 526.

Annotation: 156 ALR 207.

The rights of shareholders with respect to a dissolution of a business trust are determined by the provisions of the trust instrument and the terms of the certificates of shares. *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13.

Practice Aids:—Provisions of trust instrument as to termination and dissolution or liquidation of trust. 3 Am Jur Legal Forms 3:1, 3:114-3:116.1.

Footnote 17. § 93, *infra*.

Footnote 18. *Bryan v Seiffert*, 185 Okla 496, 94 P2d 526.

A provision of the declaration of trust that the shareholders shall have no right to call for a partition or division of the trust property or to institute any court proceedings, "except at the expiration of the term of this trust," does not preclude them from maintaining an action on the ground that the trust has expired, or from securing a judicial determination of that question. *Melville v Weybrew*, 106 Colo 121, 103 P2d 7, cert den 311 US 695, 85 L ed 450, 61 S Ct 140, later app 108 Colo 520, 120 P2d 189, cert den 315 US 811, 86 L ed 1210, 62 S Ct 795.

Footnote 19. *Wiess v McFaddin* (Tex Civ App) 211 SW 337.

Footnote 20. *Hossack v Ottawa Development Asso.* 244 Ill 274, 91 NE 439.

Footnote 1. *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13.

Footnote 2. *Sullivan v Edward Hines Lumber Co.* 239 Ill App 1 (dissolution of business trust sought by minority stockholder of corporation whose other stockholders formed trust to perfect title to corporation property, by which minority stockholder profited).

Footnote 3. Quo warranto lies against trustees who carry on business as a corporation without incorporating as required by law. *State ex rel. Colvin v Paine*, 137 Wash 566, 572, 243 P 2, 247 P 476, 46 ALR 165.

Footnote 4.

Annotation: 156 ALR 209.

The fact that the shares of the trust are transferable indicates an intention that such transfer, or the death of the shareholder, will not result in a dissolution of the trust. *Hossack v Ottawa Development Asso.* 244 Ill 274, 91 NE 439.

Practice Aids: –Trust instrument provision that death of shareholders shall not terminate trust. 3 Am Jur Legal Forms 3:117.

Footnote 5. *Greco v Hubbard*, 252 Mass 37, 147 NE 272.

Footnote 6. *Houston Oil Co. v Village Mills Co.* (Tex Com App) 241 SW 122, holding that a judgment against the trustees was not invalid because of their conveyance of the trust estate prior to the entry of the judgment.

Footnote 7. *Flint-Texas Oil-Drilling Trust v Bridges* (Tex Civ App) 23 SW2d 875.

Footnote 8. *Hamilton v Young*, 116 Kan 128, 225 P 1045, 35 ALR 496; *Rhode Island Hospital Trust Co. v Copeland*, 39 RI 193, 98 A 273. And see *Schumann-Heink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 485.

In a Massachusetts trust, provision is commonly made for a ratable sharing in the proceeds upon termination of the trust. *Realty Associates of Portland v Women's Club*, 230 Or 481, 369 P2d 747 (obiter).

Footnote 9. *Greer Invest. Co. v Booth* (CA10) 62 F2d 321, affg (DC) 52 F2d 857, app dismd in part (CA10) 62 F2d 1072.

Footnote 10. *Cook v Liberty Pipe Line Co.* (Tex Civ App) 281 SW 221. And see *Reclamation Co. v Simmons* (Tex Civ App) 293 SW 194.

§ 93 Grounds for, and circumstances warranting, equitable action and relief

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Although a court of general equity jurisdiction has the power to decree the termination of a business trust on the ground that it has expired by the terms of the trust instrument, 11 a court of equity will not decree the final dissolution of a business trust, contrary to the terms of the trust instrument, without a very clear showing of necessity. 12 It has been held that a court has no power to dissolve such a trust in violation of the provisions of the trust instrument, in the absence of a showing that the business of the trust cannot be continued. 13 And the right of minority shareholders to maintain such an action, in the absence of provisions of the trust instrument giving them that right, has been said to depend upon a showing that the purposes of the trust are no longer capable of fulfilment under proper management or that the business could not be continued as contemplated by the trust instrument. 14 The facts that the trustees of a business trust are not pursuing the purposes of the trust and that they have paid no dividends to the shareholders, while perhaps proper to be considered in a proceeding to remove the trustees, are not a ground

on which shareholders may maintain an action to dissolve the trust, in the absence of a showing that the trust could not be continued under proper management. 15 And the mere fact that a subscriber purchased shares under the belief that the officers and many of the other subscribers were in favor of closing out the affairs of the trust does not entitle him to a dissolution of the trust, without other grounds and prior to the accomplishment of the purposes of the trust. 16

On the other hand, it has been held that a court of equity has inherent power to appoint a receiver to liquidate a business trust where fraud, mismanagement, or abuse of trust is present, whether or not insolvency is likewise present. 17 A hopeless deadlock in the management of a trust, paralyzing its business and activities, may warrant a court in dissolving the trust before the expiration of its term. 18 And the facts that the parties to a trust agreement organized the trust and became shareholders under the mistaken belief that a provision of the trust instrument, expressly purporting to do so, was effectual to exempt them from personal liability for the debts of the trust, and that by subsequent judicial decisions the law was established that such shareholders were personally liable notwithstanding such provisions, were held grounds for the dissolution of the trust at the suit of shareholders. 19 Liquidation of a temporarily solvent business trust has been held proper where the capital structure of the trust, although not subject to the controls of federal legislation governing investment companies, but failing to comply with the standards and safeguards prescribed therein, would permit controlling shareholders to launch the trust upon speculative enterprises making future insolvency likely and threatening the rights of debenture holders, and where the controlling shareholders and the Securities and Exchange Commission were unable to agree upon an acceptable plan for reorganization of the trust. 20

Footnotes

Footnote 11. *Melville v Weybrew*, 106 Colo 121, 103 P2d 7, cert den 311 US 695, 85 L ed 450, 61 S Ct 140.

Footnote 12. *Phoenix Oil Co. v McLarren* (Tex Civ App) 244 SW 830.

Annotation: 156 ALR 210.

Footnote 13. *Oklahoma Fullers Earth Co. v Evans*, 179 Okla 124, 64 P2d 899.

Footnote 14. *Myers v Oklahoma Oil & Gas Royalty Co.* 192 Okla 620, 138 P2d 109.

In *Burnett v Smith* (Tex Civ App) 240 SW 1007, minority shareholders were held to have no right to maintain a suit to dissolve and terminate the trust on the ground of the fraud and mismanagement on the part of the trustees, at least without a showing that the business could not be continued by the appointment of new trustees or otherwise.

Footnote 15. *Myers v Oklahoma Oil & Gas Royalty Co.* 192 Okla 620, 138 P2d 109.

Footnote 16. *Hossack v Ottawa Development Asso.* 244 Ill 274, 91 NE 439.

Footnote 17. *Bailey v Proctor* (CA1 Mass) 160 F2d 78, cert den 331 US 834, 91 L ed 1847, 67 S Ct 1515, holding that failure of the Investment Company Act of 1940 to

specifically mention the inherent power of equity to liquidate or reorganize a corporation or business trust where fraud, mismanagement, or abuse of trust are present does not deprive the court of this aspect of its jurisdiction in actions brought under the act.

Footnote 18. *Weiss v McFaddin* (Tex Civ App) 211 SW 337.

Footnote 19. *O'Dell v Grubstake Invest. Asso.* (Tex Civ App) 38 SW2d 151.

Footnote 20. *Bailey v Proctor* (CA1 Mass) 160 F2d 78, cert den 331 US 834, 91 L ed 1847, 67 S Ct 1515.

§ 94 Scope of equitable relief

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Where a court of equity has once assumed jurisdiction of an action to dissolve a business trust, it may adjust all the rights between the parties, and will retain jurisdiction until that end is accomplished. 1 In a representative suit to terminate a trust, the court may require an accounting by the trustees, 2 may enjoin the prosecution of other suits affecting the trust to avoid multiplicity of action, 3 and may partition the property of the trust among the parties. 4

Footnotes

Footnote 1. *Bryan v Seiffert*, 185 Okla 496, 94 P2d 526.

Annotation: 156 ALR 209.

Where equity has taken jurisdiction of an action to reorganize or liquidate a business trust on grounds of insolvency, and has found the trustees guilty of gross abuse of trust, the supervening solvency of the trust and the removal of the offending trustees will not terminate the court's jurisdiction. *Bailey v Proctor* (CA1 Mass) 160 F2d 78, cert den 331 US 834, 91 L ed 1847, 67 S Ct 1515.

Footnote 2. *Deering v Stites*, 257 Ky 403, 78 SW2d 46, cert den 295 US 762, 79 L ed 1704, 55 S Ct 921.

Footnote 3. *Lincoln v Superior Ct.* 51 Cal App 2d 61, 124 P2d 179.

Footnote 4. *Bryan v Seiffert*, 185 Okla 496, 94 P2d 526.

The shareholders have no right to a partition of the trust property prior to the dissolution or termination of the business trust. § 33, *supra*.

X. RECEIVERSHIP; REORGANIZATION OR MERGER

§ 95 Receivership

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The general equitable principles permitting the appointment of a receiver by a court of equity when conditions warrant such action 5 apply to business trusts. 6 Whether a receiver for a business trust will or will not be appointed ordinarily rests in the sound discretion of the trial court. 7 Such a court may, where the conservation of the trust property and the successful management of its business require it, appoint a receiver to operate the business of the trust. 8 The facts that such a trust is insolvent, and that, unless prevented, the trustees will dissipate the assets of the trust estate, constitute a ground for the appointment of a receiver for the trust. 9 Where a business trust is being mismanaged or is in danger of being lost to the shareholders through fraud, collusion, or mismanagement on the part of the trustees, a court of equity has inherent power to appoint a receiver to take charge of the property and assets of the trust to prevent loss to the shareholders. 10 Where no substantial rights will be unduly infringed thereby, it is within the discretion of the trial court to appoint a temporary receiver pending an action by shareholders against the trustees of a business trust for an accounting, 11 or as an incident to injunctive relief sought by shareholders against the trustees, where the receivership is necessary to render the injunction effective. 12 But shareholders are not entitled to the appointment of a receiver for the trust as an ancillary process to aid them in the collection of an alleged individual debt of the trustees to them. 13

Generally, the receiver of a business trust takes its assets subject to the equities which existed as against the trust. 14 The rule applicable to public service corporations, with respect to priorities of claims for current supplies, was held to be applicable in a receivership involving a business trust which carried on a public service business. 15

The termination of a receivership also lies within the judicial discretion of the court, in the exercise of which the court will consider the rights and interests of all parties concerned. 16 A court of equity in terminating receivership of a business trust has inherent power to order such measures as are necessary or proper to see that the property of the trust is turned over to one legally entitled thereto. Hence the court may, in its discretion, order the shareholders to be notified of a motion to terminate the receivership, and give them an opportunity to be heard thereon. 17

§ 95 ----Receivership [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Case authorities:

Where cotrustees of business trust held shares of trust in equal numbers and were sole trustees, and one intended to use authority as cotrustee to injure trust, court had power to order dissolution and distribution of assets at request of other cotrustee; appointment of receiver to manage business trust properties was inappropriate relief where no other form of relief was additionally ordered. *Nigro v First Nat. Bank* (1979, Mass App) 1979 Adv Sheets 699, 387 NE2d 1196.

Footnotes

Footnote 5. See *Receivers* (1st ed §§ 30 et seq.).

Footnote 6. *Melville v Weybrew*, 106 Colo 121, 103 P2d 7, cert den 311 US 695, 85 L ed 450, 61 S Ct 140.

Annotation: 156 ALR 214.

Footnote 7. *Melville v Weybrew*, supra.

Footnote 8. See *Bierman v Nagley & W. Coal Co.* (Pa) 87 Pittsb Leg J 235.

Footnote 9. *Melville v Weybrew*, 106 Colo 121, 103 P2d 7, cert den 311 US 695, 85 L ed 450, 61 S Ct 140.

Footnote 10. *Bailey v Proctor* (CA1 Mass) 160 F2d 78, cert den 331 US 834, 91 L ed 1847, 67 S Ct 1515; *State ex rel. Warren v Douglass*, 185 Okla 3, 89 P2d 298; *Grohoma Growers Asso. v Tomlinson*, 182 Okla 17, 76 P2d 405.

Footnote 11. *McKee v Bilbo* (Iowa) 197 NW 979, holding further that the fact that a majority of the shareholders oppose the proceedings does not necessarily preclude the court from appointing such a temporary receiver.

In an action by shareholders against trustees for an accounting and to recover sums misappropriated and negligently lost by the trustees, it is proper, where necessary to the relief sought and to prevent further loss, to appoint a receiver of the trust estate. *Bingham v Graham* (Tex Civ App) 220 SW 105.

Footnote 12. *Woodward v Smith* (Tex Civ App) 253 SW 847.

Footnote 13. *Burnett v Smith* (Tex Civ App) 240 SW 1007.

Footnote 14. Hence, the appointment of such a receiver after the institution of a suit against the trust to cancel a mortgage was held not to defeat the right to cancellation. *Gray v Lincoln Housing Trust*, 229 Mich 441, 201 NW 489.

Footnote 15. *Warburton v Perkins*, 150 Md 304, 133 A 141.

Footnote 16. *Looney v Doss* (Tex Civ App) 189 SW2d 207, holding that receivership is for the benefit of all shareholders, and consequently it will not be terminated merely because the particular shareholders at whose instance the receiver was appointed request

that receivership be ended.

Footnote 17. *Looney v Doss*, supra.

§ 96 Reorganization or merger, generally

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There may be a merger of several business trusts, 18 which may be effected by implication from the manner in which the businesses of the several trusts are conducted. 19 And the doctrine of estoppel has been invoked against a business trust seeking to stand upon a separate legal identity from that of an organization to whose business it succeeded. 20 However, it has been held that the trustees of one business trust cannot, by any partnership arrangement with another trust, divest themselves of their personal duty to manage and control the trust estate confided to their care. 1

The trustees may, where the trust agreement authorizes it, create a subsidiary or auxiliary trust. 2

Bankruptcy reorganizations of business trusts are treated in the article on bankruptcy. 3

Footnotes

Footnote 18. *Page v Arkansas Natural Gas Corp.* (CA8) 53 F2d 27, affd 286 US 269, 76 L ed 1096, 52 S Ct 507.

Annotation: 156 ALR 212.

Footnote 19. *Page v Arkansas Natural Gas Corp.*, supra (principle of implied merger applied where two business trusts were mere instrumentalities of the same persons and had complete identity of control and management, their assets were intermingled, their accounts confused, their affairs completely scrambled, and both were operated practically as one organization).

Footnote 20. A business trust organized to take over a portion of the business of a preexisting partnership and bearing the same name as the partnership, with the addition of the word "company," has been held to be estopped to object to the application of a credit due it, upon an indebtedness owed by the partnership, where, by its conduct, it led the creditor reasonably to believe that it was dealing with the partnership or a firm succeeding to its business and liabilities. *Baker-McGrew Co. v Union Seed & Fertilizer Co.* 125 Ark 146, 188 SW 571.

Footnote 1. *Phoenix Oil Co. v McLarren* (Tex Civ App) 244 SW 830.

Footnote 2. *Beilin v Krenn & Dato*, 350 Ill 284, 183 NE 330.

§ 97 Incorporation; merger with, or transfer to, corporation

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Where the terms of the trust instrument authorize it, a business trust may be reorganized by the creation of a corporation, the conveyance of the trust property to the corporation, and the distribution of the corporate shares among the shareholders of the trust according to their respective interests. 4 In the absence of a provision of the trust instrument expressly authorizing the transfer of the trust estate to a corporation, the power to do so may be found in general provisions empowering the trustees to convey the trust property or to terminate the trust and liquidate its assets. 5 However, the trustees will be enjoined from carrying out a plan for the reorganization of the business in the form of a corporation, where the powers and objects of the corporation are substantially broader than the objects of the trust and the power of the trustees thereunder. 6 It has been said that no court has jurisdiction simply to rewrite a contract at the behest of dissident parties, or to convert their trust indenture into a corporation in the absence of practically unanimous consent. 7

It has been held that a corporation organized to take over the business and property of a business trust, and to which the property of the trust was conveyed, takes such property subject to the rights and claims of the creditors of the trust, 8 and that a creditor of a business trust may maintain an action for discovery to determine what assets have been transferred by the trust to a corporation organized by those interested in the trust. 9

Footnotes

Footnote 4. *Bryan v Hamrick* (CA10) 106 F2d 245, cert den 308 US 615, 84 L ed 514, 60 S Ct 262 (Oklahoma). See also *Carpenter v White* (CA1) 80 F2d 145, cert den 297 US 720, 80 L ed 1005, 56 S Ct 598 (Massachusetts); *Thomle v Soundview Pulp Co.* 181 Wash 1, 42 P2d 19.

The authority of the trustees to convey the assets of the trust to a corporation is sometimes so conferred in the trust instrument as to be limited to a conveyance subject to the terms of the trust, so that a grantee corporation holds the same as trustee. See *Greer Invest. Co. v Booth* (CA10 Okla) 62 F2d 321.

Practice Aids: –Trust instrument authorizing incorporation of trust. 3 Am Jur Legal Forms 3:62.

Footnote 5.

Annotation: 156 ALR 213.

Footnote 6. *Bryan v Hamrick* (CA10 Okla) 106 F2d 245, cert den 308 US 615, 84 L ed 514, 60 S Ct 262 (trust instrument authorized the trustees to engage in the business of

owning, buying, selling, and otherwise acquiring or disposing of oil and gas royalties and acreage, developed and undeveloped, while the corporation, to which it was proposed to convey the trust property in exchange for its shares, was authorized to engage generally in oil and gas prospecting, producing, refining, processing, and distributing).

Annotation: 156 ALR 213.

Footnote 7. Hood v James (CA5 Tex) 256 F2d 895.

Footnote 8. Ashworth v Hagan Estates, 165 Va 151, 181 SE 381.

However, the rule relating to corporations, to the effect that the funds and property of a defunct corporation are a trust fund in the hands of the directors for the benefit of stockholders and creditors, and that when one corporation buys out the property of another corporation, so that the first becomes defunct, the purchaser becomes responsible for the debts of the defunct concern, has been held not to apply in a case where a business trust sells its assets, in a jurisdiction which treats such trusts as partnerships. Industrial Lumber Co. v Texas Pine Land Asso. 31 Tex Civ App 375, 72 SW 875. But even in such a jurisdiction it has been held that a corporation organized by the trustee of a business trust, pursuant to a plan conceived at the time of the formation of the trust and in accordance with the declaration of trust, for the purpose of taking over the assets of the trust and issuing stock of the corporation to the shareholders in the trust, in proportion to their holdings, was liable to such a shareholder for the fraud perpetrated upon him by the trustee of the trust, at least to the extent of the property received from the trust, where the corporation took the assets of the trust with notice of all the facts and was operated by the same officers who controlled the trust, and gave no consideration for such assets except its agreement to issue its stock therefor. Cattle Raisers' Loan Co. v Sutton (Tex Civ App) 271 SW 233.

Footnote 9. National Surety Co. v Anacostia Finance Corp. 58 App DC 207, 26 F2d 985.

XI. PRACTICE AND PROCEDURE

A. Actions Between Trust and Third Persons

§ 98 Generally; jurisdiction and venue

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An action involving the ownership of shares by, and the removal of, the trustee of a business trust, has been held to lie in the county of the defendant's residence so that the defendant was entitled to a change of venue to that county. 10 But where two trustees who were properly served with process in an action against a business trust entered the

appearance of the trust and thereby waived the right to have the suit tried in another county, the third trustee of the trust was held to have no right to have the venue changed. 11 A court having jurisdiction of the trustees may adjudicate title to trust property lying beyond the jurisdiction of the court. 12

Jurisdiction of an action instituted in a federal court in the name of the trustees of a business trust will be governed by the residence of the trustees rather than of the shareholders, even though the latter may have the beneficial interest and ultimate power of control of the business. 13 However, by answering to the merits of a local action, a foreign business trust waives objection to the jurisdiction of the federal district court on the ground of the nonresidence of the defendant. 14

Trustees of a Massachusetts trust are not unconstitutionally deprived of property without due process of law by being denied the right to maintain an action in a state other than that where the trust was organized, with the laws of which it has not complied, upon notes executed to it in such state. 15 And the fact that jurisdiction has been conferred on federal courts with regard to actions on certain types of corporate obligations does not of itself mean that jurisdiction has also been conferred with respect to actions based on similar obligations of a business trust. 16

§ 98 ----Generally; jurisdiction and venue [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Case authorities:

The citizenship of a business trust, for the purpose of determining federal jurisdiction based on diversity of citizenship, was held to be that of each of its members, rather than that of its trustees. *Carey v U. S. Industries, Inc.* (1976, ND Ill) 414 F Supp 794.

Footnotes

Footnote 10. *Averill v Lincoln*, 52 Cal App 2d 398, 126 P2d 398, wherein the court treated the action as one to dissolve a partnership.

Footnote 11. *Limpia Royalties v Cowden* (Tex Civ App) 94 SW2d 481.

Footnote 12. *Elsom v Tefft*, 140 Wash 586, 250 P 346.

Footnote 13. *Simson v Klipstein* (DC) 262 F 823.

Footnote 14. *Ferdig Oil Co. v Wilson* (CA10) 91 F2d 857.

Footnote 15. *Hemphill v Orloff*, 277 US 537, 72 L ed 978, 48 S Ct 577.

Footnote 16. *Kresberg v International Paper Co.* (CA2 NY) 149 F2d 911, cert den 326 US 764, 90 L ed 460, 66 S Ct 146, pointing out that while business trusts may be considered as "corporations" within the scope of statutes using that word for some purposes, such decisions are not persuasive of the identity of business trusts and

corporations when the inquiry is to determine federal jurisdiction.

§ 99 Parties plaintiff

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It is generally held that the trustees of a business trust are proper parties plaintiff in an action to vindicate or enforce the rights of the trust estate, and that they may maintain such an action without the joinder of the shareholders. 17 Trust instruments frequently contain provisions to this effect. 18 Thus, the trustees are the proper parties to maintain an action on behalf of the trust for breach of contract, 19 to specifically enforce their contract for the sale of trust real property, 20 for the protection of trust property, 1 or to recover for damage thereto. 2 They may maintain actions to recover for any wrongful impairment of the corpus of the trust, 3 and may, without a joinder of the shareholders, maintain a suit to enjoin an injury to property of the trust, 4 or to quiet title to its real property. 5

The trustees of a Massachusetts trust can maintain an action in their own names to recover rent due under a lease of trust property executed by the trustees in their individual names, without naming the trust or mentioning their trust capacity. 6 Also, it has been held that to recover money on behalf of the trust, the trustees should sue as such, and not personally or individually. 7

Under a provision of a trust instrument empowering the trustees to represent the shareholders in all suits or legal proceedings affecting the trust estate or any right or duty of any beneficiary, trustees may maintain an action as representatives of the shareholders to recover on a bond given by former defaulting trustees, running to the shareholders and conditioned for the faithful application of all funds derived from the sale of shares. 8 However, it has been held that even though the trustees of a business trust may maintain an action in their own names, when such action is brought for the benefit of others the complaint should so allege, and that in such a case the beneficiaries of the trust are the real parties in interest. 9

It has been held that the trustees of a business trust may maintain an action on behalf of the trust in its adopted trade or business name, 10 and in some states there are statutes expressly authorizing such an organization to sue and be sued in its own name. 11 Under such a statute, a business trust may maintain in its own name a suit to enjoin a threatened breach of contract with it and a trespass on its property. 12 Where the right of a business trust to maintain an action in its company or distinguishing name depends upon compliance with a fictitious name statute, it has been held that failure of the trust to comply with such statute is merely grounds for abating the action until the statute is complied with, and not sufficient reason for dismissal of the action. 13

The view has been taken that a business trust organized in another state cannot maintain an action in its own name where the trustees are not parties. 14 And a business trust cannot maintain an action in its adopted name, on a promissory note made payable to an

individual, without a showing that the owner of the note was not such person as an individual but the trust, using the collective name of the individual. 15

§ 99 ----Parties plaintiff [SUPPLEMENT]

Case authorities:

A Massachusetts business trust, authorized to transact business in Florida, was the real party in interest in an action to foreclose a mortgage, and hence had capacity to bring the foreclosure suit without joining its trustees. *Tampa Properties, Inc. v Great American Mortg. Investors* (Fla App D2) 333 So 2d 480.

A foreign business trust which had qualified to function in Florida under statute dealing with common law trusts could bring an action in the common name of the trust as the real party in interest. *Corcoran v Brody* (1977, Fla App D4) 347 So 2d 689.

A real estate investment trust organized under statutes specifically relating to that type of organization, which was strictly a business organization designed to deal in interest connected with land, had attributes making it an "unincorporated association" within the scope of another statute permitting unincorporated associations or orders to sue and be sued under the name by which they were commonly known or under which they did business and providing for the manner of service of process on such associations. *Grenco Real Estate Invest. Trust v Brooker* (1975) 215 Va 413, 211 SE2d 33.

Footnotes

Footnote 17. *Schwartz v Abbott Motors, Inc.* 344 Mass 28, 181 NE2d 334; *Peterson v Hopson*, 306 Mass 597, 29 NE2d 140, 132 ALR 1; *Morriss v Finkelstein* (Mo App) 127 SW2d 46; *Elsom v Tefft*, 140 Wash 586, 250 P 346.

Annotation: 156 ALR 219.

In *Wiley v W. J. Hoggson Corp.* 90 Fla 343, 106 So 408, however, the court, adopting the view that a so-called "common-law trust" of the type here under consideration was nothing more than a partnership, held that all of the shareholders and trustees are necessary parties in an action by or on behalf of the organization involving its property and rights.

Footnote 18. See, for instance, *Jensen v Hugh Evans & Co.* 18 Cal 2d 290, 115 P2d 471; *Forgan v Mackie*, 232 Mich 476, 205 NW 600.

Practice Aids: –Trust instrument provision as to powers of trustees concerning litigation. 3 Am Jur Legal Forms 3:1, 3:56.

Footnote 19. *Simson v Klipstein* (DC) 262 F 823; *Powell Hammon Consol. Gold Fields*, 8 Alaska 153; *Schwartz v Abbott Motors, Inc.* 344 Mass 28, 181 NE2d 334; *Morriss v Finkelstein* (Mo App) 127 SW2d 46.

Footnote 20. *Simson v Klipstein*, 88 NJ Eq 229, 102 A 242, revd on other grounds 89 NJ

Eq 543, 105 A 218.

Footnote 1. *Powell v Hammon Consol. Gold Fields*, 8 Alaska 153; *Elsom v Tefft*, 140 Wash 586, 250 P 346.

Footnote 2. *Simson v Klipstein* (DC) 262 F 823.

Footnote 3. *Peterson v Hopson*, 306 Mass 597, 29 NE2d 140, 132 ALR 1.

Footnote 4. *Wesson v Galef* (DC) 286 F 621, holding that this is true even though the organization is treated as a partnership, where the management of the business and title to the property sought to be protected are vested in the trustees.

Footnote 5. *Denny v Cascade Platinum Co.* 133 Wash 436, 232 P 409.

Footnote 6. *Hull v Newhall*, 244 Mass 207, 138 NE 249.

Footnote 7. *Stewart v Solomon*, 316 Pa 236, 175 A 498.

Footnote 8. *Jensen v Hugh Evans & Co.* 18 Cal 2d 290, 115 P2d 471, pointing out that in such a case the representation of the shareholders by the trustees is not adverse to the interests of the trust estate, because the trust estate has no claim under bonds given for the benefit and protection of the shareholders.

Footnote 9. *Kadota Fig Asso. of Producers v Case-Swayne Co.* 73 Cal App 2d 796, 167 P2d 518.

Footnote 10. *Stevens v Sharpe*, 183 Okla 312, 82 P2d 672 (trust organized pursuant to express provisions of statute); *General American Oil Co. v Wagoner Oil & Gas Co.* 118 Okla 183, 247 P 99 (under a statute authorizing the creation of a trust to carry on any lawful business and generally to do any lawful act in relation to the trust property "which any individual owning the same absolutely might do"). And see *Schwartz v Abbott Motors, Inc.* 344 Mass 28, 181 NE2d 334.

Footnote 11. *Burk-Waggoner Oil Asso. v Hopkins*, 269 US 110, 70 L ed 183, 46 S Ct 48 (involving Texas statute); *Bingham v Graham* (Tex Civ App) 220 SW 105.

Even under a statute authorizing suit to be brought by such a trust in its company or distinguishing name, the decision as to the institution of suits must be made by the trustees, in whom is vested the control of the affairs of the trust. *Henderson v Scott Oil & Ref. Co.* (Tex Civ App) 258 SW 1082.

Footnote 12. *Graham v Omar Gasoline Co.* (Tex Civ App) 253 SW 896.

Footnote 13. *Kadota Fig Asso. of Producers v Case-Swayne Co.* 73 Cal App 2d 796, 167 P2d 518.

Footnote 14. *Manufacturers' Finance Trust v Collins*, 227 Mo App 1120, 58 SW2d 1004.

Footnote 15. *H. Kempner v Welker*, 36 Ariz 128, 283 P 284 (note made payable to "H. Kempner," and recovery sought by "H. Kempner, a Trust Company").

§ 100 Parties defendant

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Where a business trust organization is a true trust, so that the trustees are personally liable for its debts, an action may be maintained against a trustee in his own name without joining the beneficiaries as parties defendant, 16 and the same has been held to be true in a jurisdiction where business trusts are treated as partnerships. 17

Trust instrument provisions may determine the necessary parties in an action against a business trust. Thus, where the trust instrument gives the trustees the power to sue and be sued, an action is maintainable against them without joining the shareholders, 18 and where the trust instrument gives two of the three trustees the power to act for and bind the trust, two of such trustees have authority to defend actions against trust. 19 However, a single trustee representing himself and the other shareholders is entitled to maintain a defense on behalf of the trust, notwithstanding a confession of judgment by the two other trustees, where the latter are acting in collusion with the plaintiff in an attempt to enforce an illegal demand against the trust. 20

The view has been taken that a business trust is not suable in an action at law under its assumed or trust name in the absence of a statute authorizing such action. 1 However, other courts hold that a Massachusetts or business trust may be sued in its adopted trust name, 2 and there are statutes in some states expressly authorizing actions against business trusts in their own adopted names. 3

In an action for tort against stockholders of a business trust who are held liable on the ground that the organization amounts to a partnership, the non-joinder of a part of the shareholders has been held not to render the declaration demurrable. 4 And the dismissal of an action to recover on a debt of a business trust, as to some of the shareholders, was held not to render void a judgment rendered against the other shareholders. 5

Footnotes

Footnote 16. See *Connally v Lyons*, 82 Tex 664, 18 SW 799.

Annotation: 156 ALR 221.

Footnote 17. *Richardson v Beasley* (Tex Civ App) 50 SW2d 420, holding that a suit against a trust to recover a debt, foreclose a lien, and appoint a receiver may be maintained against the trustee, as such.

Footnote 18. *Houston Oil Co. v Village Mills Co.* (Tex Com App) 241 SW 122.

Where the trust instrument provided that in all actions and proceedings the trustee should be deemed the representative of the beneficiaries, and that it should not be necessary to

notify any such beneficiary of such proceeding, for the purpose of binding or concluding him, it was held that the beneficiaries were not necessary parties to a suit in equity to recover out of the trust estate for services rendered to the trust, at least where the beneficiaries were notified by letters of the pendency of the suit and thus had the opportunity to intervene. *Rothbart v Metropolitan Trust Co.* 307 Ill App 271, 30 NE2d 183.

Footnote 19. *Houston Oil Co. v Village Mills Co.* (Tex Com App) 241 SW 122.

Upon the death of one trustee during the pendency of an action against the trustees of a business trust, it is not necessary to make the personal representatives and heirs parties to such action where, under the trust agreement, the duties of the deceased trustee devolved upon the surviving trustees. *Sullivan v Edward Hines Lumber Co.* 239 Ill App 1.

Footnote 20. *McMillan v Greenamyre*, 50 Cal App 601, 195 P 734, later app 53 Cal App 13, 199 P 841.

Footnote 1. *Larson v Sylvester*, 282 Mass 352, 185 NE 44.

An action based on the fraud and deceit of the trustees has been held not to be maintainable against the trust in its adopted name. *Guthmann v Adco Dry Storage Battery Co.* 232 Ill App 327.

Footnote 2. *Alphonzo E. Bell Corp. v Bell View Oil Syndicate*, 46 Cal App 2d 684, 116 P2d 786; *American R. Exp. Co. v Asher*, 218 Ky 172, 291 SW 21 (trust viewed as being in the nature of a corporation).

Annotation: 156 ALR 222.

The trust, having elected to operate under a fictitious name and having maintained actions in that name, will not be heard to say that it cannot be sued under that name. *Wagoner Oil & Gas Co. v Marlow*, 137 Okla 116, 278 P 294.

Footnote 3. *Burk-Waggoner Oil Asso. v Hopkins*, 269 US 110, 70 L ed 183, 46 S Ct 48 (involving law of Texas); *Gutelius v Stanbon* (DC) 39 F2d 621 (involving law of Florida); *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13; *American Home Sav. Inst. v Lee*, 288 Mo 679, 233 SW 20; *Williams v Schulte* (Mo App) 103 SW2d 543; *Richardson v Beasley* (Tex Civ App) 50 SW2d 420.

Annotation: 156 ALR 222.

Footnote 4. *Marchulonis v Adams*, 97 W Va 517, 125 SE 340.

Annotation: 156 ALR 223.

However, it has been held in a Texas case that in an action against a business trust, which was held to be a partnership, and against certain of its shareholders as partners, it was necessary to name as parties all of the shareholders. *Feldman v Seay* (Tex Civ App) 291 SW 350. But in an earlier case from the same jurisdiction it was held not to be necessary, in an action against shareholders as partners to recover a debt of the trust, to make all of the shareholders parties. *Wells v Mackay Teleg.-Cable Co.* (Tex Civ

App) 239 SW 1001. And see *Comer v Brown* (Tex Com App) 285 SW 307.

Footnote 5. *Dyer v Black, Sivalls & Bryson* (Tex Civ App) 13 SW2d 142.

§ 101 Process

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In an action against a business trust or its trustees, service of process may be made upon the trustees⁶ or, in an action against the trust, upon its managing trustee.⁷ Service of summons on the manager of a business trust gives the court jurisdiction of the trust where the trust agreement provides for service on the manager.⁸

While, by statute, the shareholders are bound, as to their beneficial interest in the trust, by a judgment against the trust in its adopted name, service must be had on them in order to obtain a judgment against the shareholders in their individual capacity.⁹ And where, after service of process upon the trustees in their official capacity, the complaint is amended so as to seek relief against them personally, there must be service of process upon them in their private or individual capacities in order to give the court jurisdiction to enter personal judgments against them.¹⁰

Service upon a business trust organized in another state may be made upon its trustees.¹¹ Some statutes provide for service upon foreign trusts in the same manner as service is had upon foreign corporations.¹²

Footnotes

Footnote 6. *Linn v Houston*, 123 Kan 409, 255 P 1105; *Golden West Oil Co. v Golden Rod Oil Co.* (Tex Civ App) 285 SW 631, *affd* (Tex Com App) 293 SW 167.

Annotation: 156 ALR 224.

Under a statute authorizing service on a business trust by serving the president or secretary thereof, service upon trustees of a business trust was held to give jurisdiction of the trust where such trustees were respectively the president and the secretary thereof, although the persons served were designated as trustees rather than as president and secretary. *Limpia Royalties v Cowden* (Tex Civ App) 94 SW2d 481.

Footnote 7. *Moss v Republic Supply Co.* (Tex Civ App) 240 SW 326.

Footnote 8. *Wagoner Oil & Gas Co. v Marlow*, 137 Okla 116, 278 P 294.

Footnote 9. *Brown v Gorman Home Refinery* (Tex Civ App) 276 SW 787, *affd* *Comer v Brown* (Tex Com App) 285 SW 307.

Footnote 10. *Cochrane v Forbes*, 265 Mass 249, 163 NE 848.

Footnote 11. *Linn v Houston*, 123 Kan 409, 255 P 1105.

In an action in New York against a business trust organized in Massachusetts, it was held that a Massachusetts statute authorizing suit and attachment against such a trust in like manner as if it were a corporation, and authorizing service of process upon a trustee, was applicable. *Textile Properties v M. J. Whittall Associates*, 157 Misc 108, 282 NYS 17, the court stating that "the character of this business organization, at least where it is made a defendant, is to be determined by the law of Massachusetts and not by the general associations law of this state."

Footnote 12. See *State ex rel. Knox v Edward Hines Lumber Co.* 150 Miss 1, 115 So 598. And see *American R. Exp. Co. v Asher*, 218 Ky 172, 291 SW 21.

The fact that the trust would not have been treated as a corporation under the constitution and statutes of the state where it was organized was held to be without significance in construing and applying the local statute and constitution authorizing service of process on the trust as a foreign corporation. *Harris v United States Mexico Oil Co.* 110 Kan 532, 204 P 754, error dismd 260 US 694, 67 L ed 467, 43 S Ct 11, cert den 260 US 720, 67 L ed 480, 43 S Ct 11.

§ 102 Pleading and proof 13

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Where the plaintiff pleads all the necessary elements to render the trustees liable on an obligation of the trust, the defendants in their answer must plead the facts on which they base their claim of exemption, since the plaintiff need not negative a defense founded on an exception to the rule that such trustees are personally liable in the absence of an agreement to the contrary. 14 Nor is a person seeking recovery against trustees personally under a contract made by them required to negative knowledge on his part of a provision of the trust agreement purporting to exempt the trustees from liability. 15

The law of another state, alleged to differ from the law of the forum, governing the liability of members of a business trust, is not available where there is no pleading or proof thereof; in the absence of such pleading and proof the court will presume that the foreign law is the same as the common law of the forum. 16 And in order to avail himself of a defense based on the failure of the plaintiff, a business trust organized in another state, to comply with the statutes of such state, a defendant must plead the statute. 17

Conclusions by the pleader as to the power of the trustees will be treated as surplusage where the trust instrument is pleaded in full and is contrary to the conclusions thus pleaded, 18 and the same is true of conclusions with respect to the status of the organization as a true trust or a partnership. 19

Extrinsic evidence has been held admissible to show the intention of the contracting

parties with respect to the question whether or not the trustee was to be exempted from personal liability on a contract made on behalf of a business trust. 20 Where the contract is ambiguous on the question of the personal liability of the trustees thereon, the question should be submitted to the jury, with evidence of the surrounding circumstances and the concurrent dealings of the parties. 1

In an action by a business trust on a contract, it is not required to establish by positive proof its compliance in detail with the provisions of a statute relating to the manner of executing an instrument creating a business trust. 2 And in an action on a conditional sales contract assigned by the defendant to the plaintiff trustees of a business trust, the defendant, by failing to deny or to make a special demand for proof of the plaintiffs' allegations that they are trustees under the trust and are assignees of the contract, admits such allegations. 3

As in other cases, an appellate court will not ordinarily consider issues or objections raised for the first time on appeal. 4

Footnotes

Footnote 13.

Practice Aids: –Denial that defendant is trustee of business trust. 20 Am Jur Pl & Pr Forms 20:792.

Footnote 14. *People v Sicho*, 31 Cal App 2d 345, 87 P2d 862.

Footnote 15. *Review Printing & Stationery Co. v McCoy*, 276 Ill App 580.

Footnote 16. *Dunning v Gibbs*, 213 Ky 81, 280 SW 483.

If the trustees of a business trust organized in another state wish to avail themselves of legal principles prevailing in the other state, by which the trustees are immune from personal liability on the contract of the trust, in a situation where they would not be exempt from liability according to the law of the forum, they must plead and prove the law of the other state. *Linn v Houston*, 123 Kan 409, 255 P 1105.

Footnote 17. *Morriss v Finkelstein* (Mo App) 127 SW2d 46.

Footnote 18. *Alphonzo E. Bell Corp. v Bell View Oil Syndicate*, 46 Cal App 2d 684, 116 P2d 786.

Footnote 19. *Farmers & M. Nat. Bank v Anderson*, 216 Iowa 988, 250 NW 214.

Footnote 20. *Re Winter*, 133 NJ Eq 245, 31 A2d 769, *affd* 136 NJ Eq 112, 40 A2d 648 (in which the contract was executed in the name of the trust, by the trustees, with the word "trustees" opposite their names); *George v Hall* (Tex Civ App) 262 SW 174.

Where there is an ambiguity in a note as to the capacity in which trustees or officers signed the note, parol evidence is admissible, as between the original parties, to show whether such persons signed in a representative or a personal capacity. *Hamilton v Young*, 116 Kan 128, 225 P 1045, 35 ALR 496.

Footnote 1. *Wm. Lindeke Land Co. v Kalman*, 190 Minn 601, 252 NW 650, 93 ALR 1393.

Footnote 2. *General American Oil Co. v Wagoner Oil & Gas Co.* 118 Okla 183, 247 P 99.

Footnote 3. *Schwartz v Abbott Motors, Inc.* 344 Mass 28, 181 NE2d 334.

Footnote 4. Where there is no question of identity, a misnomer of the plaintiff in an action by a business trust, or the fact that the trust did not bear the name which was used in the agreement by which the defendant subscribed for its shares, cannot be raised for the first time, without pleading, upon appeal. *Blomgren v Cowley*, 282 Ill App 166.

And where a complaint was based on the theory that the defendants, shareholders in a business trust, were partners, the plaintiff cannot claim on appeal that the defendants are trustees and liable individually as such because of their failure to include terms limiting their liability in the contract sued on. *Commercial Casualty Ins. Co. v Pearce* 320 Ill App 221, 50 NE2d 434.

§ 103 Trial and judgment

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In a jurisdiction in which a business trust may be sued in its adopted name, 5 it follows that a judgment may be rendered against the trust in that name. 6 The dismissal of the claim of personal liability against a trustee does not prevent the entry of a judgment against the trust, 7 and a former action to recover against the trustees on a note executed by them has been held not to constitute an election to hold them, to the exclusion of the trust estate, so as to bar a subsequent action to subject the trust estate to the payment of the note. 8 Where the trust instrument authorizes two of the three trustees to act for the trust, the trust is bound by a judgment entered in an action defended by two trustees. 9

Trustees against whom a judgment was rendered on the theory that they were partners have been held to have no right to complain of the failure of the court to render judgment also against a shareholder of the trust. 10

A judgment for the plaintiff in an action by trustees on behalf of a business trust is not subject to the objection of indefiniteness or uncertainty, where the trust is bound by the judgment and the defendant is protected against further liability. 11

The individual property of a trustee may be seized on execution to satisfy a judgment against him on a debt or obligation of the trust estate. 12 And a statute may provide that in a suit against an organization in the nature of a business trust, a judgment against it shall be equally binding upon the individual property of the shareholders or members who have been served with citation in the suit. 13

Footnotes

Footnote 5. § 100, supra.

Footnote 6. American R. Exp. Co. v Asher, 218 Ky 172, 291 SW 21, holding that the trust was, in effect, a corporation.

Footnote 7. Waurika Oil Asso. v Ellis (Tex Civ App) 267 SW 523.

Footnote 8. Frost v Thompson, 219 Mass 360, 106 NE 1009.

Annotation: 156 ALR 227.

Footnote 9. Houston Oil Co. v Village Mills Co. (Tex Com App) 241 SW 122.

Footnote 10. McClaren v Dawes Electric Sign & Mfg. Co. 86 Ind App 196, 156 NE 584.

Footnote 11. Smith v Higginbotham (Tex Civ App) 141 SW2d 752, affd 138 Tex 227, 158 SW2d 481, the judgment reciting that certain named persons, "trustees, doing business as the J. M. Higginbotham Trust, do have and recover," etc.

Footnote 12. Walker v Hatfield (Mo App) 17 SW2d 357.

Footnote 13. See Cunningham v Carpenter (Tex Civ App) 258 SW 607.

B. Shareholders' Actions

§ 104 Generally

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The courts have recognized that the holder of preferred shares in a business trust may maintain an action against the trust to enforce his rights thereunder; 14 that a shareholder can maintain a bill in equity to compel the trustees to perform their duty to distribute accrued profits; 15 and that, in a proper case, shareholders may maintain an action for an accounting by the trustees. 16 Shareholders may also, in a proper case, bring a representative or derivative action, 17 or a suit in equity for the appointment of a receiver for, 18 or the termination and the dissolution or liquidation of, 19 a business trust.

It has been held that for the purpose of fixing the venue of an action between shareholders in a business trust, the organization will not be treated as a partnership. 20 And in an action between shareholders, the defendants are not bound by a judgment rendered in another state in an action against other shareholders to which such defendants

were not parties. 1

In a shareholder's action seeking reorganization and eventual incorporation of a business trust, it has been held improper to omit as parties shareholders residing in a certain state so as to create the diversity of citizenship necessary to give federal jurisdiction, where such omitted shareholders could conveniently have been joined as parties. 2

§ 104 ----Generally [SUPPLEMENT]

Practice Aids: Massachusetts or business trust. 88 ALR3rd 704.

Footnotes

Footnote 14. Wineinger v Farmers' & Stockmen's Loan & Invest. Asso. (Tex Com App) 287 SW 1091.

Annotation: 156 ALR 101.

Footnote 15. Taber v Breck, 192 Mass 355, 78 NE 472.

Annotation: 156 ALR 98.

It seems that mandamus will not lie at a shareholder's instance to compel trustees of a business trust to perform their duties under the trust instrument. See Newman v Smith, 263 App Div 85, 31 NYS2d 576, affd 289 NY 545, 43 NE2d 527, pointing out that a shareholder's rights with respect to trust affairs vest in contract, not in statute.

Footnote 16. § 107, infra.

Footnote 17. §§ 105, 106, infra.

Footnote 18. § 95, supra.

Footnote 19. §§ 92 et seq., supra.

Footnote 20. Ziegelmeier v Joyce (Tex Civ App) 97 SW2d 346.

Annotation: 156 ALR 228.

Footnote 1. Darling v Buddy, 318 Mo 784, 1 SW2d 163, 58 ALR 493.

Footnote 2. Hood v James (CA5 Tex) 256 F2d 895.

§ 105 Representative or derivative actions, generally

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The doctrine of virtual representation applies to actions by minority shareholders of a business trust, and permits a part of the shareholders to maintain an action against the trustees for the benefit, and as representatives, of all of the shareholders. 3 Thus, shareholders may maintain a suit for an injunction against the trustees to prevent them from wasting, destroying, and dissipating the trust estate. 4 A shareholder of an organization in the nature of a business trust may maintain a representative action against a director thereof to recover on account of the latter's fraud, without procuring or seeking a dissolution of the alleged "partnership." 5 A shareholder may maintain a suit to recover on account of the systematic exploitation of the trust by persons dominating the same, and to preserve and restore its assets, although he acquired his stock after the occurrence of the acts complained of. 6 And shareholders have been held entitled to proceed in equity for rescission of transfers of trust property made under circumstances tinged with improper dealing, where the trustees fail to take appropriate action for the benefit of the trust. 7

While a prior demand upon, and refusal by, the trustees to bring the suit is generally a condition precedent to the right of shareholders to maintain a suit on behalf of themselves and of the trust, such demand and refusal are not essential where the circumstances make it clear that the demand would be refused. 8 But where a shareholder brings a bill to seek redress of wrongs done to the trust, his rights are derivative and he must show some wrong to the trust. 9 A minority shareholder has no right to maintain a suit to compel the performance of a contract for the conveyance of trust lands, where the trust agreement vested in the trustee, under the direction of the majority of the shareholders, discretion as to whether to enforce the contract of sale or to retain and distribute the lands. 10

The recovery of assets in a shareholders' class suit inures to the benefit of the trust estate, and so, indirectly, to all its shareholders, without priority of one over the other. 11 And shareholders are concluded by a judgment in a proper representative action against the trustees. 12

§ 105 ----Representative or derivative actions, generally [SUPPLEMENT]

Practice Aids: Negligence, nonfeasance, or ratification of wrongdoing as excusing demand on directors as prerequisite to bringing of stockholder's derivative suit on behalf of corporation. 99 ALR3rd 1034.

Case authorities:

Demand requirement on board of directors as prerequisite to bringing shareholder derivative action was excused where complaint contained allegations that defendant directors were parties to wrongdoing of improperly using corporate funds to process and mail solicitation material, acting to sell corporate property at artificially low prices and breaching fiduciary duties, since demand was thereby futile and unnecessary under Federal Rules of Civil Procedure. *Leff v CIP Corp.* (1982, SD Ohio) 540 F Supp 857, CCH Fed Secur L Rep P 98662, 34 FR Serv 2d 882.

In a derivative action on behalf of a Massachusetts business trust alleging various improper acts on the part of the trust's investment advisor, the shareholder's complaint

failed to sufficiently allege an excuse for failure to make a demand on the trustees of the trust, even though it was alleged that a majority of the trustees had authorized and participated in the allegedly illegal transactions and that the institution of the action by the present trustees would place its conduct in hostile hands. *Greenspun v Lindley* (1974, 1st Dept) 44 App Div 2d 20, 352 NYS2d 633, 369 NYS2d 123, 330 NE2d 79, 88 ALR3d 697.

Footnotes

Footnote 3. *Davis v Hudgins* (Tex Civ App) 225 SW 73.

Annotation: 156 ALR 228.

Footnote 4. *Woodward v Smith* (Tex Civ App) 253 SW 847.

A shareholder of a business trust was held to be entitled to maintain an equitable action against the trustee to restrain the latter from voluntarily paying a tax illegally assessed by the federal authorities. *Weeks v Sibley* (DC) 269 F 155.

Footnote 5. *Walburn v Ingilby*, 1 Myl & K 61, 39 Eng Reprint 604. And see *Haines v Bankers' Petroleum & Ref. Co.* (Tex Civ App) 273 SW 940.

Footnote 6. *Peterson v Hopson*, 306 Mass 597, 29 NE2d 140, 132 ALR 1, wherein the court stated that a holder of transferable shares has a right to participate in all the assets of the trust, including assets wrongfully diverted from the trust before he obtained his shares.

The omission of an allegation that the remaining assets of the trust are insufficient to protect the present rights of the shareholder does not defeat his right to maintain a suit to vindicate the rights of the trust and to preserve and restore its assets, based on a systematic exploitation of the trust by persons dominating it. *Peterson v Hopson*, *supra*.

Footnote 7. *Kotimsky v Lubin* (DC Ill) 62 F Supp 710, a shareholder's action against one occupying the position of promoter, director, and entrepreneur of a business trust whose affairs he dominated, but who was neither officer nor trustee and so required to account for his dealings with the trust exhibiting bad faith and violation of fiduciary duty.

Shareholders have been permitted to maintain a suit against trustees to cancel a transfer of property by the trustees to the trust. See *Webb v Shea*, 149 Ark 406, 232 SW 602.

Footnote 8. Thus, such demand and refusal are not a prerequisite of the right of shareholders to sue, where the purpose of the suit is to remove the trustees and obtain an accounting for their unfaithfulness, and to set aside illegal transactions entered into by them, since it is apparent that a demand in such a case would be futile. *Greer Invest. Co. v Booth* (CA10 Okla) 62 F2d 321.

As to the right of shareholders to determine whether or not an action will be instituted by the trust, and to use the name of the trust as plaintiff, see *Henderson v Scott Oil & Ref. Co.* (Tex Civ App) 258 SW 1082.

Footnote 9. *Cohen v United States Trust Securities Corp.* 311 Mass 152, 40 NE2d 282.

Footnote 10. *Futrall v Triplett* (CA8) 84 F2d 861 (Arkansas).

Footnote 11. *Booth v Greer Invest. Co.* (DC) 7 F Supp 576 (Oklahoma).

Footnote 12. See *Deering v Stites*, 257 Ky 403, 78 SW2d 46, cert den 295 US 762, 79 L ed 1704, 55 S Ct 921.

§ 106 --Proper or necessary parties

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In a suit by minority shareholders of a business trust against the trustees, seeking an accounting, the appointment of a receiver, and a winding up of the affairs of the trust, it is not necessary to make all of the shareholders parties. 13 So too, one of several beneficiaries of a business trust may maintain an action for removal of a trustee without the necessity of joining the other beneficiaries; while all of the beneficiaries are proper parties, they are not indispensable parties. 14 Also, in a suit by shareholders against the trustees of a business trust for an accounting by the latter, for the recovery of sums misappropriated or lost by the trustees, and for the appointment of a receiver, the trust, in its distinctive name, was held not to be a necessary party. 15

The present trustee of a business trust is a proper party to an action by a shareholder to vindicate the rights of the trust and to preserve and restore its assets. 16 A proceeding to remove a trustee is adversary in character, requiring that the trustee sought to be removed be made a party and be given notice of the proceeding. 17 However, a proceeding to fill an existing vacancy, or to accept the resignation of a trustee and appoint a successor, may sometimes be ex parte. 18

Footnotes

Footnote 13. *Davis v Hudgins* (Tex Civ App) 225 SW 73.

Annotation: 156 ALR 229.

But the joining, in an action by the shareholders of a business trust to remove trustees, compel an accounting, and cancel a transfer of trust property to a corporation, of shareholders who had exchanged their shares, as a part of the challenged transaction, for shares of the corporation, and who sought a rescission of the exchange of their shares, was held not to be multifarious, since their prayer to be restored to their former status as shareholders in the trust called for relief that was merely incidental to the main relief, which they sought in common with the other shareholders. *Greer Invest. Co. v Booth* (CA10 Okla) 62 F2d 321.

Footnote 14. *Wesson v Crain* (CA8 Ark) 165 F2d 6, further stating that the trustee owes

the duty imposed by his office to each and all of the beneficiaries.

The possibility that a judgment for the trustee in such case would not or might not protect him against similar actions by other beneficiaries is an inadequate reason for denying the right of one or more beneficiaries to proceed without joining all beneficiaries to the action. *Wesson v Crain*, supra, stating that the probability that a beneficiary bringing a groundless action against a trustee would be charged on the books of the trust with the trustee's expenses of litigation is sufficient protection against a multiplicity of suits seeking removal of the trustee.

Footnote 15. *Bingham v Graham* (Tex Civ App) 220 SW 105.

Footnote 16. *Peterson v Hopson*, 306 Mass 597, 29 NE2d 140, 132 ALR 1.

Footnote 17. *Looney v Wing* (Tex Civ App) 195 SW2d 557, error dismd.

Footnote 18. *Looney v Wing*, supra, stating also that this is especially true where a majority of the stockholders join in the petition, a circumstance which may invoke the doctrine of virtual representation.

§ 107 Accounting

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The shareholders of a business trust may, in a proper case, maintain an action for an accounting against the trustees, 19 and the court may, in a suit by shareholders against the trustees for an accounting, compel the trustees to produce for examination the books kept by them. 20 However, an accounting by the trustees will be ordered by a court only where it will serve some definite and useful purpose. 1 The substantive rights and liabilities of the parties in an accounting action depend, of course, upon the terms of the trust instrument 2 and the particular circumstances of the case at bar. 3 In a proceeding for an accounting by the trustees of a Massachusetts trust, the burden is on the trustees to show that, in the discharge of their duties, they have exercised reasonable skill, prudence, and judgment. 4 But where the trust instrument vests in the trustees of the business trust absolute power to manage and control the property and business of the trust, and provides that the shareholders shall not have a right to an accounting, shareholders cannot maintain a suit against such trustees for an accounting, in the absence of a showing of an abuse of power or wrongdoing or a misuse of the trust funds by the trustees. 5

Footnotes

Footnote 19. *Haskell v Patterson*, 165 Ark 65, 262 SW 1002; *Bingham v Graham* (Tex Civ App) 220 SW 105. And see *Hawkins v Smith*, 153 Kan 542, 111 P2d 1108; *Ashley v Winkley*, 209 Mass 509, 95 NE 932.

Annotation: 156 ALR 155, 230.

Shareholders may maintain a suit against trustees for an accounting for proceeds of trust property wrongfully retained by the trustees. *Skinner v Cromwell* (CA10) 40 F2d 241, later app 62 F2d 432, cert den 289 US 754, 77 L ed 1498, 53 S Ct 785 (Oklahoma).

The heirs of a deceased shareholder of a business trust may demand an accounting from the trustees. *Bryan v Seiffert*, 185 Okla 496, 94 P2d 526.

It was indicated, but not decided, in *Small v Smith*, 294 Pa 163, 143 A 786, that if shareholders were entitled to an accounting from the trustees of a business trust organized in another state, they should apply therefor in the courts of the other state.

Footnote 20. *McKee v Bilbo* (Iowa) 197 NW 979.

Footnote 1. *Bryan v Seiffert*, 185 Okla 496, 94 P2d 526.

Footnote 2. See generally §§ 14 et seq., supra.

Footnote 3. In charging a trustee with sums lost to the trust estate by reason of his misconduct, he should not be charged with the proportion of the loss represented by the shares owned by a shareholder who participated in the misconduct. *Ashley v Winkley*, 209 Mass 509, 95 NE 932, where the participating shareholder was the dominant shareholder, and was largely responsible for the misconduct of the trustee.

Footnote 4. *Cohen v United States Trust Securities Corp.* 311 Mass 152, 40 NE2d 282; *Ashley v Winkley*, 209 Mass 509, 95 NE 932.

Footnote 5. *Small v Smith*, 294 Pa 163, 143 A 786.

H. B. C.