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Business Trusts

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BUSINESS TRUSTS

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 Jur 2d, 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).

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I. DEFINITIONS AND NATURE; VALIDITY

A. IN GENERAL

§ 1. Definitions and terminology.

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. 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.

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.

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.

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.

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.

6. Uniform Commercial Code § 1-201(28). For a list of jurisdictions which have

§ 2. Origin and development of business trusts.

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 advantages¹¹ 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

§ 3. Nature and attributes.

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

adopted the Uniform Commercial Code, see AM JUR 2d DESK BOOK, Document 130 (and supp).

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

Annotation: 156 ALR 29.

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

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.

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.

11. § 5, infra.

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

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.

14. § 1, supra.

15. §§ 78 et seq., 84 et seq., infra.

16. § 55, infra.

17. § 22, infra.

18. §§ 27, 29, infra.

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

§ 4. — As a legal entity.

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

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.

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

1. § 8, *infra*.

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.

3. § 34, *infra*.

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*.

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

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.

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.

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

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 Redell*, 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.

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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

§ 5. Advantages and disadvantages of business trust form of organization.

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 trust¹⁷ or maintain a suit for a

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.

11. See 9 Am Jur 2d, BANKRUPTCY § 140.

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.

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.

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.

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

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

17. **Annotation:** 156 ALR 50, 231.

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

§ 6. Validity of, and efficacy as, business trust.

Broadly speaking, business trusts are regarded as legal and valid,⁹ at least

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

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

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

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

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

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.

4. §§ 34 et seq., *infra*.

5. § 34, *infra*.

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

6. §§ 34 et seq., *infra*.

7. § 37, *infra*.

8. § 40, *infra*.

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 P 2d 744 (constitution 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 50, 136 ALR 13; *Larson v Sylvester*, 282 Mass 352, 185 NE 44 (liability of trustee); *Wm.*

in the sense that such organizations are not, by reason of their nature, illegal¹⁰ 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

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 332, 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.

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.

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

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

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

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

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

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

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

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."

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

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.

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

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

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.

3. *Annotation*: 156 ALR 52, 54.

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.

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 per-

sonal 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.

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

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.

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

9. *Thomle v Soundview Pulp Co.* 181 Wash 1, 42 P2d 19, wherein the court stated that, as

§ 7. What law governs.

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

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.

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, 202 NYS 17.

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

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

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.

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.

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.

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

Annotation: 156 ALR 54.

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

B. OTHER ORGANIZATIONS AND RELATIONSHIPS
COMPARED AND DISTINGUISHED

§ 8. Generally.

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

18. *Morrissey v Commissioner*, 296 US 344, 80 L ed 263, 56 S Ct 209.

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.

19. § 1, *supra*.

20. §§ 3, 5, *supra*.

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

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*.

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

Annotation: 156 ALR 35.

4. §§ 87 et seq., *infra*.

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."

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.

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 corporation¹⁰ 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

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

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.

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.

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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."
"TRUSTEES"

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.

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

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

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.¹⁵

§ 10. Partnerships.

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

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*.

14. *Kresberg v International Paper Co.* (CA 2 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).

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.

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.

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.

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.

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

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

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

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

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.

1. § 11, *infra*.

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.

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.

4. § 34, *infra*.

5. *Hecht v Malley*, 265 US 144, 68 L ed 919, 44 S Ct 462 (for purposes of federal taxation); *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871; *Schumann-Heink v*

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

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.

6. Williams v Milton, supra, involving taxation.

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.

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.

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.

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

Annotation: 156 ALR 46, 114 et seq.

11. § 36, infra.

12. § 36, infra.

§ 12. Joint-stock companies.

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

II. CREATION, ORGANIZATION, AND DURATION

§ 13. Generally.

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

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.

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.

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.

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.

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

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.

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

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

Annotation: 156 ALR 63.

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

§ 14. The trust instrument.

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

§ 15. — Construction.

In the construction of a business trust instrument, the intention of the parties,

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

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.

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.

4. *Annotation*: 156 ALR 64.

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

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.

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.

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.

8. *Smith v Moore*, 129 Mass 222.

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

§ 16. — Recording.

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

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

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

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

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

13. *Oil Fields Corp. v Dashko*, 173 Ark 533, 291 SW 25, cert den 275 US 518, 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."

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.

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 518, 72 L ed 419, 48 S Ct 85, reh den (US) 72 L ed 1016, 48 S Ct 206.

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

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

§ 17. — Amendment.

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

§ 18. Name and seal.

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

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.

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

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.

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).

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

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.

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.

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.

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

§ 19. Bylaws.

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

§ 20. Purpose or business.

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

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.

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.

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.

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

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 FORMS 3:68.

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.

9. *Annotation:* 156 ALR 75.

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."

11. § 2, *supra*.

12. §§ 77 *et seq.*, *infra*.

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

§ 21. Duration.¹⁵

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 statute¹⁷ 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

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.

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,

aff'd 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.

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

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.

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.

18. *Hart v Seymour*, 147 Ill 598, 35 NE 246; *Hedgkiss v Northland Petroleum Consolidated*, 104 Mont 328, 67 P2d 811; *Baker v*