COMMON LAW TRUSTS AS SUBSTITUTES FOR PRIVATE CORPORATIONS

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CHAPTER 1.

INTRODUCTION AND HISTORY

DEFINITION AND FUNDAMENTAL TERMS OF TRUSTS.--A trust is the right, enforceable solely in equity, tothe beneficial enjoyment of property of which the legal title is in another. Recent court decisions have recognized a trust as a right of property, real or personal, held by one party for the benefit of another. The parties to a trust are: (1) the settlor or creator, (2) the trustee, and (3) the cestui que trust or beneficiary. The person founding the trust is the creator or settlor; the one appointed or required by law to execute the trust and in whom the property vests is the trustee; and the one for whose benefit the trust is created is the cestui que trust or beneficiary. The property placed in trust is the trust res.

ORIGIN OF TRUSTS.--In a highly developed business world the necessity of dealing through intermediaries and controlling property through others often arises. This demand for the services of others in business is responsible for the law of agency, master and servant, and trusts.

In England as early as the fourteenth century it was the custom to convey land to one "to the use of" another. X would convey land to Y "to the use of X," with the idea that while Y would become the legal owner X would enjoy it and take any profits. In the example Y was called the feoffee to uses and X the cestui que use. This system of conveyance gave X certain benefits and ex-

emptions denied him as holder of the legal title. He could not forfeit it for treason and his interest in it as cestui que use was not subject to dower. And by making a conveyance of land to Y "to the use of A upon the death of X," X could dispose of the land after his death, although he could not at that time devise the land by will. This method of conveyance was also used to evade the Statutes of Mortmain prohibiting religious institutions from holding real property.

From a very early date money or other personal property could be given to another to hold in trust and the beneficiary had a remedy at the common law. But the rights of those for whose benefit these uses in land were created were not at first recognized as enforceable by the courts, but rested for their safety only upon the honesty of the feoffee. Common law courts administered a system protecting only those rights for which writs of the court were provided and there was no writ to protect the use. Where the common law was lacking in a remedy it was customary to appeal to the chancellor, the custodian of the King's conscience. When the feoffee failed to carry out the use the cestui que use petitioned the chancellor for relief. The chancellor as early as the fifteenth century came to recognize the justice of these complaints. In so doing chancery, or the system of equitable jurisprudence, was following the example of the common law courts with respect to uses and trusts in personal property. Since that time the courts of equity have been the exclusive custodians of trusts. These courts have gradually worked out a modern, well-balanced system whose general principles are for the most part well settled. The English law of trusts was well developed by the year 1800 and it came to the United States as a part of our heritage

of English jurisprudence when courts of chancery were created.

COMMON LAW TRUST DEFINED.--A common law trust is a pure trust created by the transfer of legal title to property to trustees as principals who are directed to hold and manage the same in the conduct of business as specified for the use of the beneficiaries of the trust and their assignees. The common law trust is executed by trustees acting under their inherent individual rights secured by the Constitution of the United States and the Common Law. These trusts may be created under a will, by deed, or agreement and the creating instrument is called a declaration of trust, trust agreement, or deed of trust.

THE NATURE OF A TRUST.--Every trust implies two interests, one legal and the other equitable; the trustee holding the legal title and the cestui que trust the equitable title. Naturally the legal title carries with it the right to possession and control of the trust property, while the equitable title confers upon the cestui que trust (1) the right to a distributive share of the income from the trust estate; and (2) some ultimate benefit from the liquidation of the trust res.

The right of a person to divide the legal and equitable title to property is discussed in Bispham's Principles of Equity (6th Ed.) Sec. 49, in the following manner: "The system of trusts is now so thoroughly recognized that, according to the laws of property in England, and in other countries where the English common law is in force, it is one of the rights of ownership that this division of the complete title should, if desired, take place. If the absolute owner of the property wishes for any reason to have the equitable title only vested in him and the legal title outstanding in another, he has a perfect right to hold and enjoy his property

in that way. Nor is it necessary that the cestui que trust should be under any disability in order that he may enjoy this privilege. A person sui juris, and who is absolute owner of property, may avail himself of the system of trusts, and may keep the legal title outstanding in another as long as he sees fit so to do." While there is an inherent right to divide the legal and equitable title and to contract this may nevertheless be subject to the limitation that some states do not recognize dry trusts, as where a mere legal title is vested in a trustee without providing for the performance of an active duty. Under such conditions the legal title vests directly in the beneficiaries.

NOMENCLATURE APPLIED TO COMMON LAW TRUSTS.--The number of names given to this form of business organization would alone indicate its newness. In the United States the organizations were first used in Massachusetts where they have always been known as "voluntary associations." Other terms by which these organizations are known are common law companies, Massachusetts trusts, co-operative societies, business trusts, and associations under deeds of trust. Some of these terms are inappropriate as the only form of business organization sanctioned by the common law was the partnership. Sears in a late work on the subject used as a title for his book "Trust Estates as Business Companies," while Sidney Writington recently wrote on the subject under the title of "Unincorporated Associations." The terms "common law trusts," and "trust estates" will be used in this article as descriptive of a pure trust embarked in a trading business.

CHAPTER 11

A COMMON LAW TRUST AS A FORM OF BUSINESS ORGANIZATION

PURPOSE OF A TRUST ESTATE IN BUSINESS.--A corporation is a creature of statute having only such rights and privileges as its creator confers. It is defenseless against legislation and of late years has been the target of burdensome state and federal taxation laws. It is with a view of escaping some of the onerous regulations and restrictions imposed upon corporations by over-zealous legislators, and yet to enjoy most of its advantages, that business enterprise is looking upon the common law trust as a substitute form of business organization. The purpose of this paper is to show that common law trusts possess most advantages common to corporations without being subject to some of the destructive legislation imposed upon them.

Prior to 1912 the corporation laws of Massachusetts made no provision for organizing for "buying and selling real estate." To secure some of the advantages of the corporate form those desiring to handle real estate created "Massachusetts trusts." The form of organization was so successful that its use was gradually extended to industrial lines. The Massachusetts Tax Commissioner was asked to discover whether these organizations were detrimental to the state or its inhabitants. In his report to the state legislature January 17, 1912, he said:

> "the real estate trusts in the city of Boston own, it is estimated, property valued at $250,000,000," which "afford opportunity for investment in real estate by small as well as large investors, and permit a distribution of such investments among a variety of properties, thus dividing the risk of loss of rent and possible shrinkage of values." He thought it could "not be denied that much benefit has resulted to the city of Boston and other places in the improvement of real estate, the add-

> ition of property to the tax lists, furnishing accommodations for increasing business and the general promotion of the growth and prosperity of the commonwealth.
>
> "The advantages which it is claimed accrue to the industrial and real estate trusts have principally to do with the greater freedom of managing the affairs of the trust. They may be stated generally as follows:
>
> (1) These associations have been found by the experience of twenty-five years to be a convenient, safe and unobjectionable method of cooperative ownership and management. They are for the interest alike of the investor and the public.
>
> (2) The form of organization insures a continuity of management and control, which appeals strongly to investors in real estate, which cannot be secured by a corporation with changing officers. The trustees who are the managing officers of a trust are not so likely to be changed as are the officers of a corporation.
>
> (3) It affords a more economical and more convenient and flexible form of management than does a corporation. Trustees can transact business with more ease and rapidity than directors."

Sears, Trust Estates as Business Companies, p. 362, in commenting on the Commissioner's report says: "When we add to this practical view, derived from an experience of twenty-five years, that a business trust is a carrying on of a business as a right and not as a privilege, both locally and abroad, that limitations upon the power of its managers may be as strict or as liberal as the owners of that business desire, and that these limitations may be enforced according to the principles of equity jurisprudence, its superiority over corporate formation for legitimate business would seem evident."

THE CREATING INSTRUMENT.--"There are four essential elements of a valid trust of personal property: (1) a designated beneficiary; (2) a designated trustee, who must not be the beneficiary; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and (4) the actual delivery of the fund or other property, or of a legal

assignment thereof to the trustee, with the intention of passing legal title thereto to him as trustee." Brown v. Spohr, 180 N.Y. 201 (1904). Unless the trust instrument is founded upon a valuable consideration care should be taken to see that all of these elements have been carried out. A court of equity is always ready to carry out a trust but it will not aid in establishing a voluntary one. The creating instrument should fix the terms under which the trust property shall be administered by the trustees acting either individually, or collectively under a trade name and seal. Power enough to permit the exercise of sound discretion in the management of the business should be conferred. A prominent writer said "the right of trustees to act singly or by a majority or collectively, either generally or specially, should be set forth, and whether or when their contracts should be in writing, or, if oral, what ratification, if any, of a single trustee's act should be required as a condition precedent to their validity." Sears, Trust Estates as Business Companies. Sec. 181. No definite rule can be stated as to just what the instrument should contain. The circumstances attending each particular case will be the determining factor. Provisions as to the duration of the trust, nature of the business, issuance of certificates and the transfer of shares, annual meetings, compensation of the trustees, and reports and audits are common. There has never been any limitation on the right of the creator of a trust to confine the powers of the trustees to within certain fixed bounds. There are two well known legal relationships in a trust (1) the trust relationship itself defining the duties and liabilities of the trustee; and (2) a contract relationship based on a collateral agreement among the settlors themselves, which defines their rights as cestuis que

inter sese.

TRUSTS CREATED BY WILL TO CONTINUE A PARTNERSHIP.--It sometimes happens that a partner wishes to have the business continued after his death. This may be arranged for by will and in such event, unless there is strong language to the contrary, only the property entrusted to the trustee will be liable for partnership debts contracted in the continued trade after the testator's death.

A DEBTOR MAY CREATE A TRUST FOR THE BENEFIT OF HIMSELF AND CREDITORS.--The owner of a business may set it apart as a trust estate, the profits to be shared by himself and others. Arrangements are frequently made whereby a financially embarrassed business is continued by a debtor and his creditors. Legal title to the business is vested in a trustee with the creditors as beneficiaries until their indebtedness is satisfied. The trust ceases when the creditors are paid. This principle is well illustrated by the notable case of Cox v. Hickman, 8 H.L.C. 268 (1860) where traders conveyed their business to trustees to be conducted for the benefit of creditors joining in the deed of trust with the surplus to be reconveyed to the traders. The House of Lords held, that the sharing in net profits by participants in an enterprise did not in itself establish partnership liability if there was in fact no intention of the parties to be part owners of the venture. The theory of the case upon which an association could incur partnership liability was that the persons forming it must have mutual rights and obligations; it is not sufficient that "they happen to have a common interest or several interests in something which is to be divided between them." Since the trustees had full control any remedy had to be confined to them and the property in trust.

This is the present law and it seems to be in harmony with the definition of a partnership as incorporated in the Uniform Partnership Act: "A partnership is an association of two or more persons to carry on, as co-owners, a business for profit."

TRUSTS FOR THE INDIVIDUAL BENEFIT OF THE SETTLOR.--There seems to be no objection to creating a trust for the exclusive benefit of a settlor. In such instances the right to control the estate is vested in the trustee with only the income therefrom inuring to the benefit of the settlor. The principal may be made inalienable by the settlor and not subject to his obligations after the date of settlement and relinquishment of entire control over the property. If the trust is in favor of a third party a further restriction may be imposed upon the alienation of income from the estate. A similar provision as to income would not be binding where a settlor undertakes to place his own property beyond the reach of creditors while he retains any beneficial use therefrom.

TRUSTS FOR THE MUTUAL BENEFIT OF SETTLORS.--That partnership liability may be avoided by two or more settlors who place the complete control and management of property in trustees was exemplified by the case of Mayo v. Mority, 151 Mass. 481, 24 N.E. 1083 (1890). In that case there was a declaration of trust by an inventor in favor of himself and other contributing scripholders in an unincorporated association. All interests were to be represented by transferable scrip or certificates of stock while the entire control, supervision and management of the trust property was to follow the vesting of the legal title in the trustees. The court held, that this arrangement did not make the certificate holders partners because it did not contemplate the carrying on of a part-

nership business upon the joint account of the grantor and the certificate holders. To determine whether an association is a trust or a partnership the creating instrument must be carefully examined. The location of the power of control is the determining element. If the shareholders have control of the management, or the right to exercise control, a partnership relation exists; if the power of control has been vested in the trustees the intended trust will be given recognition. It is well settled that trusts may be created either for establishing new businesses or continuing old ones. As a form of business organization they are in the vast majority of cases created by contract for the purpose of launching new enterprises.

CHAPTER 111.

RIGHTS, POWERS AND DUTIES OF TRUSTEES

THE STATUS OF A TRUSTEE.--When a trustee undertakes the management of a trust he incurs certain responsibilities in relation to the trust estate, to beneficiaries, and to creditors. His status is well defined by the case of Taylor v. Davis, 110 U.S. 330 (1883) where the court speaking through Justice Wood said: "A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally, as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts for his principal, the principal contracts and is bound, but the agent is not. 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. Of course, when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof. If a trustee, contracting for the benefit of a trust, wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate." As a principal a trustee stands in exactly the same position as persons trading on their own account. A trustee is a natural person as distinguished from a corporation and as such may be sued upon contract or for torts committed in whatever jurisdiction he may be found. No agreement between the creator of the trust and the trustee can change the latter's liability as to third persons. The trustee is always liable unless released by express or implied stipulations to such effect in contracts made with third persons. To do away with all doubt the creating instrument should approve of contracts limiting liability solely to the trust funds. Such exemption is not prejudicial to creditors' rights for the very obvious reason that the trust estate is always in the custody of a court of equity.

In the case of Taylor v. Davis, supra, two trustees held real and personal property. One trustee resigned without receiving

payment of his demands against the trust estate and a new trustee was appointed. The trustees then executed a written agreement with the outgoing trustee, undertaking to apply to the payment of his claim "all moneys which shall come into our hands as trustees as aforesaid after first paying therefrom all taxes and current expenses of said property and trust." An action at law was brought upon the written promise of the trustees and in affirming the judgment of the lower court against the trustees personally the court ruled, that this was a contract to be enforced at law, against the parties individually, and not as a trust to be enforced in a court of equity. The case shows in a forceful manner the principle of personal liability where there has been no express stipulation guarding against it. This strict measure of personal liability may be one of the reasons why the corporation has flourished at the expense of the trust. Whatever weight may have been given to this reason in the past it may now be avoided by either indemnity insurance or by an express stipulation against personal responsibility.

The right to relief from personal liability where it was in a clear and unmistakable manner stipulated for was upheld in Shoe and Leather National Bank v. Joseph Dix & Others, 123 Mass. 148 (1877). An action was brought on an instrument in the form of a promissory note, beginning, "We as trustees but not individually promise to pay," and signed "Geo. P. Sanger, Joseph Dix, R. A. Ballou, Trustees." The signers were trustees of a land association, and purchased of the promisee a parcel of land, the deed of which ran to them as trustees of the association, and set forth their powers. They mortgaged the land to the grantor, and gave

the above instrument, secured by the mortgage, in part payment of the purchase money. In rendering the decision the court said: "If a party, therefore, in a contract into which he voluntarily enters, and not in the execution of any official trust or duty, makes it an express stipulation that he is acting for somebody else, and is in no event to be personally liable, he certainly cannot be rendered so by law. --- But we believe no case can be found in which a promise 'as trustee,' &c., accompanied with an express disclaimer of personal liability, would fail to exempt him." Along this same line was the case of Adams v. Swig, 125 N. E. 857, wherein it was held, that trustees of a voluntary association who sign a note with the collective title "National Realty Co., By Simon Swig, Edward L. McManus, Trustees" are not individually liable where the association existed and they had power to act for it.

POWER TO ACT SINGLY.--"As far as cotrustees generally are concerned, the general rule is that they must all co-operate in the exercise of the power of their office and cannot act separately or independently of each other, except that one trustee, may in many things, act as agent of all the trustees, especially in case of emergency, and except that there may be ratification of the act of one trustee by his associates in trust." Fletcher, Cyclopedia Corporations, Sec. 6093.

DUTIES OF TRUSTEES AS EXECUTIVES.--Equity requires a very high degree of good faith on the part of trustees acting in a capacity similar to that of a board of directors. The liability, however, is more stringent and more personal as to each of the trustees. In matters of a discretionary nature the trustees must act as a unit, i.e., they must deliberate as a body and the will of

the majority governs.

LIABILITY FOR ACTS OF COTRUSTEES.--"A trustee is not liable for misconduct of a cotrustee if he himself is blameless. It is not necessarily negligent to allow the cotrustee to handle funds alone, but he cannot sleep on his trust." Wrightington, Unincorporated Associations, Sec. 44. A trustee who performs his duties diligently and in good faith cannot be held responsible for loss or injury to the estate caused by a negligent or irresponsible cotrustee unless there were circumstances of which he should have taken cognizance. The honestly and good faith of a fellow-trustee may be assumed.

TRUSTEE DEALING WITH THE TRUST ESTATE.--For the very simple reason that "one cannot serve two masters" courts of equity have declared that when a trustee deals on his own account with his beneficiaries or the trust fund fraud is presumed, and the burden is upon the trustee to show a fair transaction.

TENURE OF OFFICE.--Even though trustees are not appointed for a definite period of time it is a good policy to state their terms as continuing until their successors are duly appointed and have qualified. An incoming trustee then becomes clothed with the power and vested with the title held by his predecessor.

RIGHT OF TRUSTEES TO APPLY TO A COURT OF EQUITY FOR DIRECTION.--Trustees in doubt as to what the law is and as to what their conduct ought to be are entitled to instruction and direction from a court of equity. The court will not entertain a bill for direction on some fanciful doubt. There must be a pressing necessity relating to the duties of the trustees and no other means of determining whether the proposed method of procedure will be legal or illegal. The court's instruction is the law and the trustees in

acting upon it are protected from loss.

REMOVAL OF TRUSTEES.--The rights of a cestui que trust are jealously guarded by courts of equity. Courts of equity are ever ready to substitute one trustee for another if beneficial rights are being destroyed, prejudiced or endangered. Mr. Justice Gray in deciding whether one William May had been rightly removed from the office of trustee said: "The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the co-trustee or the beneficiaries from working in harmony with him and although charges of misconduct against him are either not made out, or are greatly exaggerated." May v. May, 167 U.S. 310 (1897).

In enumerating some of the causes for which trustees may be removed Perry, Trusts and Trustees, 6th Ed. Sec. 276 says: "It may be stated generally, that if the conduct or circumstances of the trustee are such as to render it very inconvenient, improper, or inexpedient for them to continue in the trust the court will exercise its discretion and relieve them, and appoint others in their place; as where the trustees were desirous of being discharged, or were incapable through age and infirmity of acting, or so disagreed among themselves that they could not act, or where cotrustees refused to act with one of their number, or where the trustees appointed were municipal officers for the time being and are changed yearly, or

where a corporation appointed trustee had become subject to a foreign power,---in these and like cases the courts interposed and appointed other trustees. But if there is a controversy, the court will exercise a sound discretion. Mere disagreements between the trustee and the cestui que trust will not justify removal."

ACTIONS BY AND AGAINST TRUSTEES.--Where there is more than one trustee and recourse is limited by the creating instrument to the trust funds all of the trustees should be joined as defendants in an action. A joining of all of the trustees will assure the passing of title upon a judicial sale. If, however, liability is unlimited it is obvious that a creditor may sue all, any one or more of the trustees. If the agreement is a trust all of the shareholders need not be made parties to an action by some of the beneficiaries against the trustees for breach of trust.

Under the codes providing that actions shall be brought by the real party in interest, trustees of express trusts are permitted to sue in their own names without joining the cestuis que trust. This is an exception to the general rule, apparently for the reason that the trustees are the real legal owners.

LEGAL ACTIONS AGAINST TRUSTEES.--A cestui que trust is not always confined to a court of equity for relief. In certain instances actions at law may be maintained. This is true where an amount due has been definitely ascertained; where dividends are due; where there is an express promise to pay a certain portion of the income; where income is payable directly to the beneficiary; and where money in the hands of the trustee in equity and good conscience belongs to the beneficiary.

CONSTITUTIONAL GUARANTIES OF FOREIGN TRUSTEES TO SUE.--By virtue of citizenship a trustee may sue in foreign states. The case

of Converse v. Hamilton, 224 U.S. 243 (1912) settled this point. The state of Wisconsin questioned the right of a receiver of a Minnesota corporation to sue stockholders of an insolvent corporation in the courts of Wisconsin to recover the double liability imposed by the laws of Minnesota. It was held, that while an ordinary chancery receiver cannot exercise his power in jurisdictions other than that of the court appointing him except by comity, one who is a quasi-assignee and invested with the rights of his cestuis que trustent may sue in other jurisdictions, and his right to do so is protected by the full faith and credit clause of the Federal Constitution.

PROVISION AS TO INSURANCE.--Insurance against tort liability, as now carried by many business houses and manufacturing concerns, is especially appropriate where the trust is carrying on a hazardous business. Employees may be bonded as an additional measure of safeguarding the funds of the trust.

SUMMARY.--This chapter may be summarized by some very interesting principles set forth in an article by Austin W. Scott on "Liabilities Incurred in the Administration of Trusts," 28 Harvard Law Review (1915) pp. 725-741:

(1) In the course of the administration of a trust, the trustee incurs a liability on contract, in tort or otherwise to one other than the beneficiary. The rights and remedies against the trustee may be legal or equitable.

(2) In the absence of an express stipulation relieving him from liability, a trustee is personally liable on contracts made by him for the benefit of the trust estate. He may be sued at law and execution may be levied upon his individual property. This is true whether he was acting with or without authority in incurring the

liability. Similarly, a trustee is personally liable for torts committed in the course of the administration of the trust. He is personally liable for injuries resulting from the condition of the trust premises, and for injuries caused by the negligence of an agent employed by him in the administration of the trust.

(3) When the trustee has discharged an authorized liability incurred in the due course of the administration of the trust, ordinarily he has a right to be reimbursed. He cannot recover for unauthorized acts unless in acting in good faith he has enriched the trust estate. He has no right to reimbursement if he incurs and discharges a liability for a tort resulting from his own neglect, but he has a right to reimbursement if he was not personally to blame for the tort. Normally the trustee is reimbursed out of the income from the trust estate. In rendering his accounts, he credits himself with his expenditures, and he is not bound to pay over any of the income to the beneficiary until he has been reimbursed. Only the net income is paid over. If the income, however, is not sufficient, he may have reimbursement from the corpus of the estate. He has in his right to reimbursement a lien on both the income and the corpus of the estate. His claim takes precedence over the claims of the cestui que trust and of the creditors of the cestui que trust against the trust estate. A number of cases have held that if the trust estate is insufficient to reimburse the trustee who has discharged a liability properly incurred in the administration of the trust, recovery may be had from the cestui que trust personally. "Justice requires that the cestui que trust who gets all of the benefits of the property should bear its burdens unless he can show some good reason why the trustee should bear them himself." Hardoon v. Belilias, A.C. 118 (1901). This obligation of the cestui que

trust to reimburse the trustee is one arising on equitable principles out of the relationship between the parties. The profits, if any, go to the cestui que trust; the legitimate losses, if any, should be borne by him rather than by the trustee. A trustee has more than a right of reimbursement. He has a right of exoneration, --an equitable right not to be compelled to discharge his liabilities out of his own private property. If there are several cestuis que trust, their personal obligation to reimburse the trustee is in proportion to their respective interests in the trust estate. One who is not sui juris cannot be subjected to any personal liability because he owns a beneficial interest.

(4) The right of the trustee to exoneration is an asset of the trustee's. If there is no adequate remedy at law a creditor may, by a bill in equity, reach this asset and compel its application to his claim against the trustee. Either tort or contract creditors may in this way reach the trust estate. In no case, however, where the trustee has not paid the trust creditors may his private creditors reach the trust estate or the cestui que trust. But where a trustee has paid trust creditors out of his private assets his right to reimbursement therefrom may be reached by his private creditors. In granting this relief the private creditors of the trustee are not making a profit out of the trust.

CHAPTER IV.

PERPETUITIES

PERPETUITITY DEFINED.--A perpetuity is such a limitation of property as renders it unalienable beyond the period allowed by law. Trust estates having the effect of establishing perpetuities are not apt to receive the sanction of the courts. The mere formation of a trust does not, ipso facto, suspend the power of alienation and if the trustees are given the power to dispose of the trust property at any time the power of alienation is not suspended.

STATUTORY LIMITATIONS.--The various states prescribe the periods of lawful suspension. In New York it is measured by two lives in being at the creation of the estate; in Wisconsin by "two lives in being at the creation of the estate and 21 years thereafter," in California and some of the other states no limitation is placed on the number of lives. If the creating instrument provides for the termination of the trust within these limitations there can be no possible violation of the statute.

The case of Becker v. Chester, 115 Wis. 90 (1902) held, that if realty be conveyed, by will or otherwise, to trustees upon an express trust, with absolute power to convert the same into personalty and hold the equivalent in that form for a period beyond the term for which the absolute power to alienate the realty could be suspended, the trust is valid if, upon such conversion being made, such equivalent will not be fettered by an invalid trust. Power being vested in the trustees to convey full title to the realty, satisfies the statute. The case further held that the common law rule as to perpetuities respecting personal property is not in force in the state of Wisconsin.

CHAPTER V.

LIABILITY OF THE TRUST ESTATE FOR EXPENSES, DEBTS AND CONTRACT OBLIGATIONS

THE CREATING INSTRUMENT MAY PROVIDE FOR LIABILITY.--There is little difficulty in establishing the responsibility of a trust estate for the acts and contracts of its trustee when the creating instrument empowers him to deal with the property as if he were the absolute owner thereof and clearly indicates that the risk of any loss shall be borne by the trust estate. An excerpt from the case of Wright v. Caney River Ry. Co., 151 N.C. 529, 66 S.E. 588 (1909) may be helpful at this point. The court said: "It is true, as a general rule, that a trust fund cannot be subjected to legal liability by reason of the torts of the trustee or his agents and employees, but this doctrine ordinarily exists in the case of passive trusts, or, when active, in those instances where the power and duties of the trustee are so defined and restricted by the law, or the provisions of the instrument under which he acts, that the principle of imputed responsibility similar to that which obtains in the case of principal and agent cannot prevail." This rule is founded on imputability and wholly ignores the creditor's remedy through a trustee's right to indemnity.

There seems to be no legal objection to limiting a creditor's remedy to the trust assets. A court of equity in taking jurisdiction for the purpose of the distribution of assets will apply them equitably in discharging trust obligations. The assets of the estate will not be preferred as to certain creditors. In this respect the general credit of a trust estate is safer than that of an individual or a corporation where preferences, exemptions and homestead laws might cut down the amount of assets available for

distribution.

THE ESTABLISHING OF A TRADING TRUST INDICATES A LIABILITY FOR TRUST OBLIGATIONS.--Certain cases seem to indicate that the mere embarking of a trust estate in trade renders its assets liable for the contracts and acts of its trustees. Woddrop v. Weed, 154 Pa. 307, 26 Atl. 375 (1893) was a case of this type. The facts of the case show that a testator owning and conducting a banking business, a lumber business, and a large country store, devised all of his property to his brother, in trust to "manage and carry on the business, and trade, barter, and buy and sell and do all things that may appertain to said estate, its business or its products, and make such investments and purchases for the property as he may deem best." The nature of the business carried on required large credits. Both the trust estate and the trustee became insolvent. The trustee made an assignment of all the property of the estate in trust to pay its creditors. In the course of the opinion the court said: "These credits were obtained by the trustee in conducting the same, and the creditors upon the faith of the trust estate gave them. Trust property which has been embarked in business in primarily liable to creditors for debt, and will be applied as far as it will go to the liabilities." Although the indebtedness is against the trustee there is a further security somewhat in the nature of a lien against the assets of the trust estate. Since the trustee is primarily liable his individual liability may continue after the vanishing of what appears to be a lien upon the trust funds.

SHAREHOLDERS NEED NOT ACCOUNT FOR THE ACTS OF THE TRUSTEES.--In drawing the trust instrument great care must be taken to place exclusive management and control of the trust estate in the hands of the trustees to act as sole legal owners. Control by the share-

holders effects a partnership with attending unlimited individual liability. As a measure of added precaution even the possibility of concerted action leading to binding obligations ought to be denied the shareholders. The late case of Crocker v. Malley, 249 U.S. 223 (1919) may be reviewed to advantage on this point. The shareholders of a milling company, preliminary to winding it up, caused its active property to be conveyed and its other realty to be leased to a new corporation, the shares of which were left with persons who also were granted the fee of the leased property, upon a trust, designated by a name, in which the equitable interests were divided ratably among the original shareholders, and evidenced by transferable certificates. The trustees were to hold the trust property upon trust to convert it into money and distribute the proceeds at a time left to their discretion, within twenty years after the death of certain living persons, and in the meantime were to have the power of an owner, distributing what they determined to be fairly distributable net income among the beneficiaries, and applying funds to repair or development pending distribution. Their compensation beyond 1% of the gross income was not to be increased, nor were vacancies to be filled or the trust terms modified, without the consent of a majority in interest of the beneficiaries acting separately, who, in other respects had no control, and were declared to be "trust beneficiaries only without partnership, associate or other relation whatever inter sese." It was held, that neither the trustees nor the beneficiaries, nor all together, could be regarded as a joint stock association, and that the certificate holders were in no way associated together. The powers retained by the certificate holders acting individually were construed as not being sufficient to constitute a partnership.

The Supreme Court of Rhode Island rendered a similar decision in Rhode Island Hospital Trust Co. v. Copeland et at, 39 R.I. 193, 98 Atl. 273 (1916). Here an "agreement and declaration of trust" to conduct a general business provided for four trustees and preferred and common shares transferable by party, owner, or by operation of law. The trustees had legal title to and "full power to manage the property" and were expressly prohibited from binding stockholders personally; the stockholders not being liable for any assessments. Persons contracting with the trustees were required to look to the fund only. There was no association between the shareholders, except a common interest, the owners of the common stock only having the power to call and vote at meetings, at which they could consider reports, and appoint auditors and new trustees; the shareholders being entitled to have the property managed for their benefit, receive income while the trust lasted, and their share of the property when it came to an end, but no right to manage it themselves or to instruct the trustees. The agreement was held to be a trust and not a partnership. The holders of preferred stock were not liable individually for the obligations of the trust, and hence the complainant, as executor or trustee, could hold preferred stock belonging to the estate without incurring liability under the trust obligations.

APPLICABILITY OF BANKRUPTCY ACT.--The Bankruptcy Act as amended June 5, 1910, provides for the involuntary bankruptcy of an unincorporated company. It has been held that such a trust is not an unincorporated company within the meaning of the Act. The word "Unincorporated" as used in the Bankruptcy Act seems to imply some of the attributes common to corporations, and would hardly include a pure trust where the trustees are in full control and the shareholders are in no way associated together.

CHAPTER VI.

TRANSFERABLE SHARES

ENGLAND'S ATTITUDE IN REGARD TO UNINCORPORATED COMPANIES.--Late in the seventeenth century England offered few opportunities for the investment of capital. If a man had accumulated a fortune in a profession or a business the money was invested in real estate, mortgages, bottomry, or was hoarded. The lack of opportunity for investment furnished an incentive for promoters to devise schemes for the employment of redundant funds. Stock in the wildest sort of promotions was freely sold to the unwary with the understanding that no personal liability beyond the amount of subscription attached to ownership. This period of great speculation in the shares of unincorporated associations was followed by legislation intended to protect innocent investors. The Bubble Act of 1719 prohibited unincorporated companies from acting as corporate bodies or selling transferable shares of stock. The law was construed not to be prejudicial against the issuance of transferable shares unless the undertaking was fraudulent--transferable shares were not illegal per se. After the act proved to be a hinderance to the formation of genuine trading companies and the employment of ready capital generally it became a dead letter. It was repealed in 1825 thus doing away with the contention that transferable shares were illegal. This prejudice against transferable shares in unincorporated companies exerted itself before trust estates were used as a form of business organization.

TRANSFERABLE SHARES IN A TRUST ESTATE ENGAGED IN TRADING.--A notable English case decided in 1880 followed Cox v. Hickman, supra, in recognizing that where trustees hold legal title and fully control the trading business they are not agents and the cestuis in-

cur no liability under their contracts and acts. The right of cestuis to be represented by transferable shares is also shown. In this case the legality of an organization was questioned because it was not registered under the English Companies Act of 1862. The act required the registering of partnerships organized to carry on business where their membership exceeded twenty persons. Title to certain securities was vested in trustees with full power of management. Transferable shares were issued to the subscribers. In rendering final decision the court pointed to the fact that all business was to be carried on by the trustees and that certificate holders could not be held on contracts made by the trustees. The Companies Act was held not to apply because the association was not formed "for the purpose of carrying on business" and the right of cestuis que trust to have their interests represented by transferable certificates was unquestionably recognized. Smith v. Anderson, 15 Ch.Div. 247-285 (1880).

It was never very seriously contended that the provisions of the Bubble Act had any application in the United States. The mere fact that the courts have repeatedly ignored the act is pretty good evidence that it was not intended to be among the laws recognized since the Revolution. In a trust estate engaged in business the cestuis que trust have no obligations among themselves or to anyone else, hence the same objection against transferable shares cannot exist as in partnerships where a changing body is an obstacle to be reckoned with in bringing suit against the association.

In order to remove all doubt as to the transferable feature of these shares of beneficial or distributive interest the trust instrument should confer upon subscribers a vested interest. A vested interest represents a fixed right; it is not subject to a

condition precedent, and is, therefore, a transmissible interest.

CHAPTER V11.

TRUST TAXATION

ORIGINAL METHOD OF TAXING TRUSTS.--The original method of taxing trusts created under wills or by deed was to disregard the trusteeship and to tax the property wholly from the standpoint of legal ownership. The tax was levied in the same manner as though no separation of ownership had taken place. The application of this method placed no penalty upon the trust relationship. As common law trusts with transferable shares came into use an effort was made to levy taxes upon them similar to those imposed upon corporations. The practical effect of this discrimination caused a distinction to be made between trusts under which the interests of beneficiaries are entirely evidenced by deed, will, or agreement, and trusts in which the beneficial interests are additionally evidenced by transferable shares or certificates. From the standpoint of taxation only the latter class will be noted.

GENERAL PROPERTY TAXES.--General property taxes are levied against the real estate itself. A lien for the taxes goes against the property; a personal judgment against the owner would be bad. It matters not whether the legal title is held by an individual, corporation, or trustee. For the purpose of these taxes the legal and equitable title are treated as one. The issuance of beneficial certificates under common law rights does not lay the foundation for additional taxes.

INCOME TAXES.--If a business trust is properly formed with full power of control vested in the trustees no federal income tax is imposed by virtue of the trust arrangement. Article 1504, Treasury

Regulations 62, is self-explanatory on this point:

> "Association Distinguished from Trust.--Where trustees hold real estate subject to a lease and collect rents, doing no business other than distributing the income, less taxes and similar expenses, to the holders of their receipt certificates, who have no control, except the right of filling a vacancy among the trustees and of consenting to a modification of the terms of the trust, no association exists and the cestuis que trust are liable to tax as beneficiaries of a trust, the income of which is to be distributed periodically, whether or not at regular intervals. But in such a trust, if the trustees pursuant to the terms thereof have the right to hold the income for future distribution, the net income is taxed to the trustees instead of to the beneficiaries. See section 219 of the statute and articles 341-348. If, however, the cestuis que trust have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust is an association within the meaning of the statute."

Income taxes are imposed in some states because the beneficiaries reside there. Such is the law in Massachusetts. The Massachusetts statutes further provide for the optional payment of income tax by the trustees for the certificate holders, thereby rendering such holders tax free.

In Wisconsin the test of income taxability is the residence of the trustees together with the carrying on of the business within the state. In a recent case involving taxation under the state income law the Supreme Court of the state held, that where the property of a corporation consisting of mines and lands in Michigan was transferred to trustee residents of Wisconsin, each beneficiary being a stockholder of the corporation and having the same interest under the trust agreement as he had in the corporation; the $70,000 rents received by the trustees and paid to Wisconsin beneficiaries was from property located and business conducted without the state and therefore not subject to taxation under the state income law.

State v. Hampel, 172 Wis. 67, 178 N.W. 244 (1920).

"The income tax law applies in the same manner to corporations, to joint stock companies, common law trusts, and organizations or associations by whatever name known, if such organizations have the following characteristics:

a. The doing of business in an organized capacity.

b. The distribution of profits, if any, in accordance with the number of shares of stock which each member of the organization holds, or in accordance with the proportionate share of capital which each member has invested in the business or property of the organization.

"The method by which an association is organized or created may be by a charter granted under the laws of a state, by agreement, declaration of trust or otherwise, but such an association is nevertheless taxable as a corporation if it possesses the characteristics referred to in subdivisions (a) and (b) of this paragraph. It is also interesting to note that it has been held, in the absence of specific information showing the existence of a partnership or association, that the ownership of a vessel by several individuals and the operation under a manager or agent for the account of all, does not constitute a joint stock association. The profits from such a joint venture are not taxable to the group or association, but are directly taxable to the several individuals comprising the group, who must report in their personal returns their respective shares of the profit from the venture." Chapter 11, Walton School of Commerce, Federal Tax Course.

Article 1502, Treasury Regulations 62, defines joint-stock companies and associations as follows:

"Associations and joint-stock companies include assoc-

> iations, common-law trust, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock, which each holds or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in corporate form is an association or corporation within the meaning of section, 2, but if it continues its business in the form of a trust, it becomes subject to the provisions of section 219."

If the organization is held to be an association it is taxable as a corporation, but if it is held to be a trust the trustees must file a return as a fiduciary, and the beneficiaries are liable for the income tax on their respective distributive shares from the net income of the trust estate. Note should be made of the fact that where the trustees have the right to hold the income for future distribution, the net income is taxed to the trustees rather than to the beneficiaries. According to Treasury Department regulations a trust taxable to the beneficiaries exists if the income is distributable periodically and where the beneficiaries exercise no control over the conduct of the business except to fill vacancies among the trustees and to consent to modification of the trust instrument. It may be stated generally that income tax may be assessed against the trustees or the beneficiaries but not against both.

FEDERAL CAPITAL STOCK (EXCISE) TAX.--As a means of determining whether business trusts are subject to the capital stock tax practically the same rule applies as is applicable to income taxes, i.e., the power of control is the determining factor. Article 8, Treasury Regulations 64, state:

"The test of liability in all cases involving trusts

> of the Massachusetts type is whether the cestuis que trustent have by the terms of the trust agreement a voice in the management or control of the trust. Where the trustees are in complete control of the business, the benficiaries having no control except the right of filling vacancies among the trustees or of consenting to a modification of the terms of the trust or of dissolving the trust, no association exists. If, however, the cestuis que trustent have a voice in the control or management of the business of the trust, whether through the right to elect trustees periodically or to remove the trustees or to restrict the trustees as to the management of the trust or otherwise, the trust is an association within the meaning of the statute. Where the trustees hold in their own right a sufficient number of the certificates of beneficial interest to constitute control as between the beneficiaries, the trust will be held to be an association regardless of the powers conferred upon the trustee by the instrument creating the trust."

STATE FRANCHISE TAXES.--Business trusts within the scope of this paper are not organized under state laws. They are administered by trustees acting under their constitutional and common law rights as citizens. These civic rights are inherent. Since existence is not dependent upon statutory law there is nothing due the state for the privilege of operating. The efficacy of a state law imposing a franchise tax on a business trust is doubtful. No state had attempted to apply franchise taxes to trusts, until recent legislation in New York. The word "corporation" is defined in such manner as to include any business conducted by a trustee or trustees wherein interests are evidenced by certificates. Chapter 408, Laws of 1922.

Franchise taxes cannot be imposed on a trust estate "doing business" in foreign states. The business is that of an individual trustee, who as a citizen of one state has the constitutional right to own property and do business in other states on the same basis as citizens of that state. Accordingly trustees standing on their national civic rights cannot be denied the privilege of holding

real or personal property in any state of the union where trusts are recognized. Under Section 2, Article 4, of the Constitution of the United States "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

FEDERAL AND STATE STAMP TAXES.--Under Treasury Regulations original issue stamps must be attached to record books if certificates are issued by a trust controlled by the beneficiaries. Stamps are not required where full control is vested in the trustees. Subdivision (b), art. 4, Treasury Regulations 40, states:

> "The issue to the beneficiary of certificates covering shares in the nature of shares of stock, where a number of persons pool their individual properties and appoint trustees having a definite term of office for the purpose of managing it, and retain certain rights of control over the property and a voice in the selection of the trustees, who are authorized to issue the certificates, is subject to tax."

Whether or not federal stamps are required on transfers is determined by the same principle. Subdivision (h), art. 13, United States Internal Revenue Regulations 40, (1922 Ed.) covers this point:

> "The sale or transfer of certificates issued by trustees, where such trustees are legally appointed for the entire period of the trust and the beneficiaries retain no substantial control over the affairs of the trust, but delegate their proprietary functions to others, and further control on their part depending upon contingencies, their rights being limited to filling vacancies caused by death, resignation, or disability, is not subject to tax."

The New York law imposing stamp taxes on the transfer of stocks includes "certificates of interest in business conducted by a trustee or trustees." Chapter 354, Laws of 1922.

A rule issued by the Tax Commission of Massachusetts includes the certificates of "all voluntary associations existing under a written instrument or declaration of trust where the beneficial in-

terests are divided into transferable certificates of shares, at the rate of 2¢ on each $100 of the face value or fraction thereof." Vol. 1, Stock Transfer Guide Service, Massachusetts, 1168.

INHERITANCE TAXES.--The laws regarding inheritance taxes in their application to business trusts are not uniform. The place of administration theory was followed in a late Minnesota case when it was held that trust shares are subject to inheritance taxes in Minnesota even though held by a non-resident estate of New York. In the course of the opinion the court said: "the shares of the mining companies, the corpus of the trust, have always remained here since the transfer to the trustees; the president and secretary and secretary and his office force have not only had here charge of the trust estate, its records and business, but such persons have also constituted the secretary and office force of the mining companies; the income from the trust property--that is, from the shares in the mining companies--has always been accounted for and turned over to the trustees in this state; and the trust was planned and authorized by the Great Northern Railway Company, a domestic corporation, and represents property mostly situated in this state, and which belonged to the railway company when the trust agreement was made. The Great Northern Railway Company was the real settlor of the trust."

Professor J.H. Beale writing in the April, 1919, number of the Harvard Law Review contends that an inheritance tax is payable at the place of the administration or seat of the trust.

A Wisconsin decision shows how the real situation will be examined to determine the taxing jurisdiction. The facts of the case show that on March 15, 1918, Isaac Stephenson died leaving an estate of over $2,000,000. A part of the estate was represented by

certificates representing 27,836½ parts in the Isaac Stephenson Company Trustees, a trust holding lands and personal property in the state of Michigan. It was contended that the certificates represented the ownership of real estate in Michigan and therefore did not constitute a taxable estate in Wisconsin. Authority was given to sell the real property. The court held, that the directions permitting the conversion of Michigan real estate into personalty made the shares personalty and taxable in Wisconsin for inheritance purposes, and the situs was the residence of the deceased.

CHAPTER VIII.

CONSTITUTIONAL GUARANTIES, EXHIBIT, AND CONCLUSIONS

PROVISIONS OF THE CONSTITUTION RELATING TO INDIVIDUAL RIGHTS.--It was pointed out in Chapter I, that the trust is one of the agencies of courts of equity. Though the exact date of the inception of the trust is not known it was in vogue prior to the Statute of Uses, 27 Henry VIII, chap. 10, 1536. Trusts were at that time special and general. Special trusts were those in which the property was held for a temporary and special purpose with active duties upon the trustee, as where real property was conveyed to "X to collect the profits and income and deliver them to Y during a stated period." General trusts were those in which the property was to be held permanently with no active duties devolving upon the trustee, as where land was conveyed "to X to the use of Y," in which case Y would be entitled to the profits indefinitely and X would have no active duties. These general trusts were also called uses. The Statute of Uses was aimed at the evils growing out of the system of uses and trusts. These evils were in part (1) that the true ownership of land was concealed; (2) that wives were defrauded of their dower and husbands of their curtesy because these rights were not recognized in the interest of a cestui que use; (3) that the feudal lords were deprived of their special privileges; and (4) that creditors suffered because their claims could not be satisfied from the equitable interest of the beneficiary. The statute proposed to do away with fraud caused by uses and trusts in land by executing the use, i.e., by immediately transferring the legal title to the beneficiary. The courts construed the statute in such a way that it did not apply to uses in estates for years, to active or special uses, and to a use upon a use. In these cases, and in

other instances the use or trust was enforcible in a court of equity. These equitable interests, held not to be destroyed by the Statute of Uses, were called trusts. With the adoption of the common law, English trust principles found a place in the system of American jurisprudence. These principles have been augmented by Constitutional guaranties recognizing fundamental inalienable individual rights. Among the provisions are certain articles of such particular interest that they will be quoted:

"No State shall---pass any---law impairing the obligation of contracts," etc. (Art. 1, Sec. 10, Par. 1.)

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." (Art. 4, Sec. 2, Par. 1.)

"This Constitution and the laws of the United States which shall be made in pursuance thereof;---shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (Art. 6, Par. 2.)

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution;" etc. (Art. 6, Par. 3.)

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," etc. (Amend. 14, Sec. 1.)

These Constitutional guaranties cannot be impaired by Congress nor the Legislatures of the several states. Trustees acting under their individual rights as citizens may engage a trust in a lawful

business anywhere trusts are recognized, subject of course to regulations prohibiting the conduct of certain kinds of business except by corporations. Individuals or unincorporated associations may be excluded from carrying on certain types of business if there is a reasonable basis for the discrimination. If, however, the basis is unjust the regulation violates the equality provision clause of the Federal Constitution. Businesses relating to the health, morals, or safety of the public justify regulation under the state's police power. Banking and insurance may be limited to the corporate form of organization. This is under the police power which extends to all of the great public needs.

BLUE SKY LEGISLATION.--It is doubtful if trustee certificates, denoting the division and allotment of beneficial interests under the trust estate, are subject to regulation under the so called Blue Sky Laws. These certificates do not represent shares in the capital, or undivided interests in the trust property. They are not evidences of indebtedness and therefore not securities. Reported cases holding the beneficial certificates of pure trusts to be securities subject to Blue Sky regulation are wholly lacking. State officials of the security departments would be glad to find some way of obtaining supervisory power. The following letter presents the Wisconsin view:

RAILROAD COMMISSION OF WISCONSIN

MADISON

January 31, 1923.

Mr. E.L. Grady,
270 Tenth St.,
Milwaukee, Wis.

Dear Sir:

Your letter of the 19th inst. was duly received, but due to

the accumulation of work in the office, it has been impossible to give it attention until now. You ask, "Do the blue sky laws of this state regulate shares representing interests or equities in distributions as to earnings or principle under trust estates?"

In answering your question, there must be taken into consideration, not only the definition of "company," but the definition of "security." The term "company" is clearly broad enough to include any form of organization. The term "security" or "securities" is defined by the law to mean and include, among other things, any "evidences of title to, interest in or lien upon any or all of the property or profits of a company." An interest in a common law trust organized for the purpose of conducting a business, interest in which entitles the holder to a proportion of the profits, is clearly within the provisions of the law. As a matter of fact, such organizations are, in my opinion, partnerships, and the sale of an interest therein would be the same as the sale of an interest in a partnership. On the other hand, one can conceive of an interest in a trust estate which might possibly not fall within the definition of a security. A man, by will, transfers all his property to trustees to be managed by them, and to pay over the proceeds from his estate to specified persons. Whether the interest in such estate might constitute a security or not, we have not been required to pass upon. Ordinarily, if any transfer was made of such interest, it would be by single sale, and, therefore, exempt from the provisions of the law under Section 1753-49.J. If, however, the cestuis divided their interests up into small amounts and started the sale, broad-cast, of those interest, the question would be squarely presented. I should hesitate to decide in advance what our attitude would be on such state of facts. Even there, if the law were to be construed literally, I am inclined to think it is broad enough in its terms to cover the sale of such interests. On the other hand, considering the entire purpose of the law, I have some doubt as to whether it should or would be so construed.

I realize that this is not an answer to your question. I have merely attempted to give you my line of thought. If a trust estate is organized for the purpose of conducting a business, and interests therein are sold for the purpose of obtaining capital to operate such business, I have no question but what the sale of such interests constitutes a sale of securities within the meaning of the law. That is as far as I could go with confidence. Beyond that, the question is not free from doubt.

Yours truly,

RAILROAD COMMISSION OF WISCONSIN

(Signed) G.S. Canright.

Director, Securities Division.

EXHIBIT OF DECLARATION OF TRUST.--The following trust agreement may be helpful in showing the features that should be embraced in such an instrument to accomplish the desired end:

EXPRESS TRUST AND "HULBERT PLAN" VOLUNTARY ASSOCIATION

OF TRUSTEES UNDER THE COMMON LAW

"MYERS MANUFACTURING CO." MAIN OFFICE, OMAHA, NEB.

THIS AGREEMENT AND DECLARATION OF TRUST:

Made and entered into this first day of October, A.D., 1920: By and between Wm. M. Myers and A. I. Schomperlen, herein designated as the SUBSCRIBERS, for themselves, their heirs and assigns; and

Wm. M. myers, A. I. Schomperlen, F. G. Hulbert, N. Leavitt and Henry Hulbert, together with their successors in trust herein designated as the TRUSTEES;

WITNESSETH, that the said SUBSCRIBERS, for and in consideration of One Dollar in hand paid, the objects herein stated and other consideration of value, do hereby make, constitute and appoint the trustees above names, to be in fact the TRUSTEES of this Trust Estate herein declared, and do hereby sell, assign, convey and deliver to the said Trustees, who are by reason of these presents, to act collectively under the trade name MYERS MANUFACTURING CO., certain properties and things of value to include three applications filed and Letters Patent Pending in the U.S. Patent Office described as ---.

Together with them drawings, plans, patterns, specifications, good will and orders pending, office and factory accessories etc. more fully described in the schedules and inventories from time to time in the hands of the Trustees.

AND THE SAID TRUSTEES, hereby agree to accept the trust herein declared and to hold the properties so transferred to them, together with all other property, real or personal which they may acquire as such Trustees, in trust, to develop, improve, manufacture

or otherwise to commercialize in their discretion for gain to the trust estate, and to distribute the proceeds or portions of the trust estate funds from time to time and ultimately the entire estate when liquidated, to the beneficiaries under this trust, subject to stipulations and limitations herein expressed, to wit:

FIRST: THE TRUSTEES shall always be five in number, and the Trustees herein mentioned by name, or their successors from time to time elected to fill vacancies, shall hold office and have exclusive control and management of the trust estate property for the full term or life of this trust.

ANY TRUSTEE other than those two above named as subscribers, may be removed from office and his office declared vacant, by the unanimous vote of the remaining trustees, when in their opinion he shall have been guilty of fraud, malfeasance in office or gross neglect in the proper execution of the plans and purposes of this trust.

In event of death, resignation or removal from office of any Trustee, the remaining trustees may accept any resignation and may elect to fill any vacancy in the board of trustees.

Should the entire board of trustees become vacated, it is understood by all the parties hereto, that any Court of Equity of proper jurisdiction, can appoint trustees or the Court may execute this trust, liquidate the assets and distribute the proceeds to the beneficiaries.

As soon as any trustee, duly elected or appointed to fill a vacancy, shall have accepted this trust, the trust estate shall vest in the new trustee together with the continuing trustees, without any further act or conveyance.

Regular meetings of the trustees may be held monthly or quarter-

ly, as determined by resolution of the board or by-laws and special meetings may be called at any time by the president or any two trustees on a ten days notice sent to each trustee, and at all such meetings a majority of all the trustees shall constitute a quorum for transacting business, the unanimous vote of such quorum to be conclusive without the concurrence of all the trustees.

SECOND: TRADE NAME.

The trustees in their collective capacity shall be designated, MYERS MANUFACTURING CO. and under that name shall conduct the business of the trust and execute instruments in writing, and they may adopt and use a common seal, a fac-simile of which is shown in the execution of this instrument, and the same is hereby adopted.

THIRD: BY-LAWS.

The trustees may adopt, amend or repeal any by-laws, rules or regulations as they may deem expedient for the orderly conduct of their business and not inconsistent with stipulations herein.

FOURTH: OFFICERS.

The trustees shall annually elect from among their number a President, Vice-President, Secretary and Treasurer, whose regular duties shall be those incident to such offices and such added duties as the trustees may be resolution impose.

The trustees may appoint such other officers, agents or attorneys as they may deem necessary, may accept resignations and elect to fill any vacancies, may appoint temporary officers to serve pending absence or disability of regular officers, and any trustee may hold two or more offices simultaneously.

FIFTH: SALARIES.

The trustees shall fix and pay all compensation of officers, agents or servants and other employees in their discretion and

they may pay to themselves such reasonable compensation for their own services as may be determined by act of the board of trustees.

SIXTH: LIABILITIES.

The trustees shall assume all obligations and liabilities in connection with or growing out of their taking over and management of the property and business of the trust estate, to the extent and value thereof but not personally, and they shall agree to hold the subscribers and beneficiaries harmless and protected against any personal liability, expense, costs, damage or loss beyond the obvious risk of their interests or investments hereunder, and the trustees shall not be held liable for the acts or omissions of each other, nor for those of any officer, agent or servant oppointed by serving for or under them, and they shall not be obliged to give a bond for the faithful performance of their trust, but the treasurer may be required by the trustees to give a bond for the safety of funds or securities held by him.

SEVENTH: PROPERTY.

The trustees shall hold the legal title to all property, real or personal, at any time belonging to their trust, and may buy, sell, negotiate, improve, develop, hold or convey and encumber the same for loans for the benefit of their trust in their discretion, and they shall have and exercise exclusive control of the same.

EIGHTH: POWERS.

The powers of trustees hereunder are the powers of individuals to do any lawful thing or business anywhere except for the limitations herein expressed, and they may engage the trust estate funds and properties in any business which they may deem advantageous to their trust or likely to enhance the value of the trust estate.

They may acquire and hold Letters Patent and manufacture there-

under or dispose of same or licenses and rights thereunder, may engage in any kind of manufacturing or merchandizing business anywhere, may own, lease and operate or build any kind of buildings, vehicles or transportation lines or equipments, may buy, sell or hold real estate freely and may mortgage same, may execute deeds, mortgages, bonds, notes, debentures or other obligations, may own stock or shares in corporations or other companies and exercise the voting powers thereunder and collect the dividends, or do whatever else they may deem advantageous to their trust in any State of Country, and so far as strangers to this trust are concerned, a resolution of the trustees authorizing a particular thing to be done shall be conclusive evidence in favor of such strangers that such act is within the powers of the trustees, and no purchaser from them shall be obliged to see to the application of any money paid the trustees.

It is specifically alleged and understood that the trustees hereunder are to act solely on their Constitutional and Common Law rights, deriving neither existence nor power from any legislative act, and subject only to the limitations expressed in this instrument.

NINTH: BENEFICIAL INTERESTS.

The beneficial interests hereunder shall be divided into One Hundred Thousand equal shares, each share to be expressed by the par value of Ten Dollars.

The trustees for the purpose of defining the various interests of the beneficiaries hereunder, present and future, have agreed to issue to each as his interest may appear, from time to time, negotiable and non-assessable beneficial share certificates with express stipulations as to exemption from personal liability of both

the shareholders and the trustees, substantially in the copy-right form hereto attached and made a part thereof marked "EXHIBIT A" hereof.

In event of loss or destruction of any certificates for shares issued by the trustees, they may under such conditions as they deem to be proper, issue duplicates or substitutes therefor.

The Trustees are directed to forthwith allot to the above named subscribers, Wm. M. Myers and A. I. Schomperlen, all of the said shares of beneficial interest in exchange for the properties conveyed herein to constitute the trust estate, and their promise to return to the treasury of the trustees, a portion of said shares or the proceeds of their sale to be used by the trustees for the trust purposes in their discretion, to be held or disposed of subject however to the agreement that should the subscribers donate more than half of all the shares to the treasury, then in such case, the trustees, shall at the close of each fiscal year, return to the said donors as many of said treasury shares as shall equal the aggregate of one half as many shares as they shall have disposed of otherwise during the said fiscal year.

TENTH: DISBURSEMENTS.

The trustees may from time to time declare and pay dividends, or make distributions to the beneficiaries under this trust, from any available funds or holdings of the trust, but the time and manner of such distributions shall be wholly in the discretion of the trustees, except that it be equally proportioned to the various beneficiaries, according to all the shares then outstanding and the number of shares held by each, but the donated shares while dormant in the treasury, shall not participate.

ELEVENTH: FISCAL.

The fiscal year of the trustees shall end on the last day of

September in each year and the books of the trustees for the transfer of shares shall remain closed from that date until after the annual meeting of the shareholders, to admit of mailing to each an advance notice of the meeting, and to permit the trustees to make out their annual report to be submitted at such meeting or mailed to each of the shareholders of record.

TWELFTH: MEETINGS.

The annual meetings of the shareholders shall be held on the first Monday in November each year after 1920 at the office of the trustees in the City of Omaha, Neb. or elsewhere as the trustees may determine and specify in the notices, which notices shall be mailed to each shareholder at least ten days before the meeting date.

Special meetings of the shareholders may be called by the trustees at any time by a similar notice mailed to each.

The main object of the shareholders meetings shall be to hear and discuss reports of the trustees, and in their resolutions or voting, each shareholder shall be entitled to one vote for each share he holds, and may vote in person or by proxy.

THIRTEENTH: BENEFICIARIES.

Ownership of shares in the beneficial interests hereunder, shall not entitle certificate holders to any title or undivided interest in the trust estate property.

The death of a shareholder shall not operate to terminate this trust.

The heirs or executors of the estate of any decedent may succeed to his beneficial interests only on surrender of the certificate for the shares he held, for cancellation and re-issue to the lawful successor.

No shareholder nor his legal representative may demand any

partition or division of the trust estate property, nor any special accounting.

Form of certificate inserted as follows:

Voluntary Association of Trustees under the "HULBERT-PLAN" Common Law Rights of Contract which the U.S. Constitution forbids any State to Impair by Statute.

Number Shares

MYERS MANUFACTURING CO

Trustees of a Trust Estate

Main Office: Omaha, Nebraska.

100,000 Beneficial Shares Par Value $10.00 a Share

THIS CERTIFIES THAT _____ is the holder of _____ beneficial shares under MYERS MANUFACTURING CO., fully paid and non-assessable, subject to a Declaration of Trust in favor of Trustees under above designation, dated October 1, 1920, and filed in the office of the Recorder of Deeds of Douglas County, State of Nebraska, which indenture is hereby referred to and made a part thereof, exempting both the shareholders and trustees from personal liability beyond the Trust Estate.

(Seal)

Transferable only on the books of the Association by the holder in person or by attorney upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the trustees have caused this Certificate to be executed in their name and behalf, by their duly authorized officers, this _____ day of _____, A.D., 19__.

MYERS MANUFACTURING CO.

_____ _____

Secretary President

SHARES

$10.00

Each.

FOURTEENTH: EXEMPTIONS.

The trustees shall have no power to bind the shareholders personally to any obligations or liabilities, and the shareholders, and all persons, corporations or companies extending credit to, contracting with or having accounts against the trustees or trust estate, shall look only to the trust estate funds and property for payment, or for settlement of any claim, tort, damage, judgment or decree, or for any other indebtedness which may become due and payable from the trustees or trust estate, so that neither the shareholders nor trustees, present or future, shall be held to any personal liability hereunder or by reason of any connection with or interests under this trust.

FIFTEENTH: DURATION.

This trust shall continue for the term of twenty years after the death of the last surviving subscriber hereto whose name appears in the execution of this instrument, unless the trustees shall elect to wind up its affairs at a previous date.

At the expiration of the said term, or at any time previous thereto, the Trustees may proceed to liquidate the trust properties and distribute the proceeds to the holders of the beneficial share certificates then outstanding.

When such final distribution shall have been equably effected, this trust shall be closed and the trustees discharged, when such resolution and notice shall have been recorded in the County records where this original document is of record.

Provided, however, that at any time previous to the winding up of the affairs of this trust, the trustees may under instruction of a Court of Equity and with the consent of at least holders of two thirds of the outstanding shares, extend the above term within legal limits as may then be determined.

SIXTEENTH: AMENDMENTS.

This Declaration of Trust and Agreement may be amended within legal limits at any time by the SUBSCRIBERS and the TRUSTEES, or their legally constituted successors, such amendment to be effectuated by attaching thereto an appendix by them duly executed, and recording a copy in the County Records of the County where this original document is of record, and it shall be the duty of the trustees to mail to each shareholder of record, a copy of such amendment.

NOTHING HEREIN EXPRESSED, shall be construed as intent to evade or contravene a statute, nor to delegate to trustees any of the powers belonging exclusively to statutory franchise sold to corporations, nor to create any fictitious entity deriving either existence or powers from any legislative act.

IN WITNESS WHEREOF, the said Wm. M. Myers and A. I. Schomperlen, herein designated as the SUBSCRIBERS, for themselves, their heirs and assigns, have hereunto set their hands and seals in token of their approval of and assent to the terms of trust herein set forth:

AND THE SAID Wm. M. Myers, A. I. Schomperlen, F. G. Hulbert, N. Leavitt and Henry Hulbert, herein designated TRUSTEES, for themselves and their successors in trust, have hereunto set their hands and seals in token of acceptance of the trust herein declared.

WM. M. MYERS (SEAL) A. I. SCHOMPERLEN (SEAL)

SUBSCRIBERS

WM. M. MYERS (SEAL) A. I. SCHOMPERLEN (SEAL)

N. LEAVITT (SEAL) F. G. HULBERT (SEAL)

HENRY HULBERT (SEAL)

TRUSTEES

AND THE SAID TRUSTEES, in their collective capacity, have hereunto subscribed indorsement in their trade name by their duly authorized officers of their board, and have caused their common seal to be hereto affixed.

(Seal)

MYERS MANUFACTURING CO.

WM. M. MYERS, PRES.

A. I. SCHOMPERLEN, SECRETARY.

STATE OF ILLINOIS:
: SS
COUNTY OF COOK :

I, Arthur Geo. Hulbert, a Notary Public in and for the said County in the State aforesaid, HEREBY CERTIFY THAT, Wm. M. Myers, F. G. Hulbert, A. I. Schomperlen, N. Leavitt and Henry Hulbert, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the purposes therein set forth.

(Notarial Seal)

GIVEN UNDER MY HAND AND OFFICIAL SEAL, this second day of October, A.D., 1920.

ARTHUR GEO. HULBERT

Notary Public.

USE OF TRUST FORM BY INCOMPETENTS.--Some lawyers and others of little professional standing have brought the trust into disrepute by advertising to form them for nominal fees, and with little trouble to the promoters. Such practices have and are very apt to result in careless organization and ultimate disappointment. Careful lawyers are needed to draft trust agreements that fall within the confines of established legal principles. Of this Sears says: "No one but a competent legal advisor skilled in the laws of the state in question, and supplied with full knowledge of his client's affairs, can be relied upon to determine that a trust should be created, to draft the trust instrument properly to effectuate the objects of its creation, and to advise and instruct the trustees in safe management of the trust estate."

CONCERNS ORGANIZED UNDER THE TRUST FORM.--A study of Moody's Rating Book Service reveals the fact that trust estates are becoming more or less common. Figures showing the number of business trusts in existence in the United States are not available. Moody places a high rating on the securities of the following concerns:

(1) Amoskeag Manufacturing Company. This company is engaged in the textile business and has the largest single cotton mill in the United States. It is located at Manchester, N. H.

(2) Chicago City and Connecting Railways Collateral Trust, Chicago, Ill.

(3) Congress Street Associates, Boston, Mass.

(4) Boston Ground Rent Trust, Boston, Mass.

(5) Masonic Temple Trust, Chicago, Illinois.

(6) Ludlow Manufacturing Associates, Ludlow, Mass.

(7) Texas Pacific Land Trust, Dallas, Texas.

(8) Pepperell Manufacturing Company, Boston, Mass.

(9) New England Investment & Security Company, Springfield, Mass.

(10) Simmons Hardware Company, St. Louis, Mo. This company does an extensive wholesale hardware business with all parts of the world. A letter from the company says: "The Associated Simmons Hardware Companies is a Missouri trust and has been in existence for about twelve years, It owns the capital stock of Simmons Hardware Company of Missouri, and of the other jobbing houses at various other points in the country bearing the same name, also the stock of factories and other subsidiaries. Associated Simmons Hardware Companies is owned by several hundred share holders whose evidence of ownership is in the form of Participation Share Certificates similar to the stock certificates of a Corporation."

(11) Yukon-Alaska Trust, New York City.

(12) New England Securities Company, Boston, Mass.

SIMILAR ADVANTAGES OF TRUST ESTATES AND CORPORATIONS.--Properly formed trust estates have many of the common advantages of corporations. The two forms of organization are similar in the following ways:

(1) For practical purposes a trust estate can be made as permanent as a private business corporation. Most states permit the existence of a trust for at least twenty years after the death of the last survivor of persons named in the creating instrument.

(2) Limited liability of trustees and stockholders.

(3) Transferable shares.

(4) Trust estates are managed by trustees acting collectively; a corporation is managed by a board of directors.

(5) Dissolution may be accomplished by agreement.

(6) A trust estate may sue and be sued through its trustees

(7) Beneficiaries and stockholders have a right to accountings and to all proper information.

ADVANTAGES OF TRUST ESTATE OVER CORPORATION.--In some ways the trust estate as a means of conducting business seems to have important advantages over the corporate form:

(1) Unless limited by the creating instrument the trust estate may, through the trustees, be engaged in any legal undertaking anywhere. Privileges to operate in foreign states need not be purchased.

(2) Since the trust estate "derives neither existence not power from any legislative act" but functions wholly through trustees exercising only Constitutional and Common Law rights, it is not subject to the following burdensome taxation imposed in varying degrees upon corporations:

a. Organization taxes.
b. Annual franchise taxes.
c. State income taxes.
d. State inheritance taxes.
e. Stock transfer taxes.
f. License fees in each foreign state where the corporation does business.
g. Federal stamp taxes.
h. Federal capital stock (excise) taxes.
i. Federal income taxes.

It is also relieved from filing some of the local, state and federal reports required of corporations.

(3) Its permanent form of management lends itself to a continuation of policy by permitting the trustees to "carry on" without the interference of beneficiaries. This is superior to the annual

election plan used by corporations.

(4) Trustees may apply to a court of equity for instruction where their rights and powers are not clear, and thus their acts will receive the court's sanction in advance of their commission.

(5) Creditors cannot be preferred.

(6) The trust instrument may provide for the winding up of the business without resort to legal proceedings whith their usual burden of expense and delay.

DISADVANTAGES OF THE TRUST ESTATE.--The greatest disadvantage against the use of the trust form in business is the lack of knowledge on the part of the legal profession as to just how it is formed and how it works out in a practical way. Some of the principles relating to common law trusts are unsettled, the laws in the various states are not uniform, and as a means of feeling on surer ground attorneys advise the corporate form. Financiers are also hesitant about putting their money in an enterprise that may later be declared a partnership or an unchartered corporation. Commissions cast a jealous eye upon trust estates because they are being operated without having paid for the privilege. Though more trust legislation is expected there are certain Constitutional guaranties that cannot be set aside except by amendment. Trusts generally are so useful that from a political standpoint alone an amendment seems remote.

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