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Business Trusts

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where the business of the trust, and its main object and purpose, are to develop and sell its real property.¹⁹

III. SHARES AND CERTIFICATES

§ 22. Generally.

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

The courts have taken somewhat different views of the nature of a shareholder's rights in the trust estate, depending to some extent upon the purpose of the determination. Thus, the interest of a shareholder in a business trust has been said to constitute personalty and not real estate, although the trust estate consists largely of real property,³ and notwithstanding the frequent statement that shareholders have an equitable interest in the trust property.⁴ However, for purposes of taxation it has been held that shares in a Massachusetts trust partake of the nature of the trust property and are real or personal property accordingly as the property of the trust is, actually or under

Stern, 194 Wis 233, 216 NW 147, 58 ALR 462.

Annotation: 156 ALR 76.

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

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

19. *Hart v Seymour*, 147 Ill 590, 35 NE 246.

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

Annotation: 156 ALR 87.

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

Transferable certificates of shares in a business trust are equitable choses in action bearing a close resemblance to certificates of stock

in a corporation. *Goodhue v State Street Trust Co.* 267 Mass 28, 165 NE 701.

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

Practice Aids.—Trust instrument provisions as to shares or certificates. 3 AM JUR LEGAL FORMS 3:1, 3:9, 3:10, 3:37, 3:38, 3:85-3:96.

1. *Yeaman v Galveston City Co.* 106 Tex 309, 167 SW 710.

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

3. *Mallory v Russell*, 71 Iowa 63, 32 NW 102 (holding that the wife of a deceased cestui que trust cannot claim dower in land held by the business trust); *Pittsburg Wagon Works' Estate*, 204 Pa 432, 54 A 316 (holding that the interest of a member cannot be sold under execution as real estate); *Parker v Mona-Marie Trust* (Tex Civ App) 278 SW 321 (holding such shares to be personal property and, accordingly, to convey no interest in an oil lease, this being regarded as real property); *Stephenson's Estate*, 171 Wis 452, 177 NW 579 (for purposes of taxation).

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

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

the principle of equitable conversion.⁵ And a certificate of shares in a true business trust has been held to be not a "security," within the meaning of a taxing statute, but a muniment of title to an equitable interest in the real estate constituting the trust res.⁶

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

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

§ 23. Classes of shares; participation agreements.

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

Business trusts organized for the purpose of producing oil sometimes issue, in addition to the ordinary trust shares, participating agreements entitling the holders to a certain share of the oil produced.¹¹ The distinction between such participation agreements and ordinary certificates of beneficial interest will be observed by the courts.¹²

§ 24. Subscription or purchase.

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

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

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

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

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

7. *Annotation*: 156 ALR 97.

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

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

9. *Morrissey v Commissioner of Internal*

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

Annotation: 156 ALR 89.

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

Annotation: 156 ALR 89.

Practice Aids.—Certificate of preferred shares. 3 AM JUR LEGAL FORMS 3:90.

—Trust instrument provision as to dividends on preferred shares. 3 AM JUR LEGAL FORMS 3:87.

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

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

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

Annotation: 156 ALR 90.

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

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

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

§ 25. — Effect of fraud, misrepresentation, or violation of law, generally.

Upon a proper showing of fraud inducing his subscription, a subscriber to shares in a business trust may rescind the subscription and recover the

Practice Aids.—Trust instrument provisions as to sale or issuance of shares by trustees. 3 AM JUR LEGAL FORMS 3:1, 3:10, 3:37, 3:58.

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

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

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

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

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

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

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

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

Annotation: 11 ALR2d 1380.

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

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

3. *Burton v Ross* (Tex Com App) 292 SW 297.

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

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

§ 26. — What amounts to fraud or misrepresentation.

The sale of shares in a Massachusetts or business trust is not fraudulent per se, so as to entitle the subscriber to recover damages for fraud or deceit on the sole ground that the organization was a business trust and not a corporation, in the absence of a showing that there was a misrepresentation in this respect and that the misrepresentation that the shares were those of a corporation was material to the subscriber.¹⁵ But a false representation by a person selling shares in a business trust that the organization was a corporation organized under the laws of the state has been held to constitute such a material misrepresentation as would constitute a defense to an action

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

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

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

7. See *Moran v Union Bank*, 266 Ill App 315, *aff'd* 352 Ill 503, 186 NE 182.

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

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

10. *Reilly v Clyne*, 27 Ariz 432, 234 P 35,

40 ALR 1005; *Landwehr v Lingenfelder* (Mo App) 249 SW 723; *Schmidt v Stortz*, 208 Mo App 439, 236 SW 694.

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

Annotation: 156 ALR 91.

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

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

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

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

on a note by one other than a holder in due course, where the shareholders in such a trust were not accorded the same immunity from liability as were stockholders in a corporation.¹⁶

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

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

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

§ 27. Transfer or pledge.²

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

It is competent to provide in the trust instrument that the shares of a business trust must be offered to the trustees before being transferred to outsiders.⁶

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

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

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

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

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

1. *Schmidt v Stortz*, 208 Mo App 439, 236 SW 694.

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

3. *Hossack v Ottawa Development Asso.* 244

Ill 274, 91 NE 439; *Swartz v Sher*, 344 Mass 636, 184 NE2d 51 (recognized); *Phillips v Blatchford*, 137 Mass 510.

4. *Practice Aids*.—Trust instrument provisions as to transferability or assignability of shares. 3 AM JUR LEGAL FORMS 3:1, 3:2, 3:91, 3:92.

—Assignment of shares. 3 AM JUR LEGAL FORMS 3:93.

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

Annotation: 156 ALR 93.

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

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

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

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

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

§ 28. — Effectuation of transfer.

Instruments creating business trusts usually prescribe the manner in which a transfer or assignment of shares therein is to be effectuated.¹² These provisions are binding upon purchasers of shares¹³ as well as upon other persons. Thus, it has been held that the trustees of a business trust may refrain from transferring certificates on the books of the trust until the procedure prescribed for transfer has been followed, and may withhold payment of dividends to the transferees until transfer on the trust books can be made.¹⁴ As between the parties to a transfer of shares unperfected on the books of the trust, however, the transfer is good, and actual knowledge thereof will charge the trustees with liability for dividends paid to the transferor thereafter.¹⁵

The trustees of a business trust may be compelled to recognize and enter on their books a transfer of shares made in accordance with the trust instrument.¹⁶ Upon the presentation of the certificate indorsed in blank with the genuine signature of the owner, the trust is under duty to transfer the shares

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

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

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

10. *Snow v Hogan*, 312 Ill App 636, 38 NE 2d 934.

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

12. *Practice Aids.*—3 AM JUR LEGAL FORMS 3:1, 3:91, 3:92.

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

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

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

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

16. *Fairfield Holding Corp. v Souther*, 258 Mass 510, 155 NE 639; *Rice v Rockefeller*, 134 NY 174, 31 NE 907.

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

and issue a new certificate on demand, and it is not negligent in so doing, in the absence of fraud or collusion or notice of lack of title in the persons presenting the certificate.¹⁷ A court of equity has jurisdiction to compel the trustees to effectuate such a transfer in accordance with the provisions of the trust instrument, but the burden is on an alleged transferee to show that he is entitled to have the transfer perfected.¹⁸

It has been held that a brokerage firm regularly dealing in shares of a business trust may maintain an action to compel the trustees to make transfers in accordance with the trust instrument.¹⁹ And the fact that a purchase of shares was made by a corporation as agent for another person does not relieve the trustees of their duty to recognize and record the transfer, where the offer was made in good faith and met all the requirements of the declaration of trust.²⁰ However, a court will not compel the trustees of a trust to transfer shares obtained through a breach of faith and the use of confidential information secured through the former employment of the purchasers by the trust.¹

§ 29. Bequest or inheritance.

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

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

IV. SHAREHOLDERS, MEMBERS, OR CESTUIS QUE TRUSTENT

A. IN GENERAL

§ 30. Generally.

In jurisdictions where the business trust is regarded primarily as a trust and there is no governing statute, shareholders occupy a relation to the busi-

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

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

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

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

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

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

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

Annotation: 156 ALR 97.

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

ness trust similar to the relation of stockholders to a corporation.⁵ However, the relationship is somewhat different where the business trust is treated as a partnership, since the shareholders then may be said to have a direct interest in the affairs of the trust.⁶

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

§ 31. Eligibility.

The rule applicable to trusts generally that any person having capacity to take and hold legal title to property has capacity to be the beneficiary of a trust of such property⁹ would appear to apply to business trusts as well. Accordingly, while an unincorporated voluntary association which is not a legal entity cannot hold title to shares in a business trust,¹⁰ there would appear to be no reason why one business trust, where regarded as a legal entity,¹¹ may not become a shareholder in another such trust.¹² And where business trusts are treated as true trusts rather than as partnerships, no inherent reason is apparent why a corporation may not hold shares of such a trust as well as the shares of another corporation. However, particular statutory or charter provisions may prevent a corporation from holding shares in a business trust.¹³ And the principles or statutory limitations which prohibit corporations from entering into a partnership have been held to preclude them from becoming shareholders in a business trust which is, in contemplation of the law, a partnership.¹⁴ Thus, it has been held that a corporation violated its charter and subjected itself to dissolution by becoming a party to a business trust agreement which had the effect of creating a partnership.¹⁵

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

Annotation: 156 ALR 99.

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

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

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

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

9. See *TRUSTS* (1st ed § 137).

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

the shares, thus giving the club a voice in the administration of the trust.

11. § 4, *supra*.

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

Annotation: 156 ALR 99.

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

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

15. *People v North River Sugar Ref. Co.* 121 NY 582, 24 NE 834 ("Sugar Trust" case). And see *State ex rel. Watson v Standard Oil*

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

B. RIGHTS AND POWERS

§ 32. Generally.

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

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

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

§ 33. Proprietary interests.

The proprietary interests of shareholders are subject to the terms of the trust instrument.⁶ And their rights in the property of the trust depend upon the title actually acquired by the trustees, and are subject to the defects in

Co. 49 Ohio St 137, 30 NE 279 (quo warranto proceedings by the state against the corporation participating in the trust arrangement of the "Standard Oil Trust").

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

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

18. § 43, *infra*.

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

Annotation: 156 ALR 101.

Practice Aids.—Trust instrument provisions as to rights of shareholders. 3 AM JUR LEGAL FORMS 3:1, 3:79, 3:103 et seq.

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

Annotation: 156 ALR 98.

Practice Aids.—Trust instrument provisions as to rights of shareholders to profits and divi-

dends. 3 AM JUR LEGAL FORMS 3:1, 3:87, 3:96, 3:112.

1. *Comstock v Dewey*, 323 Mass 583, 83 NE 2d 257.

Practice Aids.—Trust instrument provisions as to meetings of, and voting by, shareholders. 3 AM JUR LEGAL FORMS 3:1, 3:107-3:109.

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

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

4. §§ 61 et seq., *infra*.

5. §§ 104 et seq., *infra*.

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

Practice Aids.—Trust instrument provisions negating shareholders' ownership of trust property. 3 AM JUR LEGAL FORMS 3:1, 3:103, 3:113.

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

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

C. LIABILITY FOR TRUST DEBTS AND OBLIGATIONS

§ 34. Generally.

According to the generally accepted view—that is, the “control test”¹⁶—the status of a business trust for the purpose of determining the liability of the shareholders depends upon who has the power of control over the business and property of the trust. If the ultimate power of control is vested in the trustees, who also hold the legal title to the trust property, the organization is treated as a true trust, rather than as a partnership, and the shareholders are not liable for the debts or contractual obligations incurred by the trustees.¹⁷ As stated by some courts, if the organization is actually a Massachusetts

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

8. § 55, *infra*.

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

Annotation: 156 ALR 102.

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

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

12. *Kountze v Smith*, 135 Tex 543, 144 SW 2d 261 (trust instrument expressly providing that the certificates of shares, and the rights and benefits evidenced thereby, should be personal property).

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

14. *Practice Aids.*—3 AM JUR LEGAL FORMS 3:11.

15. *Aronson v Olsen*, 318 Ill 26, 180 NE 565.

Annotation: 156 ALR 103.

16. § 11, *supra*.

17. *Bank of America Nat. Trust & Sav. Asso. v Scully* (CA10) 92 F2d 97 (law of California); *Goldwater v Oltman*, 210 Cal 408, 292 P 624, 71 ALR 871; *Schumann-Icink v Folsom*, 328 Ill 321, 159 NE 250, 58 ALR 435; *Commercial Casualty Ins. Co. v Pearce*, 320 Ill App 221, 50 NE2d 434; *Rossman v Marsh*, 287 Mich 580, 283 NW 696, affd on reh 287 Mich 720, 286 NW 83; *Darling v Buddy*, 318 Mo 784, 1 SW2d 163, 58 ALR 493; *Re Winter*, 133 NJ Eq 245, 31 A2d 769; *Rhode Island Trust Co. v Copeland*, 39 RI 193, 98 A 273.

Annotation: 156 ALR 105, 107.

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

trust,¹⁸ or a true trust, the shareholders are not liable for its debts.¹⁹ But if the shareholders have the power of effectual control over the trustees or over the affairs of the trust, the concern is regarded as a partnership, and the shareholders are consequently liable.²⁰ Where the ultimate power of control over the property and business of the trust is vested in the shareholders, they are liable as partners for the debts of the trust even under a statute expressly authorizing the creation of a trust to carry on any lawful business designated in the trust instrument, since such an organization is not a trust, but a partnership.¹

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

The fact that credit was not extended to the trust on the financial responsibility of a particular shareholder, or even that at the time credit was extended to the trust the creditor did not know that the particular shareholder had any connection with the trust, does not prevent the creditor from holding such shareholder personally liable for the debt, where the trust is regarded as a partnership.⁶

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

19. *Grcco v Hubbard*, 252 Mass 37, 147 NE 272.

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

Annotation: 156 ALR 105, 112.

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

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

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

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

Annotation: 156 ALR 105.

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

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

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

6. *Feldman v Scay* (Tex Civ App) 291 SW 350.

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

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

§ 35. Liability for torts.

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

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

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

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

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

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

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

12. See *TRUSTS* (1st ed § 492).

See *Liquid Carbonic Co. v Sullivan*, 103

Okla 78, 229 P 561, for example of a statute expressly providing that beneficiaries of an express trust shall not be liable for any act, omission, or liability of the trustees.

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

Annotation: 156 ALR 113.

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

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

15. *Piff v Berresheim*, 405 Ill 617, 92 NE 2d 113, wherein shareholders who authorized a trustee having full knowledge of the title to convey certain lands of the business trust, including two lots for which a purchaser had previously paid in full but which had never

§ 36. Nature and degree of control sufficient to impose liability.

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

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

been conveyed to him, were held liable to the purchaser for his damages as participants in the fraud upon the purchaser.

16. § 11, *supra*.

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

Annotation: 156 ALR 114.

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

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

The power of control was vested in the shareholders, so as to render them liable for the torts of the trust, where the trust instrument provided for annual meetings of the shareholders for the election of trustees, and

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

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

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

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

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

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

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

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

The mere reservation to the shareholders of a business trust of the power to amend the trust instrument does not, of itself, convert the organization into a partnership so as to render the shareholders liable for the debts⁹ or the torts of the trust.¹⁰ And the power to terminate the trust has been held not to give the shareholders such control over the affairs of the trust as will render them liable for its debts,¹¹ even in combination with the power to remove trustees,¹² or with other powers reserved to the shareholders.¹³ However, the power to amend the trust instrument or to terminate the trust, in addition to other powers

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

Annotation: 156 ALR 116.

4. *Levy v Nellis*, *supra*.

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

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

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

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

Annotation: 156 ALR 117.

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

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

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

And see 23 Columbia L Rev 423, 437.

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

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

reserved to the shareholders, has been held to render them liable as partners for the debts of the trust.¹⁴

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

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

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

In a jurisdiction following the doctrine that a business trust is, in legal contemplation, a partnership in the nature of a joint-stock company, notwithstanding that exclusive control is vested in the trustees, it has been held that a provision of the trust instrument purporting to exempt the shareholders from liability for the debts incurred by the trustees on behalf of the trust is invalid and ineffectual, where there is no compliance with a statute relating to the formation of limited partnerships, with respect to a creditor who dealt with the trustees with knowledge of the terms of the trust instruments but without expressly agreeing to look only to the assets of the trust.¹⁹

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

Annotation: 156 ALR 119.

15. *Annotation*: 156 ALR 119.

Practice Aids.—Trust instrument provisions as to character of organization, or negating partnership relation. 3 AM JUR LEGAL FORMS 3:1, 3:12, 3:111.

—Trust instrument provisions that shareholders shall not be personally liable for trust obligations. 3 AM JUR LEGAL FORMS 3:1, 3:110, 3:111.

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

Annotation: 156 ALR 120.

17. *Annotation*: 156 ALR 122.

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

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

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

Annotation: 156 ALR 123.

§ 38. — Effect of notice or lack of notice.

Where shareholders would otherwise be personally liable for the debts of the trust, it has been held, in the cases in which the question of notice has been considered, that a provision of the trust instrument purporting to exempt them from such liability does not relieve them of liability to creditors having no notice of such provision.²⁰ On the other hand, it is generally¹ held that persons dealing with the trustees or officers of a business trust with notice of a provision of the trust instrument purporting to exempt the shareholders from personal liability for any debt or liability incurred by the trustees, or on any contract made by them on behalf of the trust, cannot recover against the shareholders personally.² Thus, where the trust instrument contained provisions limiting the liability of the shareholders, they have been held not liable to an attorney who performed services for a business trust with knowledge of the restrictive provisions,³ to a person who was put on inquiry as to the nature of the organization and the relationship of the parties connected therewith,⁴ or on a contract made by the trustees with a person who was one of the organizers of the trust and who knew of the provisions of the trust agreement purporting to exempt the shareholders from personal liability.⁵ Likewise, one who dealt with a business trust with actual notice of provisions of the trust instrument purporting to exempt the shareholders from personal liability for the debts of the trust has been held to be estopped to maintain an action against such shareholders on a note executed by the trustees.⁶ However, where all of the shareholders were trustees, so that the trustees and the beneficiaries were the

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

Annotation: 156 ALR 120.

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

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

1. In Texas, it is held that mere notice on the part of a person dealing with a business trust of provisions of the trust instrument

purporting to exempt the shareholders from personal liability does not preclude him from recovering against shareholders, in the absence of an agreement on his part to that effect. *Thompson v Schmitt*, 115 Tex 53, 274 SW 554, followed *Victor Ref. Co. v City Nat. Bank*, 115 Tex 71, 274 SW 561; *Seasums v Citizens' Nat. Bank* (Tex Civ App) 72 SW2d 403. However, even in this jurisdiction the circumstances under which a creditor deals with the trustees, with notice of such a provision of the trust instrument, may give rise to an implied agreement that the shareholders shall not be liable. See *Dayle L. Smith Oil Co. v Continental Supply Co.* (Tex Civ App) 268 SW 489. **Annotation:** 156 ALR 126, 127.

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

Annotation: 156 ALR 124, 125.

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

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

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

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

same persons, constructive notice imputed to a creditor of the trust instrument purporting to exempt the shareholders and the trustees from personal liability and to bind only the trust estate for the obligations of the trust was held to be unavailing to exempt the shareholders-trustees from personal liability, in the absence of a contract to that effect.⁷

§ 39. — Sufficiency of notice.

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

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

§ 40. — Contractual limitations, recitals, and references.

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

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

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

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

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

11. § 16, *supra*.

12. *Farmers' State Bank & T. Co. v Gorman*

Home Refinery (Tex Com App) 3 SW2d 65; *Victor Ref. Co. v City Nat. Bank* (Tex Civ App) 263 SW 622, affd 115 Tex 71, 274 SW 561.

Annotation: 156 ALR 127, 128.

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

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

14. *Industrial Lumber Co. v Texas Pine Land Asso.* 31 Tex Civ App 375, 72 SW 875, wherein the court said: "The statute merely

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

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

D. RIGHTS AND LIABILITIES INTER SE

§ 41. Generally.

Where only the rights of shareholders and trustees among themselves are involved, the court will, as far as possible, give effect to the provisions of the trust instrument.¹⁸ As between the parties to the trust instrument, a provision therein exempting the shareholders from personal liability is valid and binding.¹⁹ Such a provision is binding upon the shareholders, who are charged with knowledge thereof,²⁰ and the same is true as between the shareholders and an officer¹ or trustee² of such a trust. The trustees cannot, for their own benefit

confers a power. It does not limit or destroy any common-law right. We are aware of no rule either of law or public policy which forbids the making of such a contract."

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

Annotation: 156 ALR 128.

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

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

Annotation: 156 ALR 129.

Shareholders are not liable on a note executed by the trustees, purporting to exempt them from liability and referring to a trust instrument containing a provision that the sharers should not be liable, where they have

no power of control. *Levy v Nellis*, 284 Ill App 228, 1 NE2d 251.

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

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

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

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

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

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

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

2. Since shareholders are bound by the pro-

or protection, assert the liability of shareholders, where such liability results from the failure of the trustees to perform their duty to insert in a contract made by them a provision exempting the shareholders from liability.³

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

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

§ 42. Contribution.

Where the shareholders of a business trust are personally liable for the debts of the trust, one of them who has been required to pay such a debt may enforce contribution from the other shareholders.¹⁰ The estate of a deceased shareholder has been held liable for contribution on account of a debt incurred and paid after his death.¹¹ It would appear, however, that the liability of shareholders to contribute is only for that proportion of the debt represented by their proportionate interests in the trust.¹² And where contribution is sought for a judgment paid by a shareholder in another state, it has been held

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

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

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

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

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

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

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

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

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

Annotation: 156 ALR 135.

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

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

that shareholders who were not parties to that action are not concluded thereby.¹³

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

V. TRUSTEES, OFFICERS, AND AGENTS

A. IN GENERAL

§ 43. Generally; eligibility.

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

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

§ 44. Status.¹

In the typical Massachusetts or business trust, title to the property is held by trustees, and the business and property of the concern are managed by them

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

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

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

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

Annotation: 156 ALR 137.

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

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

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

Practice Aids.—3 AM JUR LEGAL FORMS 3:1, 3:73.

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

In such a situation, the legal and equitable titles to the property of the trust would come together in the same persons which generally terminates a trust. See TRUSTS (1st ed § 88).

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

1. *Practice Aids.*—Provision of trust instrument as to title of trustees. 3 AM JUR LEGAL FORMS 3:4.

—Trust instrument provision negating partnership relation. 3 AM JUR LEGAL FORMS 3:1, 3:12.

—Denial that defendant is trustee of business trust. 20 AM JUR PL & PR FORMS 20:792.

for the benefit of the shareholders.² In making contracts for the trust estate, in conducting its business, and in holding and managing its property, the trustees act as principals and not as agents or representatives of the shareholders.³

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

§ 45. Designation or election; term of office.

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

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

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

§ 46. Compensation.

Instruments creating business trusts usually make provision for the compensation of the trustees,¹⁰ in which case the rights of the trustees with respect to

2. §§ 1, 3, *supra*; § 55, *infra*.

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

Annotation: 156 ALR 136.

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

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

Unlike a corporation director who, if he acts apart from the board, may function as an officer or agent of the corporation, a trustee of a business trust acts in the single capacity of principal in performing the usual

duties of a trustee. *Loring v United States* (DC Mass) 80 F Supp 781.

4. *Byrnes v Chase Nat. Bank*, 225 App Div 102, 232 NYS 224 aff'd 251 NY 551, 168 NE 423.

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

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

6. *Annotation*: 156 ALR 138.

Practice Aids.—Provisions of trust instrument as to number, election, and term of office of trustees. 3 AM JUR LEGAL FORMS 3:1.

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

8. *Lambach v Anderson*, *supra*.

9. *Lambach v Anderson*, *supra*.

10. *Practice Aids*.—3 AM JUR LEGAL FORMS 3:1, 3:27-3:31.

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

In the absence of a provision in the trust instrument fixing the compensation of the trustee of a business trust, he is entitled to reasonable compensation for his services,¹⁵ and it has been held that an agreement will be implied to pay him a reasonable compensation out of the trust funds for services rendered by him to the trust.¹⁶ What amounts to reasonable compensation depends, of course, upon all the circumstances,¹⁷ and the fact that trustees or managers are also beneficiaries does not affect their claim for services.¹⁸

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

§ 47. Right to reimbursement or indemnity.

The trust instrument may specifically provide as to the expenses and reimbursement of the trustees of a business trust.²⁰ And even in the absence of such a provision, the general principle of trusts, that a trustee is ordinarily

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

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

12. *Walker v Close*, 98 Fla 1103, 125 So 521, reh den 98 Fla 1125, 126 So 289. See *Beltz v Griggs*, 137 Kan 429, 20 P2d 510. **Annotation:** 156 ALR 141.

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

13. *Dunbar v Redfield*, supra.

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

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

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

A provision of the trust agreement requiring the beneficiaries to pay the costs, charges, and expenses in connection with the management of the business has been held to render them liable to the managers of the business for a reasonable compensation for their services,

although there was no specific provision for compensation to the managers. *Trust No. 5522 & Trust No. 5644, Bellehurst Syndicate v Commissioner of Internal Revenue (CA9)* 83 F2d 801 (California).

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

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

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

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

20. *Practice Aids*.—3 AM JUR LEGAL FORMS 3:1, 3:32, 3:33.

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

On the other hand, property of the trust estate cannot be used to reimburse trustees for losses or expenses incurred by them, unless they have exercised good faith and common prudence.⁵ And they are not entitled to contribution or indemnity from the shareholders for a liability incurred by the trustees in violation of the trust instrument.⁶ Thus, the right of a trustee to reimbursement or indemnity is lost where his personal liability resulted from his failure to insert, as required by the trust instrument, a provision exempting the shareholders and trustees from personal liability.⁷

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

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

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

1. See TRUSTS (1st ed § 514).

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

Annotation: 156 ALR 142.

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

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

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

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

7. *Downey Co. v 282 Beacon Street Trust*, 292 Mass 175, 197 NE 643 (coupled with failure to secure the concurrence of his co-trustee); *Mims v Stephens County-Ranger Oil*

Co. (Tex Civ App) 268 SW 1014; *Barnett v Cisco Bkg. Co.* (Tex Civ App) 253 SW 339, holding that trustees, as sureties on a note executed for a trust without stipulation against shareholders' liability, cannot assert primary liability of shareholders.

Annotation: 156 ALR 142.

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

Annotation: 156 ALR 139.

9. *Practice Aids.*—Trust instrument provisions as to removal and replacement of trustees. 3 AM JUR LEGAL FORMS 3:1, 3:69, 3:70.

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

Annotation: 156 ALR 140.

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

vent the provisions of the trust instrument governing the manner in which trustees may be removed.¹²

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

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

B. POWERS AND FUNCTIONING

1. IN GENERAL

§ 49. Generally.

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

The powers of trustees of a business trust are limited to those conferred by the trust instrument¹⁹ and those necessarily implied therefrom,²⁰ and in order

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

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

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

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

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

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

18. See *Rhode Island Hospital Trust Co.* [13 Am Jur 2d]—27

v Copeland, 39 RI 193, 98 A 273; *Reeves v Powell* (Tex Civ App) 267 SW 328.

Annotation: 156 ALR 144.

Practice Aids.—Provisions of trust instrument as to powers and functions of trustees. 3 AM JUR LEGAL FORMS 3:1, 3:44-3:79.

—Trust instrument provision as to sufficiency of trustees' notices to shareholders. 3 AM JUR LEGAL FORMS 3:106.

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

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

Practice Aids.—Trust instrument provisions as to implied powers. 3 AM JUR LEGAL FORMS 3:1, 3:47.

to bind the trust estate the trustees must act within the scope of the powers thus conferred.¹ A person dealing with the trustees of a business trust, knowing them to be such, is bound to ascertain the extent of their power,² and, having knowledge of their actual authority, cannot rely upon any apparent powers.³

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

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

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

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

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

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

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

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

5. See TRUSTS (1st ed § 296).

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

The trustees are not merely agents who act independently one of another. They constitute a board and they can act only as a unit in the disposition of any business of the trust which requires the exercise of judgment or discretion. *Gordon Campbell Petroleum Co. v Gordon Campbell-Kevin Syndicate*, 75 Mont 261, 242 P 540.

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

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

Practice Aids.—Trust instrument provisions as to meetings of trustees and manner of functioning. 3 AM JUR LEGAL FORMS 3:1, 3:34-3:36, 3:40.

9. See *Home Lumber Co. v Hopkins*, 107 Kan 153, 190 P 601, 10 ALR 379.

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

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

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

Annotation: 156 ALR 145.