Business Trusts

as Substitutes for

Business Corporations

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AS A SLIGHT TESTIMONIAL TO HIS
STERLING CHARACTER AND THE
ESTEEM IN WHICH I HOLD
HIS FRIENDSHIP

PREFACE.

Something more than a year ago it became necessary for me, in the discharge of my professional duties, to consider the proposed employment of the express trust as a vehicle of trade. Interest thus aroused has since led me to read as widely on the subject as opportunity permitted. I learned that the attention of lawyers generally was being directed to this subject. Accordingly when, recently, I accepted an invitation to address the Bar Association of Kansas City, no subject seemed to be more opportune for discussion—certainly none, appropriate for such an occasion, in which I personally felt a keener interest. The subjoined production was the result. There was no thought of publication in its preparation, but merely, within the necessarily restricted limits of such a paper, to select for discussion those phases of the subject which seemed both interesting and fundamental. Since its delivery, members of the Bar, whose judgment I value, have advised that it be published, and so numerous are the requests received for copies that I have consented to its publication. I have done this with some hesitation, for it is not, and in the nature of things could not have been, a comprehensive treatise. On the contrary, many of the important aspects of the subject were of necessity eliminated from consideration. Such, for example, as the duties of the trustees, their right of indemnity, their liability to the *cestuis,* action by and against the trustees, theory and extent of creditors' rights against the trustees and against the trust estate, inviolability of the trust fund, seeking direction of the Chancellor, etc. With this foreword of explanation I submit the pages that follow in the hope that they may be of interest and possibly of service to my brethren of the Bar.

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BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS

The Business Corporation

§ 1. **Its Rapid Growth:** The most remarkable fact of all commercial history is the business corporation. Remarkable not only because of the economic and social part it has played, but remarkable also because of the rapidity and magnitude of its growth. With approximate accuracy it may be said that the business corporation is the product of the past seventy years.

As late as 1775, so eminent an authority as Adam Smith wrote: "The only trades which it seems possible for a joint stock company to carry on successfully without an exclusive privilege are those of which all the operations are capable of being reduced to what is called a routine, or to such a uniformity of method as admits of little or no variation. Of this kind is, first, the banking trade; secondly, the trade of insurance from fire, and from sea risk and capture in time of war; thirdly, the trade of making and maintaining a navigable cut or canal; and, fourthly, the similar trade of bringing water for the supply of a great city."[1]

There is authoritative warrant for the statement that up to the year 1800 there were not to exceed one hundred private corporations in the entire United States, that one-half of these were in Massachusetts

[1] Wealth of Nations, Vol. 2, Book 5, Part 2, p. 242.

and that the enterprises carried on by them were banking, turnpike roads, toll bridges, canals, and, to a very limited extent, manufacturing.[2]

Giving attention to our own State of Missouri, it may be noted that during our territorial days but two private corporations were created and both of those were banks, namely: The Bank of St. Louis in 1813 and the Bank of Missouri in 1817. From Missouri's admission to the sisterhood of States in 1821, to the year 1850, while a number of academies, colleges and seminaries, turnpike road, insurance and railroad companies, and a few bridge and bank companies were incorporated, yet it is unlikely that more than fifty companies were granted charters which now would incorporate under the manufacturing and business act.

The first English text upon corporations, Kyd, was published in 1793 and dealt exclusively with municipal corporations. The first American text, that of Angel and Ames, appeared in 1831, and gave scant treatment to business corporations. Indeed, it may be said that corporate literature and the business corporation as it exists today virtually begin with the year 1850.

And yet in 1918 there were in the United States at least 350,000 business corporations with gross incomes of $79,500,000,000, net incomes of $10,730,000,000, paying to the Federal Government alone in income taxes for the year 1917, $2,142,000,000.[3]

§ 2. **Reasons for Delay in Development:** Without doubt their growth was retarded until this late date first because of the difficulty and expense attendant

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[2] Williston, Law of Business Corporations, 2 H. L. R. 105, 149.

[3] Statistics of Income, Treas. Dept. 1919.

upon the securing of corporate charters and, secondly, because the necessities of commerce were served with measurable adequacy by the ordinary partnership, and quasi-partnership,—the joint stock company.

In England only the Crown and the Parliament could grant corporate charters and not until 1862 was the English Company's act adopted,[4] called by Sir Francis Palmer, the "Magna Charter of Co-operative Enterprises." In our country it was necessary to obtain corporate charters by special acts of the legislatures. Excepting perhaps a half dozen states, we find no general incorporation acts till toward the middle of the last century.[5] In Missouri the first general corporation act for business companies was enacted in 1849,[6] and not until 1865 was the creation of corporations by special acts of the legislatures prohibited by constitutional provision.[7]

During the early part of the last century the field of commercial enterprise was held by the ordinary partnership practically alone. But, the increase in population, the constantly growing settlements by the pioneers of new territory, the discovery of vast natural resources, the multiplication and complexity of human needs and wants, the progress of inventions and particularly the advent of steam, proved that the partnership was an agency utterly inadequate to commercial necessities. It was inadequate chiefly because of the unlimited liability of its members, for this made it im-

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[4] 25 and 26 Vict. C. 89.

[5] First general incorporation acts for manufacturing companies were N. Y. 1811, Mass. 1836, Mich. and Conn. 1837, and Ind. 1838.

[6] Laws 1849, page 18; Laws 1864, page 20; R. S. 1865, Chapter 39, 367.

[7] Art. VIII, Sec. 4.

possible to mobilize necessary capital. The result was that corporations began to increase; and when the restraint that was imposed upon their formation was removed by the enactment of general corporation acts under which they might be readily organized at little expense, they quickly crowded the partnership from the field and started upon that career which is the outstanding feature of commercial history.

§ 3. **Accomplishments**: Neither has the rapidity of their growth exceeded the importance of their accomplishments, for, without forgetting, or in any degree minimizing or palliating, the gross frauds, the heavy oppressions, and the black iniquities that have been, and are today being, perpetrated under the corporate cloak, it must be conceded by all that the business corporation has been also of immeasurable benefit to mankind. It has played an important, if not an indispensable, part in the development and progress of our country and the world. It has afforded the means for experiments essential to the development of our arts and sciences. It has fostered our industries, cultivated our deserts, brought from their hiding places the stored-up treasures of nature, harnessed the very elements to the service of mankind, bridged our rivers, tunneled our mountains, constructed our railroads and, while linking our states in closer unity, has brought the nations of the earth together.

§ 4. **Reasons**: Without doubt this monopolization by the corporation of the field of commercial endeavor, has been due to the limited liability of the investor or stockholder, for it was this assurance that made it possible to mobilize capital in projected business enter-

prises. In this connection it is interesting to recall that we have come far away from the original conception of the chief value of the corporation. Since the municipal, the ecclesiastical, the educational and the charitable corporation preceded the regulated company and the joint-stock company, its immortality was emphasized as the chief and most valuable attribute of corporate existence. Indeed, as late as 1819, it would seem to be this characteristic that was chiefly emphasized by our great Chief Justice in his famous definition in the Dartmouth College case.[8] With the advent of private corporations, it was the right of association, governmental powers and trading privileges that were chiefly desired and that were granted. Though early decided that the stockholder was not personally liable for the debts of the corporation, yet the corporation, through leviations, could compel him to pay the sums assessed. Later this power was avoided by contract between the stockholder and the company; but until and unless it was so avoided, the creditor might enforce it in chancery through a kind of subrogation.[9] The artificial personality gradually came to be emphasized, and from that fiction was developed what proved to be the attribute of chief value, namely: the limited liability of the stockholder; for, the theory is that since the corporation is an artificial person entirely distinct from those who have formed it, its debts and obligations are those of this artificial person and not of its stockholders.

§ 5. **Growing Dissatisfaction:** And yet, though its growth has been marvelous and its accomplish-

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[8] 4 Wheat. 518.

[9] Salmon v. The Hamborough Co. (1671), 1 Ch. Cas. 204.

ments great, is there not now perceptible an increasing dissatisfaction with the corporation as a business agency? Can it be that the very fiction, viz.: impersonal, artificial entity distinct from the persons composing it, which has given such value to the corporate form, is now being laid hold of to cripple its usefulness? Why are business men, in increasing numbers, asking for another device, some other vehicle or agency of trade, that will serve the needs of commerce and be free from oppressive exactions?

§ 6. **Disadvantages:** That there are corporate disadvantages must be conceded. Prejudice is one of them. It is reflected daily in our courts, in the verdicts of juries, while our legislatures too frequently respond to it.

Again, the corporation being an artificial person, existing only in contemplation of law and by force of law, can have no legal existence beyond the boundaries of the sovereignty which created it. "It must dwell in the place of its creation and can not migrate to another sovereignty."[10] It is not a citizen within the meaning of Article 4, Section 2 of the Constitution of the United States, providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[11] It follows that it may do business in another state only by comity, and that the other state may prescribe such conditions as it will (not discriminatory) upon the right of the foreign corporation to transact business within its borders. The consequent cost and inconvenience are

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[10] Bank of Augusta v. Earl, 38 U. S. (13 Peters) 519.

[11] Paul v. Virginia, 8 Wall. 178.

harassing and burdensome to the corporation that transacts business in several states.

Constantly changing legislation and the necessarily attendant uncertainty are additional impediments, for there is no assurance whatever that the law of today with respect to corporate rights will remain as the law of tomorrow.

Inquisatorial legislation and the state's visitorial powers, finding expression in the necessity of making multitudinous reports, and of submitting to examinations by state authorities, are also disagreeable features of corporate existence.

Above all, perhaps, taxation presents the most formidable objection to corporate life, for it seems that we have entered upon a new economic era, in which revenue in large part is to be collected from the public indirectly through corporate levies.

§ 7. **Is There a Substitute:** Is there any arrangement men may make, any form of agreement they may enter into under which they may serve the requirements of commerce and trade as satisfactorily as does the corporation? The ordinary partnership will not answer. Its necessarily limited resources and the unlimited liability of its members have already proven this. The limited partnership is no more satisfactory since it is rendered impracticable by statutory requirements. Neither will we find our answer in the quasi-partnership,—the joint-stock company, for, while it affords advantages not found in the ordinary partnership, still it contains the very element of the ordinary partnership that causes its rejection, namely: the unlimited liability of its stockholders.

The vehicle for which we seek, therefore, must, as its essential characteristic, afford limited liability to the investor; for, unless it is possible for men to contribute to a business enterprise without thereby endangering their entire private fortunes, it will be futile to attempt the mobilization of capital in amounts sufficient to transact any considerable part of the business of the country.

The Business Trust

§ 8. **Origin and Development:** Whether derived from the Roman *fidei-commissa,*[12] or, as Mr. Justice Holmes concludes, from the German law,[14] all students of the law will agree with Professor Maitland that "Of all the exploits of equity the largest and most important is the invention and development of the Trust. It is an institute of great elasticity and generality; as elastic, as general as contract."[15] A remarkable tribute this to an institution the parents of which were Fraud and Fear, and whose nurse was a Court of Conscience;[16] for it should be remembered that in its youthful days the trust or *use,* if not devised, was still employed by the debtor to avoid his creditor, by the freeholder to be relieved from the feudal burdens he owed his lord, and by the ecclessiastic to avoid the mortmain statutes.[17] It was also laid hold of during the wars of York and Lancaster to prevent forfeitures of estates for treason.[18] Later, with the increase in property, the multiplication of investments and the increasing complexity in financial affairs, it reached its maturity and was used in the making of marriage and family settlements and settlements upon charities. It is of the express

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12 Spence Equitable Juris, Vol. 1, p. 435.

14 Early English Equity, 1 L. Quarterly Rev. 162.

15 Lectures on Equity, p. 23.

16 Sir Robert Atkyns in argument, Attorney General v. Sands, Hard. 491.

17 Lewin, Trusts (12th Ed.) 1.

18 Perry, Trusts (6th Ed.), Sec. 3.

trust so employed we are accustomed to think, and with which we are the most familiar.

§ 9. **The Proposed Business Trust:** Now it is urged by members of our profession who, to a serious consideration of the subject, have brought wide research and a wealth of learning, that this 'institute of great elasticity and generality, as elastic, as general as contract,' may be utilized in the field of commerce and trade as an effective substitute for the ordinary private business corporation.[19] Its use, as they suggest, closely resembles in form the incorporated company. It is created by the execution of a declaration of trust, usually by three or more trustees, to whom there has been, or will presently be, transferred or paid the property or money to constitute the *corpus* of the trust. It recites: (1) the property to constitute the *corpus* of the trust and that the *corpus* shall be by the trustees managed and disposed of for the benefit of the holders from time to time of the transferable certificates of shares, or beneficial interest, issued and to be issued by the trustee thereunder; (2) if desired, the number of shares or of beneficial interests that may be issued; their character, whether common or preferred, or both (for both may be issued); and the nominal or par value if they are to have an expressed par value; (3) the business to be conducted by the trustees and an elaborate recitation of the pow-

[19] S. R. Wrightington, of the Boston Bar, see his "Unincorporated Associations;" John H. Sears, formerly of the St. Louis and now of the New York Bar, see his "Trust Estates As Business Companies;" Alfred D. Chandler, of the Boston Bar, see his "Express Trusts Under the Common Law;" and Prof. H. L. Wilgus, see his "Corporations and Express Trusts as Business Organizations," 13 Mich. L. Rev. 70, 205.

ers they may exercise in its prosecution and in the management of the *corpus;* (4) usually a clause providing that creditors shall look only to the funds and property of the trust for payment, and requiring the trustees to incorporate in their contracts a provision to this effect; (5) that the shareholders shall have no title to the trust property but only the right at the termination of the trust to share pro rata in the proceeds of the sale of the property thereof, and meanwhile to income, which shall be distributed when and as provided therein; and that the death of a shareholder shall not operate to terminate the trust or entitle his legal representative to an accounting; (6) generally a name and provision for the adoption of a seal; (7) the trustees' compensation and the manner and time of choosing trustees and filling vacancies; (8) the extreme limit of time during which the trust may continue, usually not more than twenty-one years after the death of the last surviving original trustee. Such other provisions as appear appropriate and desirable may, of course, be added. Thus the *corpus* of the trust corresponds to the capital of the incorporated company, the trustees to the Board of Directors, the beneficiaries or *cestuis que trust* to the stockholders, and the beneficial interests or shares to the corporation's shares of stock.

§ 10. **Its Legality Considered:** We purpose to consider this proposal solely from the standpoint of the investor.

The comparative novelty of this employment of the express trust, at once excites inquiry as to its legality. Equity has long since established the principle that all persons *sui juris* have the same power to create trusts

that they have to make a disposition of their property; "that every one competent to enter into a contract, or to make a will, or to deal with the legal title to property, may make such disposition of it as he pleases; and he may annex such conditions and limitations to the enjoyment of it as he sees fit; and he may vest it in trustees for the purpose of carrying out his intention."[20] Or, as said by Lewin:[21] "It may be laid down as a general rule that whoever is competent to deal with the legal estate may, if he so disposes, vest it in a trustee for the purpose of executing the settlor's intentions." While not customary, it has not been unusual for a testator in his will to designate that a trustee therein appointed shall, for a limited time, carry on the business of a partnership of which testator was a member, and it must be conceded that no legal objection has been found to this use of the trust.[22] Again, since a settlor may convey property to a trustee in trust for himself and others[23] there would seem to be no legal objection to the business trust upon the ground that the beneficiaries thereof are themselves the settlors. It has been judicially determined by two notable decisions, one in England and one in North Dakota, that a business trust created by a debtor with himself and his creditors as *cestuis que trust* is a valid arrangement which equity will recognize and enforce.[24]

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[20] Perry, Trusts, 6th Ed., Sec. 13.

[21] Trusts, 12th Ed., Chap. 3, Sec. 1.

[22] Burwell v. Mandeville's Executor, 43 U. S. (2 How.) 506; Smith v. Ayer, 101 U. S. 320; *Ex parte* Richardson, 3 Maddocks, Ch. 79.

[23] *In re* Est. of Soulard, 141 Mo. 642; McIlvaine v. Smith, 42 Mo. 45; Lampert v. Haydel, 96 Mo. 439.

[24] Cox v. Hickman, 9 C. B. (N. C.) 47; Wells-Stone Mercantile Co. v. Grover, 7 N. Dak. 460.

As long ago as 1880, in Smith v. Anderson,[25] which is without doubt the leading English case upon this subject, the court of Chancery gave judicial recognition and approval to a trust of the character we are now discussing. For at least the past thirty-five years, in the State of Massachusetts, the business trust has been a recognized institution of great utility.[26] In at least three decisions by the Supreme Court of the United States, presently to be noticed, it has received judicial recognition. Likewise in other cases here and there (only a few it is true) the courts have approved them.

Therefore, it may be fairly concluded that weapons of attack have not as yet been used to destroy the legality of the business trust. However, every innovation to serve commercial needs has met with opposition. Indeed, this was true of the corporation, and it is reasonable to assume that the express trust as an agency of trade, if it shall be increasingly used, will be subjected to the closest legal scrutiny and that objections to it not yet considered will be found.

Recently the Attorney General of the State of Ohio,

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[25] 15 Ch. D. 247; see also Crowther v. Thorley, 50 L. T. 43; *In re* Siddall, 54 L. J. Ch. 682; *In re* Thomas, 54 L. J. Q. B. 336; *In re* Faure Electric Acc. Co., 40 Ch. Div. 141, 151, 152.

[26] Hoadley v. County Comrs., 105 Mass. 519; Whitman v. Porter, 107 Mass. 522; Shoe & Leather Co. v. Dix, 123 Mass. 148; Gleason v. McKay, 134 Mass. 419; Phillips v. Blatchord, 137 Mass. 519; Ricker v. American Loan and Trust Company, 140 Mass. 346; Mayo v. Moritz, 151 Mass. 481; Hussey v. Arnold, 185 Mass. 202; Williams v. Boston, 208 Mass. 497; Williams v. Johnson, 208 Mass. 544; Williams v. Milton, 215 Mass. 1; Frost v. Thompson, 219 Mass. 361; Rand v. Farquhar, 226 Mass. 91; Dana v. Treas. and Recr. Genl., 227 Mass. 562; Cunningham v. Bright, 228 Mass. 385; Priestley v. Treas. and R. Genl., 230 Mass. 452; Kimball v. Whitney (Mass.), 123 N. E. 665; Tax Comrs. (Mass.) Rep. House Doc. No. 1646; also House Doc. No. 1788.

answering an inquiry from the Commissioner of Securities as to whether a trust, seemingly of the character we are considering, was valid, rendered an opinion holding that it was not, because, in his judgment, it had the appearance of a corporation, its mode of conducting business was such as was calculated to impress the general public with the belief that it was a corporation, and its acts and mode of organization and control were such as appertained to corporations, or were done after the manner of corporations. Therefore, he held it was violative of a statute of Ohio authorizing an action in *quo warranto* to be brought "against an association of persons who act as a corporation within this State without being legally incorporated."[27]

This suggests, first, whether the state may, by constitutional statutory provision, forbid this proposed use of the trust, and, second, the further inquiry whether, in the absence of statute, *quo warranto* would lie for assuming or usurping the privileges, or the franchise, of an incorporation.

§ 11. **May the State Forbid It:** The question is not whether the state may constitutionally abolish the express trust in the interest of the public welfare, but whether it may prevent such use of the trust as we are considering. The constitutionality of such preventive legislation is a question, the adequate consideration of which this occasion does not permit. Suffice it to observe that such legislation could find warrant only in the police power; that there is a limit beyond which that power may not be exercised; that if a business, or the manner in which a business is conducted, is in-

[27] Opinion No. 575, dated Aug. 19, 1919.

jurious to the community it may not shield itself behind the constitutional guaranty of life or contract; that if a business, or the manner in which it is conducted, is not injurious to the community, these constitutional bulwarks render it impervious to legislative attack; and that whether considerations of the public advantage require the suppression of a trade, avocation or business, or the means by which, or the manner in which it is conducted, can not be decided by mere legislative fiat, but remains for final determination by the court under the facts as they actually exist in the light of recognized legal principles and constitutional rights.

§ 12. **Will Quo Warranto Lie:** Concerning the second inquiry suggested, namely: Whether, in the absence of statute, *quo warranto* would lie for assuming or usurping the privileges or the franchise of a corporation, it is submitted that it should not.

a. *For Usurping the Privileges of a Corporation*: The privileges exercised by the business trust are those which are merely *accessory* as distinguished from *essential* attributes or privileges of the corporation.[28] It was formerly thought that the privilege of having transferable shares could be had only by charter from the Crown or by act of Parliament, and that pretending to be possessed of this privilege was pretending to act as a corporation, and that, therefore, it was illegal at common law to attempt to create a body not having the protection of the King's charter, the shares of which might be assigned without any control or restriction whatsoever. This view has been long since

[28] Warner v. Beers, 23 Wend. 103, 190.

exploded and would be now dismissed with that statement except for its historic interest and relation to the subject under discussion, and that even to this day it is an impression widely prevailing among the laity.

The joint-stock company, that is an unincorporated company with numerous members or partners holding transferable shares, was recognized as a valuable instrument of commerce as early as the last decade of the seventeenth century. While such company was a partnership in that unlimited liability for its obligations rested upon its members or shareholders, still it differed from the ordinary partnership in the multiplicity of the members or partners, the absence of the principle *delectus personae* in consequence of the transferability of shares or interests, and in the fact that it was not dissolved by the death of a member. While it was useful for the mobilization of credit, its very existence encouraged wild speculation and became the means of perpetrating gross frauds. Many of these companies also assumed to operate under abandoned corporate charters whose powers were utterly foreign to the purpose of the new organization. England's tremendously expanding commerce following the treaty of Utrecht in 1713 found these joint stock companies rapidly increasing; and with their increase the public was seized with a mania for stock gambling and speculation. They were organized for the promotion of the most chimerical and whimsical schemes. For example, one company was formed "for breeding silk worms in Chelsea Park;" another "for importing a number of large jackasses from Spain in order to propogate a larger kind of mule in England;" another "for making salt water fresh;"

while another project was thus advertised in the newspapers: "For subscribing two million to a certain promising or profitable design which will hereafter be promulgated."[29] An authoritative historian refers to the year 1720 as "a year remarkable beyond any other which can be pitched upon by historians for extraordinary and romantic projects, proposals and undertakings, both national and private."[30] He further records: "Any impudent imposter, while the delirium was at its greatest height, need only to hire a room at some coffee house, or some other house near that alley (exchange alley) for a few hours and open a subscription book for somewhat relative to commerce, manufacture, plantations or of some supposed invention, either newly hatched out of his own brain, or else stolen from any of the abortive projects of which we have given an account in former reigns, having first advertised it in the newspapers the preceding day, and he might in a few hours find subscriptions for one or two millions (in some cases more) of imaginary stock. . . . Among these many bubbles, there were some so bareface and palpably gross as to not have so much as the shadow of anything like feasibility."[31] Accordingly, that same year (1720) in order to put an end to such companies and the feverish speculation that was proving so harmful to the nation, Parliament passed that famous act known as the "Bubble Act."[32] The act in terms seemed to make it an offense for any except an incorporated company to raise transferable shares of stock, and at first it was so construed, the decisions seemingly going

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29 Anderson's Hist. of Com., V. 3, p. 103.
30 Anderson's Hist. of Com., V. 3, p. 91.
31 V. 3, p. 102.
32 6 George I, C. 18, Sec. 18.

to the extent of holding that regardless of the act it was illegal at common law for any unincorporated society to raise transferable shares.[33] Finally, however, more than a century after the act was passed, and, indeed, after it had been expressly repealed,[34] it was definitely decided by the English courts (1) that the act was directed at the raising of transferable shares only in those unincorporated companies whose purposes were mischievous and tended to the common grievance, and (2) that it was not an offense at common law for an unincorporated company to have and issue transferable shares.[35] Therefore, as said by Judge Lindley:[36] "The legality at common law of such companies may, therefore, be considered as finally established." It further seems that this ground of illegality was urged chiefly because of the rule of pleading established by the courts requiring that all partners, however numerous, must be made parties defendant. The shareholders of these unincorporated companies being partners in contemplation of law, and the judges finding it necessary to adhere to this rule of pleading considered such companies mischievous and illegal.[37]

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[33] Vansandan v. Moore, 8 East. 516; Kinder v. Taylor, not reported but referred to and quoted in part by Collyer, Law of Partnership, 6th Ed.; Ellison v. Rignold (1821), 2 Jac. and Walk. 503; Josephs v. Pebrer (1825), 3 Barn. and Cres. 639; Duvergier v. Fellows (1828), 5 Bing. 248; affd. 10 B. and C. 1826; Blundell v. Winsor (1837), 8 Sim. 601.

[34] In 1825, by 6 George 4, C. 91.

[35] King v. Webb (1811), 14 East. 506; Walburn v. Ingelby (1832), 1 Mylne and K. 61; Garrard v. Hardey (1843), 5 Mann. and Gr. l. c. 257; Harrison v. Heathorn (1846), 6 Mann. and Gr. 81; *Re* Mexican & So. Am. Co. (1859), 27 Beav. 474, 4 DeG. and J. 320.

[36] Law of Companies, 5th Ed. Chap. 4, p. 133.

[37] Lindley, Law of Companies, 5th Ed., p. 134.

As it was both difficult and costly to obtain a corporate charter and the Bubble Act stopped the development of the joint stock society, enterprise languished and "for upwards of a century industry was deprived of a certain amount of capital which would otherwise have been available."[38]

Therefore, it may be taken as firmly established that the privilege of raising and issuing transferable shares is a common law right and not a privilege peculiar to the corporation. The fact that the exercise of this right by the quasi-partnership or joint-stock company is in derogation of the principle *delectus personae,* and makes it difficult for the purposes of suit to identify the partners, lends an emphasis to the objection to its exercise by such companies which does not obtain with the trust. In the case of the pure trust, because of the absence of personal liability of the *cestuis que trust,* the public is indifferent to the changing personnel of the beneficiaries. This is a matter of important consideration with the business trust, in view of the requirement of equity that the beneficiaries of a trust be identified. Since, in the business trust, with changing beneficiaries the shares or certificates of beneficial interest furnish the indicia of identification, their legality is, of course, essential.

In this connection, it should be noted that as yet there has been no satisfactory determination of the exact nature of the *cestuis'* interests in a business trust, that is, whether they are mere *choses in action,* or equitable interests, estates or titles in the *corpus.* Upon principle it would seem that they should be regarded not as *jura in rem,* but *jura in personam,* mere *choses*

[38] Scott, Const. and Finance of English, Scottish and Irish Joint Stock Cos., V. 1, p. 438.

in action.[39] Nevertheless, since equitable interests are commonly regarded not as mere *choses in action* but as interests in the *corpus,* when so regarded their character will be determined by the character of the *corpus,* being considered as personalty or realty as the *corpus* is personalty or realty. A recent decision contains a dictum that where the property of the trust is real property "the provision for assignability of shares without complying with the formalities necessary for a conveyance of real estate does not make them personal property. They represent equitable interests in the *corpus* and if the *corpus* is real estate it would seem that the transferability would depend upon the law governing the transfer of interests in real estate in the place where the real estate was situated, in the absence of legislative authority making special provision for their transfer."[40] If the capital or *corpus* of the trust consists solely of realty and the trustees are directed to convert it into cash at the termination of the trust, then no equitable conversion will be deemed to have occurred and the property remains real property. If the *corpus* consists of both personal and real property and the trustees are directed to convert at the termination of the trust, then, under some cases, an equitable conversion will be deemed to have taken place at the inception of the trust and the entire fund will be considered personalty from that time forward.[41] To avoid any possibility that the shareholders shall be embarrassed in their right to transfer their interests,

[39] Maitland, Equity, p. 112; Langdell (1877), Summary of Equity Pleading, 90.

[40] Bartlett v. Gill, 221 Fed. 476.

[41] Dana v. Treasurer and Receiver General, 227 Mass. 562; Priestley v. Treasurer and Receiver General, 230 Mass. 452; Bartlett v. Gill, *supra.*

whatever the nature of these interests may be, by mere assignment of their certificates, it is advisable that the declaration of trust contain a peremptory direction to the trustees to convert the property, but allowing such conversion to be postponed in their discretion. The *corpus,* though consisting of real property alone, will then unquestionably be considered as having been converted from the beginning and the interests of the beneficiaries would be regarded, if not mere *choses in action,* then as interests in personal property and hence personalty. This consideration is also of importance in connection with questions of inheritance and other taxes that may arise.

We conclude, therefore, that the business trust does not usurp the privileges of the corporation.

b. *For Usurping the Franchise of a Corporation*: Neither can it be said to usurp the franchise of a corporation. As well said by the Missouri Springfield Court of Appeals: "The corporate franchise is *the right to exist as an entity* for the purpose of doing things which are permitted under the law authorizing the incorporation. The things which the corporation is authorized to do are its *powers* as distinguished from its *franchise,* that is its right to exist as a corporation."[42] As the franchise, the distinguishing feature of the corporation, is the artificial personality distinct from the individuals composing it, there can be no usurpation of corporate function unless there be an assumption of such distinguishing personality. To quote Judge Lindley again:[43] "What distinguishes corporations from

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[42] State on Inf. v. Business Men's Athletic Club, 163 S. W. 901, l. c. 907.

[43] Law of Companies, 5th Ed., p. 134.

other bodies is their independent personality; and no society which does not arrogate to itself this character can be fairly said to assume to act as a corporation."[44]

c. *Constitutional Objection*: Another objection which reasonably may be expected to be raised is this: Our (Missouri) State Constitution, Sec. II, Art. 12, provides: "The term 'corporation' as used in this article shall be construed to include all joint-stock companies or associations having any powers or privileges not possessed by individuals or partnerships." The same definition appears as the first section of our laws relating generally to corporations.[45] A great number of the states have the same or substantially the same constitutional provision. It may be urged, therefore, that the business trust is a corporation within the meaning of this constitutional definition, and that, not having been incorporated in the manner prescribed by law, it should not be recognized as a lawful institution and may be dissolved by *quo warranto*.

This objection, though not free from difficulty, should not prevail. If the arrangement proposed is a pure trust and avoids associate powers among the beneficiaries it certainly cannot be considered to be a "joint-stock company" or an "association," whether the word "association" is to be qualified by "joint-stock" or not.[46] Otherwise it might be unsafe to constitute any trust with more than one trustee and one beneficiary, particularly if intended that the trustees should conduct or transact any business. Again, does not the constitutional provision mean joint-stock com-

[44] See also Theodore W. Dwight, "The Legalty of Trusts," Pol. S. Quar., V. 3, p. 610.

[45] R. S. Mo. 1899, Sec. 2963.

[46] See opinion of James, L. J., in Smith v. Anderson.

panies and associations that have and exercise under grant of the sovereign, powers and privileges not possessed by individuals or partnerships? Furthermore, properly to interpret this section requires that it be read in conjunction with Section 2 of the same article, providing that "no corporation after the adoption of this constitution shall be created by special laws." When it is remembered that these sections first appeared in the constitution of 1865, and that their purpose was to put an end to the practice of granting corporate charters by special acts of the legislature, it seems manifest that the intention was to define "corporation" and provide that no such thing thereafter could be created by special laws. Hence, even if the business trust is to be considered as a "joint-stock company" or "association," with powers and privileges not possessed by individuals or partnerships, it could reasonably be urged that the only effect of the constitutional provisions referred to is to preclude their establishment by special laws. Again, so far from rendering invalid such stock companies and associations our courts have construed this constitutional and statutory definition to be recognition of them, entitling them to sue and be sued "as entities" in the courts of our state, and recent statutory amendment so regards them.[47] These views find support in a very carefully considered and exhaustive opinion by the Supreme Court of Idaho,[48] though perhaps they are at variance, in part at least, with a recent decision of the Supreme Court of Kansas.[49]

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[47] Wientchter v. Miller (Sup. Ct. Mo.), 208 S. W. 38; Williams v. U. S. Express Co., 195 Mo. App. 362; Acts Mo., 1915, p. 225.

[48] Spottswood v. Morris, 12 Idaho 360, 6 L. R. A. (N. S.) 665.

[49] The Home Lumber Company, *et al*, v. Hopkins, Attorney General, *et al*, filed Feb. 7, 1920.

§ 13. **Does It Afford Limited Liability:** Assuming therefore, the legality of the business trust, the all important question arises whether it possesses that attribute which is indispensable if it is to serve as a substitute for the business corporation, namely: limited liability of the investors or shareholders.

First. *As to the Cestuis Que Trust or Shareholders*: The law is firmly settled that the *cestui que trust* is not personally liable for the obligations incurred by the trustee in the management of the trust estate. This, for the reason that the trustee has no authority to bind *ex directo* the *cestui que trust.* The trustee is not an agent but, upon the contrary, he himself is the principal. He is the owner (in trust it is true) of the property, and the business he transacts is his business, even though another is to receive the benefits or profits therefrom. "A trustee is a man who is the owner of the property and deals with it as principal, as owner and as master, subject only to an equitable obligation to account to persons to whom he stands in the relation of trustee and who are the *cestuis que trust.*"[50] Since, in relation to the property and the business in which it is employed, he stands as proprietor, as principal, as master, upon no recognized principle of law can the beneficiary be held for his obligations with respect to that property and that business. Therefore, in the few cases that have arisen in which creditors of trustees in business trusts have undertaken to hold the shareholders liable they have failed.[51]

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[50] Smith v. Anderson, *supra.*

[51] Cox v. Hickman, 8 H. L. C. 268; Wells-Stone Mercantile Co. v. Grover, 7 N. Dak. 406; Mayo v. Moritz, 151 Mass. 481; Rhode Island Hospital Trust Co. v. Copeland, 39 R. I. 193; Johnson v. Lewis, 6 Fed. 27.

If the declaration of trust confers absolute and uncontrolled power upon the trustees with respect to the management of the property given them and the beneficiaries have only the rights that are implied because they are fundamental to the trust relation, viz: to call upon the trustees to account, to have them removed for misconduct or neglect, to receive the income while the trust lasts, and their share of the *corpus* or of the conversion thereof upon its termination, then plainly the arrangement is a pure trust and the shareholders are not liable to creditors. It transpires, however, that sometimes a declaration of trust has been so drawn that it is uncertain whether it constitutes in truth a trust. This arises from the fact that the provisions thereof have given certain rights to the beneficiaries in addition to and beyond those fundamentally and necessarily adherent to the *cestui que trust.* For example, the right to hold meetings and fill vacancies among the trustees; to elect the trustees periodically; to remove trustees and choose successors; to initiate and adopt and to consent to amendments to the trust agreement; to direct or agree to a termination of the trust; and to give directions to the trustees.

In any of such cases, it is submitted that the inquiry should be, who are the owners of the property and of the business in which it is employed? If the trustees, they are the principals, the masters, and the arrangement is a strict trust; if the shareholders, they are the principals, the masters, and the trustees, so called, are mere agents and a strict trust does not exist. If the shareholders are the principals and the trustees their agents, then it would follow of necessity that the shareholders would be personally liable for the conduct of their agents and that too whether they (shareholders)

constitute a partnership or not. At least, this would be true in the absence of contract or estoppel.

Now to determine whether the trustees are the owners of the property and of the business in which it is employed, *the intention of the parties as expressed in the trust instrument should control.* That is, the legal intention—the intention which the law will impute to them from what they have written. If the instrument is in trust form and expressly or impliedly indicates that it is not the intention that the trustees shall have authority to bind the shareholders personally, and reserves to the shareholders only those rights which are consonant with the relation of trustee and *cestui que trust,* then a trust has been established, even though those rights may also be such as pertain to other relations. For example, a principal may discharge his agent and employ another, and so may a partnership and joint stock company; but so may the settlor of a trust empower the *cestui que trust* to remove the trustee and appoint a successor.[52] The principal may impose upon his agent new powers and duties, and so may a partnership and joint-stock company; but the creator of a trust may likewise give the beneficiaries the right to annul uses and appoint new uses in place thereof.[53] The principal, the partnership and the joint-stock company, having an agent to sell property, may make his right to sell dependent upon the employer's acquiescence first obtained, and so may the settlor of a trust provide that the trustee, before disposing of the property, shall first obtain the consent of the *cestui que*

[52] May v. May, 167 U. S. 310; March v. Romare, 116 Fed. 355; Foster v. Goree, 4 Ala. 440; Perry on Trusts (6th Ed.), Sec. 287.

[53] 28 Am. and Eng. Encyc. of Law, 2d Ed., p. 1105, and cases there cited.

trust.[54] Why may not association, which is essential to the partnership, be also enjoyed by *cestuis que trust* and, indeed, be provided for by the trust instrument. The possession by the *cestuis que trust* of these rights, in addition to those already mentioned as being rights which they impliedly have by virtue of the trust relation, should by no means *of itself* deprive the trustees of their ownership of the property and of the business in which it is directed to be employed. The beneficiaries may have these additional rights and the trustees still be the owners of the property and of the business, *if that is what was intended by the parties.*

In Williams v. Milton, 215 Mass. 1, Judge Loring undertook to establish a test by which to determine whether a strict trust has been created. He says that this depends upon (a) the association provided for among the *cestuis,* and (b) the nature and extent of the rights reserved to them; that if they are to associate through meetings and have rights sufficient in extent to make them the masters over the trustees, then the arrangement is not a trust, but is a partnership. But the trouble with this test is that it does not enable us to know just what association and how much power make *cestuis* partners. In this very case the shareholders had the right (a) to consent to an alteration or amendment of the trust instrument, and (b) to a termination of the trust before the time fixed in the deed. It was held that these were not rights sufficient in extent to convert the trustees into agents, and thereby the arrangement into a partnership, but that the trustees still remained the "masters of the trust property."

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[54] Hamilton v. N. Y. Stock Ex., 20 Hun. 88; Gindrat v. Montgomery G. L. Co., 82 Ala. 596; Loring v. Salisbury Mills, 125 Mass. 138.

On the other hand, the same opinion indicates that should a trust instrument reserve to the beneficial owners the right to elect the trustees and their officers annually,[55] or the right to hold meetings, remove trustees, give instructions to trustees, alter or amend the declaration of trust and direct the trustees to terminate the trust,[56] the so-called trustees would be considered as mere agents, the certificate owners principals and the arrangement a partnership. But, says this same opinion, the mere right of the shareholders to have meetings and to amend the declaration of trust by conferring additional powers upon the trustees will not make them partners.[57]

The inconelusiveness and unsatisfactory character of the Williams v. Milton test is further emphasized by cases in Rhode Island and Kansas since decided.[58] In the former, the common shareholders had the right to remove a trustee and appoint a new one in his stead, and meetings of the shareholders were provided for at which they might amend the declaration of trust "with the consent of the trustees" and terminate the trust at any time. And yet the arrangement was held to be a strict trust and these rights in the *cestuis* insufficient to constitute a partnership. In the Kansas case referred to, the trust instrument made provision for meetings of the shareholders and the election by them of the trustees annually, and this was held not to be

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[55] Whitman v. Porter, 107 Mass. 522.

[56] Williams v. Boston, 208 Mass. 97.

[57] Williams v. Johnson, 208 Mass. 544; in this connection see also, *In re* The Associated Trust, 222 Fed. 1012; Connally v. Lyons, 82 Tex. 664, and Frost v. Thompson, 219 Mass. 360.

[58] Rhode Island Hospital Trust Co. v. Copeland, 39 R. I. 193; Home Lumber Co., *et al.* v. Hopkins, Attorney General, *et al.*, filed Feb. 7, 1920.

control of sufficient "extent," to deprive the arrangement of the character of a "true trust." Under the aforesaid test laid down in Williams v. Milton, as applied in later Massachusetts cases,[59] the trust instruments under consideration in both the Rhode Island and Kansas cases might reasonably be held to constitute partnerships.

Again, if power to control the trustees is *alone* to be absolutely decisive, then what shall we say when the *cestuis* have the right to be trustees and, pursuant to such right, *cestuis,* owning a majority, or perhaps ninety or ninety-five per cent of the beneficial shares, constitute the Board of Trustees?

Williams v. Milton is fairly subject to criticism because (1) it assumes there can be no middle ground between the trust and the partnership and that if there is no trust there must be a partnership. This we are unwilling to concede. (2) It assumes that if there is a partnership there can be no trust. On principle this should not be so, particularly if the *corpus* is personal property. Why may not a partnership itself be the *cestui que trust?* Two of the three judges in Smith v. Anderson clearly held that an "association" might be the beneficiary of an express trust. (3) And, above all, it makes the question more complex by giving insufficient consideration to the intention of the parties and by approaching it from the field of partnership and examining it in the light of the law of partnership seeing if, perchance, characteristics of that relation may not be found; whereas it should be approached from the field of the express trust, remembering that the expressed

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[59] Dana v. Treasurer and Receiver General, 227 Mass. 562; Priestley v. Treasurer and Receiver General, 230 Mass. 452.

intention of the parties must control and having in mind the principles and rules of equity concerning the trust relation.

Therefore, we urge that though under the trust instrument the *cestuis* have rights in addition to those necessarily adhering to the trust relation, even though such additional rights may pertain to other relations such as principal and agent, partnership and joint-stock company, nevertheless, if they are also rights which under established principles of equity, a *cestui* may enjoy, *and the instrument discloses otherwise that a trust was intended,* then effect should be given the intention of the parties and the trustees be held to be the owners of the property and of the business—the principals, the masters. "It is the intention of the party that creates and governs uses and trusts."[60]

Until more general consideration shall have been given to this question by the courts, and it can be said that there is a preponderance of authority, the only *absolutely* safe course to pursue in drafting the trust instrument, is to see to it that the shareholders are not given therein associate relation or any rights beyond those which the law implies and affixes to the *cestui que trust.*

It must not be concluded, however, that, if the declaration does not create a strict trust, it of *necessity* follows that the shareholders are liable as partners, or otherwise, for the conduct of the so-called trustees. Even in such circumstances, if the declaration provides against liability upon the part of the *cestuis que trust,* subjects the trust estate to the discharge of all obligations, requires creditors to look solely to the funds of the estate for payment and the trustees to so contract,

[60] Halè, C. B. in Atty. Gen. v. Sands, Hard. l. c. 494.

the creditor may, by contract, be required to look solely to the trust property for reimbursement.[61]

Second. *As to the Trustees—Who May Be and Their Liability*: Here again the established principles of equity control. Speaking generally, any whom the settlors or creators of the trust desire, may be selected to be the trustees. *Cestuis que trust* are not disqualified from being also trustees, for, while the rule is that, if the equitable and the legal estates meet in one and the same person, the equitable estate merges into the legal estate, thereby extinguishing the trust or confidence, yet both estates must be commensurate with each other, otherwise there can be no merger. Therefore, there should be no legal objection to the trustees being *cestuis que trust,* certainly not if they are not all of the *cestuis que trust.*[61a] Indeed, it has been emphasized that in such a case it would be presumed that in promoting the interests of the *cestuis que trust* the trustees to so great an extent promote their own interests.[62] But manifestly one may not be a trustee if he himself is in fact the settlor and sole beneficiary.[63]

The trustee is not an agent either of the *cestuis que trust* or of the estate. He is the owner of the trust property and of the trust business. He is the principal, the master. Therefore, his acts are his own acts, his contracts are his own contracts and for both he is personally responsible.[64] More than half a century ago a very eminent authority upon the law of Trustees wrote:

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61 Kimball v. Whitney (Sup. Ct. Mass.), 123 N. E. 665; Shoe & Leather Co. v. Dix, 123 Mass. 148; Hussey v. Arnold, 185 Mass. 202; Bank of Topeka v. Eaton, 100 Fed. 8, affd. 107 Fed. 1003.

61a Murry v. King, 153 Mo. App. 710, 715.

62 Heard v. March, 12 Cush. 580.

63 Cunningham v. Bright, 228 Mass. 385.

64 Taylor v. Davis, 110 U. S. 330; Connally v. Lyons, 82 Tex. 664.

"In the present state of the law, no trustee could be advised under any circumstances to undertake the responsibility of carrying on any trade for others. For by so doing he adopts the same risks and liabilities as persons who trade on their own account, while he can participate in none of the profits; and, as a matter of ordinary prudence, a trust for such a purpose should be unhesitatingly declined."[65] To this consideration a very thoughtful writer attributes the fact that corporate organization has been preferred to trusts for carrying on trade.[66] Whatever deterrent effect this ominous statement of the law may have had in the past, the apprehensions excited by it have, in recent years, been greatly allayed by the protection which insurance affords and by the growing practice among trustees of contracting against personal liability. The right of the trustee to so contract, and thereby to require the creditor to look solely to the trust estate for compensation, is now fully recognized. As said by Mr. Justice Woods in Taylor v. Davis:[67] "If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate."[68] The trust instrument, therefore, should provide against personal liability upon the part of the trustees and that those with whom they deal must look to the property of the trust for compensation, and in

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[65] Hill, Trustee (4th Am. Ed.) 534.

[66] Sears, Trust Estates and Business Companies, Sec. 27.

[67] 110 U. S. 330.

[68] See also Bank of Topeka v. Eaton, 100 Fed. 8, affd. 107 Fed. 1003; Shoe and Leather Co. v. Dix, 123 Mass. 148; Hussey v. Arnold, 185 Mass. 202; Rand v. Farquhar, 226 Mass. 91.

their contracts the trustees should, by explicit reference to that provision of the trust, give notice of their exemption from personal liability, and that the other contracting party must look solely to the property of the trust for payment of any obligation. In any event, of course, the trustees have the right to indemnify themselves out of the property of the trust estate.

§ 14. **Advantages Over Corporations:** Let us consider the business trust in connection with the corporate disadvantages we have already mentioned.

a. *Prejudice*: There is a popular significance attached to the word "Trust," making it synonymous with "monopoly," or "conspiracy in restraint of trade." This does not presage a reception of the business trust by the public with a mind free from prejudice. Until this odious impression can be removed, and the people come to understand the true significance of the express trust, and its use as a legitimate vehicle of trade, it is unlikely that it will find the public attitude toward it more benign than does the corporation.

b. *Migratory rights* considered, the business trust has a decided advantage over the corporation, for the trustees are "persons" and also "citizens" within the meaning of Section 2, Article 4 of the Constitution of the United States and they are, therefore, entitled to all the privileges and immunities of citizens in the several states, and they may of right go into every state and there transact business without molestation upon equal terms with every other citizen.[69]

c. *Inquisitorial Legislation*: Again, for the present

[69] Farmers' Land and T. Co. v. Chicago, etc., Ry. Co., 27 Fed. 146; Shirk v. Lafayette, 52 Fed. 855; Roby v. Smith, 131 Ind. 342.

at least, the business trust is free from the necessity of making periodical reports and from inquisitorial legislation of every kind. There is, of course, no assurance how long this condition will continue. But how far the state may constitutionally go in attempts to regulate business transacted in this form pursuant to the exercise of the common law right of contract, and whether the business trust may constitutionally be singled out from all other trusts to be the object of legislative attack, are questions that will be ever present to operate as deterrents against hasty or radical action. Then too the question whether exactions may be imposed upon this form of commercial activity arranged under the right of contract, which are not imposed upon partnerships, will also give the legislature pause. It is interesting to note that in Massachusetts, except in the cases of trusts holding securities of public service corporations, the legislature has never undertaken to require more than the public filing of the declaration of trust.

d. *Taxation*: In matters of taxation the advantage is decidedly with the business trust. The corporation must pay an organization tax, a property tax, a franchise tax, a state and federal capital stock tax, and a state and federal income tax. If it would establish agencies in other states it must do so upon the terms prescribed by those states, paying always an incorporation tax to be followed in turn with the obligation of there also making the various reports and paying the various assessments imposed upon corporations. Then there is the stock transfer tax and often the separate tax against the shareholder upon his shares, even though he lives in the state of the corporation's nativity. With the express trust, on the contrary, it is

believed that no case can be found upholding the right to tax the *corpus* of the trust estate and also the equitable interest therein. Manifestly this would be double taxation and would impose a burden upon those needing the protection of the trust which others more fortunate in not needing that protection would escape. Since the business trust is the creation of the parties' common law right of contract, a franchise tax could not be imposed upon it; and the Supreme Court of Massachusetts decided that the shares in a trust held to be a partnership could not be taxed to the owner;[70] also that an excise tax on corporations could not constitutionally be applied to such associations.[71] It should be noted, however, that a majority of the judges of that court in an opinion to the legislature held that a stock transfer tax, including tax on shares in unincorporated associations, would be constitutional.[72]

The Federal Corporation Tax Law of 1909 provided for the payment of a special excise tax by "every corporation, joint stock company, or association organized for profit and having a capital stock represented by shares." The United States Supreme Court held that a trust formed for the purpose of purchasing, holding and selling lands and buildings in Boston was not required to pay any taxes under this law. This upon the ground that the tax was an excise tax upon the privilege of doing business in a corporate capacity and with the advantages which arise from corporate or quasi-corporate organization. It was, therefore, said that the act should be held not to apply to such a trust but

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[70] Hoadley v. County Commissioners, 105 Mass. 519.

[71] Gleason v. McKay, 134 Mass. 419, and Minnot v. Winthrop, 162 Mass. 113.

[72] Opinions of Justices, 196 Mass. 603.

to embrace "only such corporations and joint stock associations as are organized under some statute or derive from that source some quality or benefit not existing at the common law."[73]

Perhaps to the case of Crocker v. Malley,[74] more than to any other one thing, should be attributed the widespread and growing interest in the business trust. The Court had under consideration a trust instrument known as The Wachusett Realty Trust, drawn by Mr. Felix Rackemann of the Boston Bar. This instrument, with clearness and brevity, combines adequate comprehensiveness and may well serve as a model (see appendix). It enjoys the distinction of being the first and, thus far, the only instrument of the class we are considering to be held by the highest court of the land to constitute a pure trust. Though consent of the beneficial owners was required to fill a vacancy among the trustees, and for a modification of the terms of the trust, the court held that the agreement did not constitute either a joint-stock company, association or partnership within the meaning of the income tax act of 1913, but that it was a pure trust and should be assessed under the provisions of that act relating to fiduciaries. In view of the decision in that case, it is believed that under the present income tax law such a trust would not be considered a "corporation," or "person," as those terms are defined in the act, but that the tax would have to be levied under the sections relating to estates and trusts, and fiduciaries.

§ 15. **Disadvantages:** Candor requires the admission, however, that the business trust is not entirely

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[73] Eliot v. Freeman, 220 U. S. 178.
[74] 249 U. S. 223.

without its disadvantages. As a practical matter, the greatest of these no doubt is the very fact that it is comparatively new, that is, that it has not been in general use, and that its status therefore, is as yet not well defined. That it will, in the course of time, incite legislation of some character, it is reasonable to expect, and what the nature of this legislation will be, or to what extent it may constitutionally go, none can foretell. Tradition and respectable authority are opposed to allowing large numbers of men "an unlimited and unregulated power of grouping themselves for a common purpose."[75] And yet, experience thus far would not warrant the prophecy that this legislation will be of hostile character. We have already observed that Massachusetts has done no more than require the public filing of the trust declaration, except in the cases of trusts holding securities of public service corporations.[75a] The State of Oklahoma has, by recent legislative enactment, completely recognized and validated the business trust and exempted the trustees and beneficiaries from personal liability and required creditors to look solely to the trust estate for reimbursement.[75b] Again, there is comfort in the reflection that as yet there is practically no other legislation at all.

Then too, there are important inquiries which will remain without satisfactory answers until there shall be further adjudication. Such, for example, as the precise nature of the *cestui's* interest; to what extent the *cestuis* may be also trustees; whether the shareholders may periodically choose trustees; and especially a satisfactory guide by which to determine pre-

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[75] Holdsworth, Hist. E. L., V. III, pp. 374, *et seq.*

[75a] *Supra*, § 14, c.

[75b] Laws of Oklahoma, 1919, p. 30.

cisely the line of division between the strict trust and the partnership or other relation.

Again, will the trust violate the rule against perpetuities and restraints upon alienation in the absence of peremptory requirement that it be terminated within the period of lives in being and twenty-one years and nine months thereafter? There is great contrariety of opinion upon this last question. The better rule would seem to be that "where there are persons in being at the creation of an estate, capable of conveying an immediate and absolute estate in fee, in possession, there is no suspension of the power of alienation and no question as to perpetuities can arise."[76] But since it cannot be said that this is the established rule, prudence dictates that the trust agreement provide for its termination within the period prescribed by the rule against perpetuities. In this respect the corporation would seem to have the advantage; but it is an advantage more seeming than actual, for, in most States, the trust can be made to continue for a period of twenty-one years beyond the death of the last survivor of the youngest of living children, a period, we dare say, entirely adequate to its needs and greatly in excess of the customary two-score years and ten of the business corporation.

§ 16. **Conclusions:** The following conclusions are believed to be warranted:

1. For reasons that are manifest, the express trust cannot be used as a substitute for public service corporations, or for corporations carrying on business of

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[76] Hart v. Seymour, 147 Ill. 598; See also Johnson v. Preston, 226 Ill. l. c. 455.

a public, or quasi-public character, at all times requiring and subject to state regulation and control, such as banking and insurance.

2. The business trust cannot be used as a substitute for those corporations with three stockholders, two of whom are dummies.

3. The express trust has been used as an agency of business and trade chiefly in Massachusetts and has been so used there not as a substitute for the corporation but because the corporation could not (until recently) be used in the field in which the trust has been principally employed, namely: in the business of dealing in real property. One hundred and three of such trusts, said to own in the city of Boston alone real property of the value of Two Hundred and Fifty Millions of Dollars, were investigated in 1912 pursuant to legislative direction by the Tax Commissioner of that Commonwealth. He reported as advantages claimed by these trusts:

(a) "These associations have been found by the experience of twenty-five years to be a convenient, safe and unobjectionable character of co-operative ownership and management. They are for the interest alike of the investor and the public.

(b) "The form of organization ensures a continuity of management and control which appeals strongly to investors in real estate which cannot be secured by a corporation with changing officers. The trustees, who are the managing officers of a trust, are not so likely to be changed as are the directors of a corporation.

(c) "It affords a more economical and more convenient and flexible form of management than does a

corporation. Trustees can transact business with more ease and rapidity than directors.'"[77]

Nevertheless, it is probable that at that time not more than a dozen of these trusts were engaged in industrial enterprises.[78] Thus, it would seem that in the state where the business trust is best known, its possibilities as a business agency superior to the corporation were either doubted or not appreciated.

4. The declaration or agreement of trust need not make the beneficiaries the principals; neither need it constitute the trustees, or the beneficiaries, or both, together, a partnership, joint-stock company or association; but, when properly drafted, it is a pure trust which affords an agency in all respects legal and one *in principle* entirely adequate to be used to carry on any business for the benefit of two or more investors that is now conducted by the ordinary manufacturing or private business corporation. Whether *in practice* it will constitute such agency, remains to be demonstrated by fuller experience and its more general utilization.

5. Its employment would seem to be ideal:

(a) As a substitute for holding and for investment companies, that is companies merely holding the stock of corporations, and companies engaged in the business of dealing in, buying and selling as investments, stocks, bonds and commercial paper.

(b) As a substitute for companies whose business travels a beaten path and is routine in character, such as owning and conducting an office or apartment build-

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[77] Tax Com. Report, House Doc. No. 1646.

[78] Same, p. 19.

ing or hotel, or developing a subdivision, or doing a specified building or construction work under a contract, or operating a mine; and in this class might appropriately be placed also companies handling large estates.

6. The inconvenience attendant upon the necessity of express notice and contract in order to absolve the trustees from liability, is a practical consideration tending to repress its use in new ventures and to confine it to conversions from the corporate form of seasoned, established and proven enterprises whose methods are fixed and whose risks, with reasonable certainty, can be assessed.

8. Its chief advantages over the corporation are found (a) in the convenience, continuity and flexibility of the management; (b) in its migratory rights; (c) in its freedom from visitorial and inquisitorial laws and the consequent immunity from the necessity of making periodical reports which disclose its condition and affairs; and (d) in matters of taxation.

On the other hand, disadvantages of a very practical nature are recognized in that (a) this employment of the express trust is new; (b) attacks upon its validity with new weapons are yet to be encountered; (c) regulatory and perhaps repressive legislation affecting it may reasonably be expected; (d) the precise nature of the *cestui's* interest remains still undetermined; (e) an adequate chart disclosing clearly the line of demarcation between the domain of the trust and that of the partnership or other relation is yet to be drawn; (f) what rights the beneficiaries may have in addition to those essential to every *cestui que trust,* and whether they may periodically choose trustees, or remove trus-

tees, fill vacancies, or even themselves be trustees if the trustees will then be also owners of the majority of beneficial interests, are questions still to be determined.

Thus, riper practical experience is essential, and much law has yet to be made and many decisions yet to be rendered, before the status of the business trust can, with entire satisfaction, be known and defined.

APPENDIX

FORMS OF TRUST DECLARATIONS

THE WACHUSETT REALTY TRUST.

Prepared by

MR. FELIX RACKEMANN
of the Boston Bar

(Considered by the Supreme Court of the United States in Crocker v. Malley, 249 U. S. 223.)

Know All Men by These Presents, That we, Alvah Crocker and Charles T. Crocker both of Fitchburg in the Commonwealth of Massachusetts, John J. Riker of the City and State of New York, Samuel E. M. Crocker of said Fitchburg, and Felix Rackemann of Milton in said Commonwealth, the grantees named in a certain deed from the Crocker, Burbank & Co., Inc., (Maine Corporation), dated this day by which deed there are conveyed to us certain lands and buildings situate in the City of Fitchburg in the Commonwealth of Massachusetts, hereby declare and agree that we will, and our heirs and successors shall, hold said granted premises, and all other funds and property at any time transferred to and received by the Trustees hereunder, for the purposes, with the powers, and subject to the provisions hereof, for the benefit of the *cestui que trusts* (who shall be trust beneficiaries only, without

partnership, associate or any other relation whatever *inter sese*), and upon the trusts following, viz.:

1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the death of the last survivor of the persons named and described in the last paragraph hereof. During such postponement, and until such conversion, the interests of the *cestui que trusts* shall be considered for purposes of transmission and otherwise as personal property.

2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having, for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple.

3. In trust to collect and receive all rents and income from the property, and semi-annually or oftener at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to and among the several *cestui que trusts* according to their respective fractional

interests, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient, for the protection and development of the trust property as a whole pending its conversion and distribution. The determinations of the Trustees, made in good faith, as to all questions as between "capital" and "income" shall be final.

4. The said Crocker, Burbank & Co. Inc., (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests to whom the Trustees shall issue proper receipt certificates, which certificates, and all others which may be hereafter issued in exchange or substitution therefor, shall be deemed parts hereof and conclusive evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests.

5. The Trustees shall have authority to borrow money and fix the terms of any loans, and give any pledge, mortgage or other security which they may deem wise.

No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

6. The Trustees may employ all such agents and at-

torneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such agents or attorneys employed and retained with reasonable care.

7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustees serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

8. The recording of this instrument shall be at such times and in such places as the Trustees may in their discretion, determine to be necessary or expedient, and they shall in like manner determine the form and record of all muniments of title.

9. The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corporation which they may acquire or cause to be organized for the more convenient or expedient holding or management of the property, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may at any time be or become directors or officers of any corporation any shares of which are held by them.

10. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent reckoned upon the gross income received by them as such, unless, at any time, a majority in

interest of the *cestui que trusts* consent in writing to some larger compensation for any past service. The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

11. Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

Any vacancy in the office of the Trustee, however occasioned, shall be filled by the remaining Trustees by an instrument in writing, signed by them and assented to in writing, by the holder or holders of a majority in amount of the beneficial interests herein, such appointment to be in like manner attached to the original of this instrument, or recorded as in the case of resignation last above provided for.

12. If, at any time or times, a majority of the Trustees hereunder shall certify in writing that the remaining Trustees are either absent from the Commonwealth of Massachusetts or incapacitated through illness or otherwise, from acting, then such majority shall, at such time or times, have, and may exercise, any and all the powers of the Trustee hereunder with like effect as if similarly exercised by all.

13. The terms and provisions of this trust may be modified at any time or times by instrument in writing, signed, sealed and acknowledged by the then Trustees, assented to in writing by a majority in interest of the

cestui que trusts, and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

14. The certificate in writing of the Trustees as to any resignation from the office of Trustee hereunder and as to the appointment of any new trustees hereunder and as to the existence or non-existence of any modifications hereof, may always be relied upon, and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees in reliance upon such certificate.

15. The title of this trust (fixed for convenience) shall be "The Wachusett Realty Trust," and the term "Trustees" in this instrument shall be deemed to include the original and all successor trustees.

16. At the end of twenty years from and after the death of the last survivor of said Charles T. Crocker, Samuel E. M. Crocker and Alvah Crocker, and of the lawful issue now living of any of them (unless this trust shall heretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled.

In Witness Whereof we have hereunto set our hands and common seal on this 29th day of March in the year nineteen hundred and twelve.

ALVAH CROCKER (Seal)
CHARLES T. CROCKER
JOHN J. RIKER
FELIX RACKEMANN
SAMUEL E. M. CROCKER

Commonwealth of Massachusetts,

Worcester, ss. March 29, 1912.

Then personally appeared the above named Alvah Crocker and acknowledged the foregoing instrument to be his free act and deed,

Before me,

.....

Justice of the Peace.

Receipt Certificate Issued Under Foregoing Trust.

The Wachusett Realty Trust.

No. (24,000)

This is to certify that ..... of .....

..... is entitled to ..... twenty-four thousandths of the net proceeds of the property held under Declaration of Trust made by Alvah Crocker, *et al.,* dated March 29, 1912, known as "The Wachusett Realty Trust," when said property is converted into cash (and meantime to income), all as therein provided. Said Declaration is recorded with Worcester County, Mass. (North District) Deeds, and all the terms thereof are, by reference, made part hereof and expressly assented to.

The holder hereof has no interest, legal or equitable, in any specific property and the interest hereby represented can be transferred only by due endorsement and

surrender hereof and transfer noted on the books kept for the purpose by the Trustees, or their agent.

ALVAH CROCKER
CHARLES T. CROCKER
JOHN J. RIKER
SAMUEL E. M. CROCKER
FELIX RACKEMANN
Trustees.

Old Colony Trust Company,
Agent.
by

Dated ....., 19... .....

INDORSEMENT THEREUPON:

Value received, the undersigned hereby sells, assigns and transfers unto ..... of the fractional interests represented by the within certificate, and does hereby constitute and appoint .... true and lawful attorney irrevocable in the name and stead of the undersigned to make transfer accordingly on any books or records of the trustees.

.....

.....

Witness.....

Dated.....

TAXICAB TRUST ESTATE.

(Prepared by the Author.)

This Declaration of Trust, made at St. Louis, Missouri, this ..... day of ....., 19.., by L. Wade Childress, of the County of St. Louis, Frank C. Rand, of the County of St. Louis, and Robert Holmes, of the City of St. Louis, all in the State of Missouri, Witnesseth: That,

Whereas, By deed of even date herewith, the Columbia Taxicab Company, a corporation of the City of St. Louis, and State of Missouri, pursuant to votes of its directors and stockholders, has conveyed to the said L. Wade Childress, Frank C. Rand and Robert Holmes, the following described real property, lying, being and situated in said City and State, to-wit: Lots 22, 23, 24, 25, 26, 27, 28, 29, in block 8 of Peter Lindell's First Addition, and in block 1951 of the City of St. Louis, having an aggregate front of 200 feet on the north line of Lawton avenue, by a depth northwardly of 128 feet 6 inches, to an alley, bounded west by Channing avenue, and the undivided interest of its stockholders therein; and

Whereas, The said Columbia Taxicab Company and the Yellow Motor Car Company, a corporation of the City of St. Louis, and State of Missouri, pursuant to votes of their respective directors and stockholders, have also conveyed, transferred and delivered to the said Childress, Holmes and Rand, by their separate instruments, in writing, of even date herewith, all the

assets and property of said corporations, real, personal and mixed, of whatsoever kind and wheresoever situated (except their respective charters), including motor vehicles, cabs, automobiles, machinery, materials, equipment, office fixtures and furniture, cash on hand, accounts receivable, contracts, leases, licenses, privileges, easements, credits, causes of action, claims, demands, surplus, profits, business, trade reputation, trade-marks, trade devices, trade names, trade dress and style and trade insignia, and good will, and the undivided interests of their stockholders therein, and including, as to the Columbia Taxicab Company, the exclusive right to the use of the names "Columbia Taxicab" and "Columbia Taxicab Company" and including, as to the said Yellow Motor Car Company, the trade-mark device, trade colors, design, finish, get-up, dress and style and trade insignia of the said Yellow Motor Car Company and its taxicabs, taxicab service and business, and the trade name, "yellow cab," and the exclusive right to the names "yellow cab," "yellow taxi," "yellow motor car," "yellow taxicab company," and "Yellow Motor Car Company," and the undivided interests of its stockholders therein; and

Whereas, All of the aforesaid property so conveyed, transferred and delivered to the said Childress, Holmes and Rand, together with all other funds and property hereafter transferred to and received and acquired by them hereunder, is to be held, used and managed by them upon the trusts herein declared;

Therefore, Know All Men By These Presents: That we, the aforesaid L. Wade Childress, Frank C. Rand and Robert Holmes (hereinafter called "Trustees"), hereby declare and agree that we will, and our heirs and successors shall, hold, use and manage the said

granted and conveyed premises, property and things, and all other funds and property at any time transferred to and received by the Trustees hereunder, for the purposes, with the powers and subject to the provisions hereof for the benefit of the *cestui que trusts* (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever *inter sese*), and upon the trusts following, viz.:

(1) In trust to convert the same into money and distribute the net proceeds thereof ratably among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the certificates of beneficial interest issued by the Trustees as hereinafter provided; it being, however, expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the death of the last survivor of the persons named and described in the last paragraph hereof. During such postponement, and until such conversion, the interests of the *cestui que trusts* shall be considered for purposes of transmission and otherwise as personal property.

(2) In trust, pending final conversion and distribution of the property, to hold, control, manage, use, employ, invest and reinvest, the same, the Trustees having full power and authority (*a*) to pay and discharge as such Trustees, but not personally, the debts and obligations of the said Columbia Taxicab Company and the said Yellow Motor Car Company, including the deed of trust now outstanding on the aforesaid lots 25 to 29, defend all suits now pending, or that may be

hereafter instituted against said companies, or either of them, and, as such Trustees, but not personally, pay and perform all judgments that may be entered against said companies, or either of them; (*b*) to establish, manage and carry on the business of transporting for hire in motor vehicles, automobiles, taxicabs, busses, carriages, cabs, wagons and trucks, persons, parcels, baggage, freight, goods and merchandise; (*c*) to purchase, lease, manufacture, repair, buy, sell, hire, mortgage and deal in motor vehicles, automobiles, taxicabs, busses, carriages, cabs, wagons and trucks, and equipment for same; (*d*) to buy, build, sell, lease, take, hold, convey, mortgage and pledge such property, real personal or mixed, as may be necessary, requisite or convenient in and for the prosecution of said business, or as the interests of the trust may, in the judgment of said Trustees, from time to time require; (*e*) to acquire and hold such stocks, shares and securities of corporations or associations as in their discretion may be deemed necessary, or useful, or advantageous to the trust, and the same to sell or exchange in their discretion; (*f*) to invest or loan any moneys that may come into their hands, in such manner and in such property or securities, real and personal, and wherever situated, as may seem to them to be advantageous, prudent and expedient; (*g*) to begin and defend legal proceedings and compromise or arbitrate claims, and (*h*) generally to do all acts and things which, in their judgment, are necessary, proper, advantageous or expedient to promote the complete and most successful execution of this trust and the interests of the *cestui que trusts;* the Trustees having for all the aforesaid purposes and for all purposes of sale, lease, mortgage, exchange, investment and reinvestment, improvement and development,

and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as if they were themselves the sole and absolute beneficial owners thereof in fee simple. The naming of any specific duties and powers herein shall not be construed as limiting the general powers conferred upon the Trustees.

(3) In trust to collect and receive all rents, income and profits from the property and from the conduct of the affairs of the trust, and semiannually or oftener, at their convenience, and in their discretion, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to and among the several *cestui que trusts,* according to their respective fractional interests; the Trustees, in this connection, having full authority, from time to time, to use any funds on hand, whether received as *corpus* or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the business transacted hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient for the protection and development of the said trust property as a whole, and the business and conduct of the affairs of the trust pending its conversion and distribution. The determination of the Trustees made in good faith as to all question as between "*corpus*" and "income" shall be final.

(4) The Trustees may, from time to time, set apart (out of the income of the trust property) as and for a surplus fund such sums, if any, as they may think proper; and the said surplus fund shall be applicable during the continuance of the said trust to any pur-

poses to which money from a part of the *corpus* or income may be applied, including distribution among the several *cestui que trusts* as hereinbefore, in paragraph numbered 3, provided.

(5) The said Columbia Taxicab Company and the said Yellow Motor Car Company having determined to wind up their affairs and be dissolved without waiting for final cash sale of their property and assets, this trust is declared in favor and for the benefit of the stockholders of the said Columbia Taxicab Company, according to their respective fractional interests as determined and agreed upon by them, to whom the Trustees shall issue proper negotiable certificates of beneficial interest; said certificates of beneficial interest and all others which may be hereafter issued in exchange or substitution therefor shall be deemed parts hereof and conclusively evidence the ownership of the respective interests in this trust; and the Trustees shall, from time to time, on request (or surrender of the old), issue such new certificates as may be proper and necessary to evidence any new or subdivided interests. In case of the loss, mutilation or destruction of a certificate, the Trustees may issue a new one upon such terms as they see fit.

The said certificates of beneficial interest shall be in such form as the Trustees deem best, shall bear the impress of their seal, and shall be executed either by said Trustees themselves or by their President, attested by their Secretary.

No transfer of beneficial interest in this trust shall be binding upon the Trustees, or affect them or the trust in any way, unless and until the certificate of such beneficial interest shall be surrendered to the Trustees at their office in the City of St. Louis, Missouri, the

transfer thereof noted on their records and a new certificate of such beneficial interest issued by them.

(6) It is not intended to create hereby any relation of partnership or of agency among the Trustees, or between the Trustees and the *cestui que trusts,* or among the *cestui que trusts,* or between any or all of the *cestui que trusts;* but the title to every several item of the property constituting the trust estate shall be vested solely in the trustees; and the *cestui que trusts,* jointly and severally, shall have no legal or equitable title, right or interest in or to any several item thereof. The right of the *cestui que trusts* shall relate only to the net distributable proceeds of the liquidation of the trust, and, meanwhile, to the income from the administration thereof.

(7) The Trustees shall have no power to bind the *cestui que trusts* personally by any act, neglect or default, and no *cestui que trust* shall be personally liable as a partner or principal, or otherwise, upon account of any express or implied contract made by the Trustees, or made in any way in behalf of the trust estate, or upon account of any tort committed by the trustees or by any officer, agent or servant acting under them, or in their behalf, or in any way connected with this trust or its administration; but all *cestui que trusts* and all persons, firms, corporations and associations extending credit to, contracting with or having any claim against the Trustees of any character whatsoever, whether legal or equitable, and whether arising out of contract or tort, shall look only to the funds and property of the trust for payment or for indemnity, or for the payment of any debt, damage, judgment or decree, or any money that may otherwise become due or

payable from the Trustees, so that neither the Trustees, nor any of their officers or agents appointed by them hereunder, nor the *cestui que trusts,* shall be personally liable therefor. And every note, bond, obligation or contract in writing, made or given by the Trustees, shall, by explicit reference to this declaration of trust, give notice of the limitations upon the power of the Trustees, their officers and agents, and of the exemption from personal liability both of the Trustees and the *cestui que trusts,* and shall contain an express declaration to the effect that no recourse shall be had in any event upon any Trustee, their officers and agents or *cestui que trust* and that the other contracting party shall look only to the funds and property of the trust for payment of any liability and obligation. Even though in any case the Trustees shall not give such notice to the other party, nevertheless, such other contracting party shall have no recourse against the Trustees, their officers or agents, or the *cestui que trusts,* but shall look only to the funds and property of the trust for payment of any liability and obligation. The Trustees may also, at the cost of the trust estate, protect and indemnify themselves, their officers and agents and the trust estate against damage and loss with such contracts of insurance as to them shall seem proper.

(8) The death of any *cestui que trust* shall not terminate the trust nor entitle his legal representative to claim an account, or to take any action in the courts, or otherwise, against the trust or the Trustees, but the executors, administrators or assigns of the decedent shall succeed to all the rights of the decedent under this instrument upon producing his certificate of beneficial interest.

(9) The Trustees shall have authority to spend the moneys of the trust in any way that, in their judgment, will advance the purposes of the trust or assist in the improvement and development of its business, and they may borrow money either to pay off an indebtedness or to create funds for other purposes, and fix the terms of any loan, and give any pledge, mortgage or other security which they may deem wise. No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

(10) Every Trustee, in his individual capacity, or in any other fiduciary capacity, may purchase, hold and own beneficial interests in this trust in all respects as if he were not a Trustee, and may purchase at public auction any real estate or personal property offered for sale by the Trustees.

(11) The Trustees may employ all such servants, agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such servants, agents or attorneys employed and retained with reasonable care.

(12) The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least, annually, render account of the trust to any beneficiary requesting the same; but no Trustee serving hereunder shall be required to give any bond, nor shall any Trustee have any liability one for another, or for anything except for the result of his own gross negligence or bad faith.

(13) All written conveyances of real property, at

whatever time taken by the Trustees as such, shall name as grantees all the Trustees and shall designate them as Trustees under this Declaration of Trust, referring to the same by its book and page record in the office of the Reecorder of Deeds of the City of St. Louis.

(14) The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corporation which they may acquire, or cause to be organized, for the more convenient or expedient holding or management of the trust or the conduct of the business of the trust, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may, at any time, be or become, and vote for themselves to be or become, directors or officers, with remuneration or salary, in any corporation, any shares of which are held by them.

(15) If, and when, the Trustees shall have occasion to apply to any court of competent jurisdiction for direction as to their powers, duties and obligations, they need not notify the *cestui que trusts,* or make any of them parties to any such proceeding; but the said Trustees may apply for, and receive, such direction without any notice to the *cestui que trusts,* who shall be as conclusively bound thereby as though they had been notified and made parties to the proceeding.

(16) Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, and recorded in the office of the Recorder of Deeds of the City of St. Louis, Missouri.

Any vacancy in the office of trustee, however occasioned, shall be filled by the remaining Trustees by an instrument in writing, signed and acknowledged by them, and attached to the original of this instrument and recorded, as in the case of resignation last above provided for. A Trustee so appointed shall have all the powers and duties of his predecessor. The acting Trustees for the time being, whether surviving or remaining, shall have all the powers and discretions of the original Trustees. The title of the outgoing Trustee shall vest in the remaining Trustees, and, upon the filling of any vacancy, the title to the whole trust property shall vest jointly in those who shall then be Trustees hereunder. Any Trustee may, by power of attorney, delegate his powers for a period not exceeding six months at any one time to any other Trustee or Trustees hereunder.

(17) Any two of the Trustees concurring and acting jointly may do anything that is within the power of the Trustees, save as expressly herein otherwise provided. If two of the Trusteeships shall be vacant, or if one be vacant and one of the remaining Trustees be, for any reason, temporarily unable to act, or, if without a vacancy, two of the Trustees be for any reason temporarily unable to act, the other Trustee, acting alone, may do such things and only such things as are necessary for the preservation of the trust and its administration in regular routine. But all vacancies shall be filled as soon as practicable after their occurrence, and the power of a single Trustee to act shall be treated as an emergency power whose exercise is to be temporary, rare and as brief as possible.

(18) The certificate in writing of the Trustee as to

any resignation from the office of Trustee hereunder, and as to the appointment of any new Trustees hereunder, and as to the existence or non-existence of any modifications hereof, and as to the authorization of a particular act to be done, may always be relied upon by, and shall always be conclusive evidence in favor of, all persons dealing in good faith with said Trustees in reliance upon such certificate.

(19) The Trustees shall be entitled to receive as compensation for their services the sum of one dollar per year each, except that the Trustee who shall also be President shall receive such reasonable salary as the other Trustees shall, from time to time, determine and fix.

The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and, if any Trustee shall be adjudged personally responsible for any obligation, he shall be entitled to have such responsibility discharged in the first instance by the trust property without himself discharging the same; and the Trustees shall be entitled at all times to the advice and service of counsel, and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

(20) The title of this trust (fixed for convenience) shall be Taxicab Trust Estate and it may deal and be dealt with by said title and also in the names of its Trustees. Said title may be changed and a new title selected from time to time by the Trustees by instrument signed and acknowledged by all of the Trustees and attached to this declaration of trust and recorded

in the office of the Recorder of Deeds of the City of St. Louis, Missouri.

The term "Trustees" in this Declaration of Trust shall be deemed to include the original and all successor Trustees.

(21) The Trustees shall annually elect from among their number a President and a Vice-President, and shall also elect from among their number, or otherwise, a Secretary and a Treasurer, and such other officers as they may deem advisable, and prescribe their powers and duties. The offices of Secretary and Treasurer may be filled by the same person.

(22) The Trustees may adopt and use a common seal.

(23) The terms and provisions of this trust may be amended, modified or added to (except as regards the liability of the Trustees and the *cestui que trusts*), at any time or times, by instrument in writing signed, sealed and acknowledged by all the then Trustees, and assented to in writing by two-thirds in interest of the *cestui que trusts,* and attached to the original of this instrument and recorded in the office of the Recorder of Deeds in and for the City of St. Louis, Missouri.

(24) This Declaration of Trust and all amendments and modifications thereof and additions thereto shall be recorded in the office of the Recorder of Deeds in and for the City of St. Louis, and State of Missouri, and in such other places as the Trustees may, in their discretion, from time to time, determine to be necessary or expedient.

(25) At the end of twenty years from and after the death of the last survivor of the said L. Wade Chil-

dress, Frank C. Rand and Robert Holmes (unless this trust shall theretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons entitled thereto.

In Witness Whereof, we have hereunto set our hands and seal on this ..... day of .... in the year nineteen hundred and .....

..... (Seal)

..... (Seal)

..... (Seal)

State of Missouri, } ss.
City of St. Louis. }

On this ..... day of .....,

A. D. 19.., before me, the undersigned, Notary Public within and for the City and State aforesaid, personally appeared L. Wade Childress, Frank C. Rand and Robert Holmes, to me personally known to be the persons whose names are subscribed to the foregoing instrument, and each acknowledged to me that he executed the same as his free act and deed for the purposes and considerations therein expressed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

My commission expires .....

.....
Notary Public.

Certificate of Beneficial Interest Issued Under Foregoing.

Certificate No. Fractional Interest 5000ths

Taxicab Trust Estate.

This Is to Certify That ..... of .... is entitled to ..... five thousandths of the net proceeds of the property held under Declaration of Trust made by L. Wade Childress, Frank C. Rand and Robert Holmes, dated December 31, 1919, known as Taxicab Trust Estate when said property is converted into cash and meanwhile to income, all as therein provided. Said Declaration is recorded in the office of the Recorder of Deeds of the City of St. Louis, Missouri, in Book 3294, page 22, and all the terms thereof are by reference made part hereof and expressly assented to.

The holder hereof has no interest, legal or equitable, in any specific property and the interest hereby represented can be transferred only by due endorsement and surrender hereof and transfer noted on the books kept for the purpose by the Trustees, or their agent.

In Witness Whereof, The said Trustees have hereunto set their hands and caused their seal, duly attested by their Secretary, to be impressed hereupon this first day of January, 1920.

(Seal)

L. W. Childress,
Frank C. Rand,
Robert Holmes,
Trustees.

J. C. Maguire, Secretary.

ENDORSEMENTS THEREUPON.

For Value Received the undersigned hereby sells, assigns and transfers unto ....., ... of the fractional interests represented by the within certificate, and does hereby constitute and appoint ..... true and lawful attorney irrevocable in the name and stead of the undersigned to make transfer accordingly on any books or records of the Trustees.

Dated ....., 19...

.....

Witness:

.....

ST. LOUIS HOME OWNERS' ASSOCIATION.

Prepared by

Mr. Tom W. Bennett,
President Mortgage Trust Company of St. Louis, As Chairman of Special Committee of St. Louis Chamber of Commerce.

This Agreement made this ..... day of June, 1919, by and between ....., herein designated as subscribers, and ....., herein designated as Trustees, witnesseth:

Whereas, The subscribers have created a fund of One Million Dollars ($1,000,000.00) for the purpose of enabling wage-earners to own their own homes and to create better housing conditions in St. Louis and St. Louis County, Missouri, they do hereby assign, transfer and deliver to above-named Trustees, under the designation of the St. Louis Home Owners' Association, said fund and any increase thereof in trust as hereinafter set out.

1. The Trustees in their collective capacity shall be designated as far as practicable as the St. Louis Home Owners' Association, and under that name shall, as far as practicable, conduct all business, and execute all instruments in writing in performance of their trust.

2. The Trustees shall be fifteen (15) in number, and the persons selected and named as Trustees hereinabove shall hold office until the first Tuesday of June, 1920, at which time, at the annual meeting of the shareholders, a new Board of Trustees shall be selected by the shareholders, five (5) of whom shall be elected to serve for one year; five (5) for two years; and five (5)

for three years, and thereafter on each first Tuesday in June, five (5) Trustees shall be elected, to serve for a term of three years and until their successors are elected and qualified.

Any or all of the members of the above-named Board of Trustees shall be eligible for re-election to the Board at the meeting of the shareholders on the first Tuesday of June, 1920, and thereafter.

In case of death, resignation or inability to act of any of the Trustees, the remaining Trustees shall fill the vacancy until the next annual meeting of the shareholders and at such annual meeting the shareholders shall elect a trustee or trustees to fill the vacancy or vacancies for the remainder of the unexpired term. As soon as any trustee elected by the shareholders, or by the remaining trustees, to fill a vacancy shall have accepted the trust, the trust estate shall vest in the new trustee or trustees without any further act or conveyance.

Upon the election of any trustee, either by the remaining trustees or by the shareholders to fill a vacancy, he shall forthwith execute a written acceptance of this trust, which shall be filed with the secretary of the company.

3. The home office of the company shall be in the City of St. Louis, Mo.

4. The Trustees are authorized, in the name of the company, to purchase materials, employ labor, to purchase, hold, own, convey, lease, mortgage or otherwise dispose of real estate and personal property. The Trustees are authorized to do all things necessary and desirable or incidental that may be required to carry out the purposes for which this trust is formed. Any written instrument conveying, leasing, mortgaging real

estate or personal property may be executed in the name of the company by the President and countersigned by the Secretary when authorized by the Board of Trustees.

Said Trustees may loan trust funds herein provided for to wage-earners at the rate not to exceed 6 per cent, and for a term of years not to exceed fifteen, and not more than $5,000 shall be loaned to any one individual. Loans shall be made only to wage-earners for the purchase of homes in which they, themselves, shall live. But no borrowers shall be charged any commission or brokerage of any kind.

The Trustees may make provisions for cancellation of the debt in case of death or total disability of the wage-earner, and for compensation in the case of ill-health. The monthly payments made by the wage-earners in re-payments of said loans shall include taxes and insurance which shall be paid by the company.

5. The Trustees shall have authority to adopt and use a common seal, and make such contracts as they may deem expedient in the conduct of the business of the trust; to collect, sue for, receive and receipt for all moneys at any time becoming due to said trust; to begin, prosecute, defend or settle suits at law, in equity or elsewhere in the name of the St. Louis Home Owners Association, and to compromise or refer to arbitration any claim in favor of or against said trust; from time to time to lease, sell, exchange, or otherwise dispose of at public or private sale, any or all of the trust property, real or personal, for such prices either in cash or the stocks, shares or securities of other corporations, trusts or companies, and upon such terms as to credit or otherwise as they may deem expedient.

6. The trust herein created shall not be operated

for profit, and the returns to the subscribers of the trust fund shall not exceed five per cent per annum. In the event the net profits of the trust shall amount to more than five per cent, the excess profits over and above 5 per cent as aforesaid, shall be used in furtherance of the objects for which this trust is formed.

No salaries shall be paid to any member of the Board of Trustees unless he may be called upon to perform work which in the opinion of the Trustees requires the granting of compensation; all compensation to employes shall be fixed by the Board of Trustees.

7. The trust fund of $1,000,000.00 is hereby made the capital stock of the St. Louis Home Owners' Association, divided into 10,000 shares of the par value of $100 each. As evidence of the ownership of said shares, the Trustees shall cause to be issued to each shareholder a negotiable certificate, to be signed by such officer or agent as the Trustees may direct and by at least one of the trustees.

The shares shall be transferable by assignment in writing and upon surrender of the certificates therefor, but no such transfer shall be of any effect as regards the Trustees until it has been recorded upon the books of the company kept for that purpose.

In case of loss or destruction of any certificate of shares the Trustees may, under such conditions as they may deem expedient, issue a new certificate or certificates in place of those lost or destroyed.

8. So far as strangers to this trust are concerned, a resolution of the Trustees authorizing a particular act to be done, shall be conclusive evidence in favor of such strangers that such act is within the powers of the Trustees, and no purchaser from the Trustees or one loaning money to the Trustees, or borrowing from the

Trustees, shall be bound to see to the application of the purchase or loaned money or other consideration paid or delivered to or for the said purchasers or loaned to or by said Trustees.

Stated meetings of the Trustees shall be held at least once every month, and other meetings shall be held from time to time upon call of any officer or Trustee. A majority of the Board of Trustees present at any special or called meeting shall constitute a quorum, and the concurrence of all the Trustees shall not be necessary to the validity of any act done by them, but the wish of the majority of the Trustees present and voting at any meeting shall be binding.

The Trustees may make, adopt, amend or repeal such by-laws and regulations not inconsistent with the terms of this instrument as they may consider necessary or desirable for the conduct of the business or for the government of themselves, their agents and representatives.

The Trustees may elect annually from among their a number a President and Vice-President, and may also elect from among their number or otherwise, a Treasurer, Secretary, Manager, General Counsel and other professional advisors, which officers shall have the authority and duties usually incident to like officers in a corporation, or such duties as the Trustees may designate. The Trustees may combine the duties and authority of two or more officers in one person. They shall also have authority to elect temporary officers to serve during the absence or disability of regular officers. The Trustees may employ such other employees, agents or representatives as may be necessary for the proper conduct of the trust.

9. The Trustees shall not be liable for any error of

judgment, or for any loss arising out of any act or omission to act in the execution of this trust, so long as they act in good faith, nor shall they be personally liable for the acts and omissions of each other, or for the acts and omissions of any officer, agent or representative elected or appointed by them or acting for them, and they shall not be obliged to give bond to secure the due performance by them of this trust.

Any Trustees may acquire, own and dispose of shares in this trust to the same extent as if he were not a Trustee.

10. Shares hereunder shall carry only the rights specifically set forth in this instrument and in the certificates thereof. The death of a shareholder or a Trustee during the continuance of the trust shall not operate to determine the trust, nor shall it entitle the legal representative of the deceased to an accounting, or to take action in the courts or elsewhere against the Trustees; but the executors, administrators or assigns of any deceased shareholder shall succeed only to the rights of said decedent under this trust, upon the surrender of the certificates for the shares held by him.

The ownership of the shares hereunder shall not entitle the shareholder to any title in or to the trust property whatsoever, or right to call for a partition or division of the same, or for an accounting, or for any voice or control whatever in the management of said property or of the business connected therewith, except to participate in the elections of the Trustees as herein provided.

11. The Trustees shall have no power to bind the shareholders personally. All persons, trusts, or corporations extending credit to, contracting with, or having claims against the Trustees, shall only look to the

funds and property of the trust, for the payment of any such contract or claim, or for the payment of any debts, damages, judgments or decree, or of any money that may otherwise become due and payable to them from the Trustees, so that neither the Trustees, shareholders nor officers, present or future, shall be personally liable therefor.

In every written order, contract or obligation which the Trustees shall give, authorize or enter into, it shall be the duty of the Trustees to stipulate, or cause to be stipulated, that neither the Trustees nor the shareholders shall be personally responsible therefor under or by reason of such order, contract or obligation.

12. The Trustees shall, in the building of homes, give due consideration to the recommendations or requests of the subscribers hereto, and priority where, in their opinion, the best interests of the trust seem to require the same.

13. The wage-earners borrowing for the purpose of purchasing homes as aforesaid, shall, as far as practicable, collectively be entitled to representation upon the Board of Trustees.

14. This trust shall not continue in any event longer than for term of twenty (20) years, at which time the then Board of Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the holders of the shares, provided, however, that if, prior to the expiration of said period the holders of at least two-thirds of the shares then outstanding shall, at a meeting called for that purpose, vote to terminate or continue this trust, then the said trust shall either terminate or continue in existence for such further period as may then be determined. For the purpose of winding up the affairs and liquidating the

assets of the trust the then Board of Trustees shall continue in office until such duties have been fully performed.

15. This agreement and declaration of trust may be amended or altered in any particular whatever, except as regards the liability of the Trustees, at any annual or special meeting of the shareholders with the consent of the holders of at least two-thirds of the shares then outstanding, provided ten days' notice of the proposed amendment or alteration shall have been given in writing in the call for the meeting, and in the case of the adoption of such amendment or alteration, the same shall only become effective when it has been certified by the chairman of the meeting which voted it, countersigned by at least two of the then Board of Trustees in token of the acceptance by said Board of Trustees of said amendment or alteration as an added or altered part of their trust, then attached to and made a part of this agreement and a copy thereof, with the Secretary's certificate attached as aforesaid, filed with the office or official having custody of the duplicate of this instrument.

In Witness Whereof, etc.

AGREEMENT AND DECLARATION OF TRUST OF THE ..... COMPANY.

(Prepared by member of Chicago Bar whose name the author has been unable to learn.)

This Agreement, made this ..... day of ..... A. D. 19.., between ....., designated as the Subscriber, and ....., ... and ....., together with their successors, herein designated as the Trustees, witnesseth:

That Whereas, the Subscriber proposes to transfer, assign and deliver to the Trustees, under the designation of the ..... Company, certain properties, as shown in "Schedule A" identified by the signatures of the parties hereto and filed with the Trustees; and the Trustees for the purpose of defining the interest of the Subscriber and his assigns in such property, have agreed to issue to the Subscriber, negotiable certificates representing Beneficial Interests, or shares, in and to the Trust Estate herein created, to the amount of ..... (.....) Common Beneficial Interests; each Interest to be of the expressed par value of ..... (.....) Dollars, the same being fully paid and non-assessable, and are transferable on the books of the Trustees in accordance with the terms of this instrument.

Now, Therefore, the Trustees hereby declare that they will hold said property to be transferred to them as well as all other property which they may acquire as Trustees, together with the proceeds and profits thereof, in trust; to manage and dispose of the same

for the benefit of the holders from time to time, of certificates issued hereunder, and in the manner and subject to the stipulations herein contained, towit:

First: That whenever the term "Trustees" is used herein, it shall refer to and include the above Trustees, and also any successors in trust, appointed under the terms hereof. That whenever the term "Company" is used herein, it shall be deemed to refer to said .... Company, being the designation, so far as practicable, of the said Board of Trustees and their successors in trust, in their collective capacity, under the terms hereof. That whenever the term "Certificate Holder" is used herein it shall be deemed to mean the owner of a certificate evidencing one or more Beneficial Interests, of the par value of ..... Dollars ($.....) each, in and to the Trust Estate herein mentioned the legal title, ownership and control of which estate is vested in said Trustee; and that whenever the term "Certificate" is used herein, it shall be deemed to mean an instrument in writing, or printed or partly written and printed, issued by said Trustees, evidencing the ownership of an equitable interest in said estate of one or more beneficial interests, as may therein be stated.

(b) The Trustees, in their collective capacity, shall be designated, so far as practicable, as the .... Company, and under that name shall, so far as practicable, conduct all business and execute all instruments in writing, in performance of their trust.

Second: The Trustees do hereby acknowledge the receipt by them of the property aforementioned, and it is expressly agreed that the said property, as well as any other which may hereafter be acquired by the Trustees for the purpose herein mentioned under the

terms hereof, shall be received by the Trustees, and shall be by them held, owned, controlled, managed, and applied to the uses and purposes herein mentioned, and to no other.

(b) That the money, or property, together with the income and issues thereof received or acquired by the said Trustees under the terms hereof, shall constitute and be held, kept and used by them as a Trust Estate for the use and benefit of the Certificate Holders in the said estate, and that the said Trustees are authorized, empowered and directed to apply the said money or property or the proceeds, the increase or income thereof, constituting said Trust Estate, as follows, towit:

(c) Here state the particular line of business to be followed.

(d) Make further amplifications and specifications of paragraph (c).

(e) To enter into, apply for, purchase or otherwise acquire any franchises, contracts or concessions for or in relation to the construction, execution, carrying out, equipment, improvement, administration, management or control of the aforementioned operations or of works and conveniences, and to undertake, execute, carry out, sublet, dispose of or otherwise turn to account the same.

(f) To construct, manufacture, buy, sell, install, lease or otherwise dispose of and deal in and trade in works, machinery, appliances, instruments, vehicles, supplies, materials and articles of every nature and description used or capable of being used in the production, manufacture, operation, distribution, control or other application or use of hydrocarbons, gas, oil, electricity or any other power now known or which may hereafter be discovered or invented.

(g) To manufacture, purchase or acquire in any lawful manner, and to hold, own, mortgage, pledge, sell, transfer, or in any manner dispose of, and to deal in and to trade in goods, wares, merchandise and property of any kind and every class and description, and in any part of the United States.

(h) To acquire the good will, rights and property and to undertake the whole or any part of the assets or liabilities of any person, firm, association or corporation; to pay for the same in cash, the Beneficial Interests of this Trust Estate, bonds or otherwise; to hold or in any manner dispose of or conduct in any lawful manner the whole or any part of the business or property so acquired, and to exercise all the powers necessary or convenient in and about the conduct and management of such business.

(i) To apply for, purchase or in any manner to acquire, and to hold, own, use and operate, and to sell or in any manner dispose of, and to grant license or other rights in respect of, and in any manner deal with any and all rights, inventions, improvements and processes used in connection with or secured under Letters Patent or Copyrights of the United States or other countries, or otherwise, and to work, operate or develop the same and to carry on any business, manufacturing or otherwise, that may directly or indirectly effectuate these objects or any of them.

(j) To guarantee, purchase, hold, sell, assign, transfer, mortgage, or otherwise dispose of, or deal in, the stocks, bonds, or shares of any corporation, association or trust estate engaged in any business herein named, or of this State, or any other State, country, nation or government, and while the owner of such stock or shares, may exercise all the rights, powers and

privileges of ownership, including the right to vote thereon, to the same extent as natural persons might or could do.

(k) To enter into, make and perform contracts of every kind with any person, firm, association or corporation, persons, municipality, body politic, county, State, government, colony or dependency thereof, and without limit as to amount, to draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures, and other negotiable and transferable instruments and eveidences of indebtedness whether secured by mortgage or otherwise, so far as may be permitted by the laws of the State of ....., or of the United States.

(l) To do any or all of the things herein set forth to the same extent as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees, or otherwise, and either alone or in company with others.

(m) To have offices, conduct its business and promote its objects within and without the State of ....., in other States, the District of Columbia, the territories and colonies of the United States, and in foreign countries, without restriction as to place or amount.

In general, to carry on any other business in connection therewith, whether manufacturing, agricultural, mining or otherwise, not forbidden by the laws of the United States.

Third: The Trustees hereunder shall be three in number, but at any annual meeting, or regular or special meeting of the Trustees, called for that purpose, the Board of Trustees may be increased to five, seven or nine members by the then Board of Trustees, and

the Trust Estate shall rest in the additional Trustees, in connection with those already in office, the same as if they were original parties to this instrument; and the Trustees herein mentioned shall hold their office until the annual meeting, or until their successors have been elected and have accepted their trust.

(b) The Trustees shall, at every annual meeting or adjournment thereof, elect a full Board of Trustees to serve for the next ensuing year, said annual meeting to be on the ..... in ....., each year, commencing in 19...

Fourth: The Trustees are authorized to employ all necessary or proper agents, servants, brokers, attorneys, employees or counsel, to carry into effect the purpose of the trust herein contained, and to protect and preserve the same, and to provide and pay out of said trust estate the compensation, fees, commissions or expenses incurred in the management thereof. To contract for and on behalf of said trust estate, and to bind the same and its property to the performance of such contracts; to borrow money on behalf of such trust estate on such terms and conditions as said Trustees shall deem best, and to bind said estate and its assets to the payment of such indebtedness and to pledge and incumber any property of said estate, whether real, personal or mixed, for the security of the indebtedness so incurred, under such terms and conditions as to the Trustees may seem best, and to agree upon, approve and fix, execute and deliver in the name and on behalf of the said trust estate, any deed, pledge, mortgage, bond, note, endorsement or guarantee, trust deed, or any other instrument which may be necessary or proper to carry out the terms of this instrument. But neither the said Trustees nor the said certificate holders nor any of them shall be in any manner per-

sonally liable by virtue of any contract, note, bond, deed of trust, mortgage or other instrument executed under the terms of this paragraph, but the same shall fully bind the property of the said trust estate for the performance thereof.

(b) The said Trustees are hereby authorized to do, or cause to be done in any lawful manner, all the things which are incidental, necessary or proper to carry fully into effect all of the purposes herein enumerated or powers hereby conferred, the general authority given being intended to control and make fully effective the power and authority of the Trustees under this instrument, notwithstanding the specific enumeration and description thereof herein.

(c) It is expressly understood that all expense incurred by said Trustee in carrying out the terms hereof, as well as all liabilities incurred by them in the execution of said trust, whether arising from contract or tort, shall be considered as expenses of executing said trust, which shall first be paid out of the assets and properties thereof, and which shall be a first and prior lien against the said estate and property, superior to all others.

(d) The said Trustees shall, in their own name, as Trustees of said estate, bring any suit or action which in their judgment shall be necessary or proper to protect said estate or to enforce any contract made for the benefit thereof, and to defend in their discretion any suit or action against said estate or against the Trustees thereof. The said Trustees are expressly authorized to bring or defend such suit in their discretion or to compromise and settle any suit, claim or controversy in which the said estate is interested, as to them may seem best, and to discharge the same out of said estate and its assets; and they are specially authorized to pay

or transfer out of said estate and its assets, all sums of money or property necessary to discharge any judgment against them in their said capacity as Trustees, together with all court costs, or other costs, including counsel and attorney's fees and also to pay out of said estate or its assets, such sums of money, or transfer or appropriate property thereof, for the purpose of settling, compromising, or adjusting any such claim or controversy, together with any such costs and expenses connected therewith, and all of such expenditures shall be treated as expenses of executing this trust.

(e) The Trustees shall have full power to invest and reinvest the trust estate, its profits, income, increase, surplus or avails, subject to the terms of this instrument. But the trustees shall not delegate to any agent or attorney in fact, the power to contract on behalf of said estate, or bind it to the payment of money, but when said Trustees have agreed upon the terms and forms of any contract or contracts, or other instrument or instruments necessary or proper for the carrying out of the purposes herein mentioned, and the execution of the trust hereby created, they may, by resolution or other written authority, designating and describing the form of such contract or contracts or instrument, authorize an agent or agents, attorney or attorneys in fact, to countersign and deliver, in the name and on behalf of said Trustees, any such contract or instrument, but in no case shall such agents or attorneys be authorized to countersign or deliver any notes, bonds, bill of sale, mortgages, trust deeds, encumbrances, or pledges transferring, binding, encumbering or alienating the property of said trust estate, whether real, personal or mixed.

(f) The Trustees shall hold the legal title to all property at any time belonging to their trust and shall have

and exercise the exclusive management and control of the same, and the right of the said Trustees to manage, control and administer the said trust estate shall be absolute and unconditional, free from the control or management of the certificate holders.

(g) So far as strangers to this trust are concerned, a resolution of the Trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the powers of said Trustees, and no purchaser from the Trustees or one loaning money to the Trustees shall be bound to see to the application of the purchase money or loaned money or other consideration paid or delivered by or for said purchaser or loaner to or for said Trustees.

Fifth: Stated meetings of the Trustees shall be held at least once every month, and other meetings shall be held from time to time, upon the call of any officer or Trustee. A majority of the Board of Trustees shall constitute a quorum, and the concurrence of all the Trustees shall not be necessary to the validity of any action done by them, but the wish of the majority of the Trustees present and voting at any meeting shall be conclusive, except as hereinafter provided; they may adopt and use a common seal; they may make, adopt, amend or repeal such by-laws, rules, and regulations, not inconsistent with the terms of this instrument, as they may deem necessary for the conduct of their business or for the government of themselves, their agents or representatives.

Sixth: The Trustees may elect officers, who shall have the authority and perform such duties as the Trustees may determine. They may combine the duties of several officers in one person. Two of such officers, elected, at least, shall be from among their own members. The Trustees shall have authority to elect

or appoint temporary officers to serve during the absence or disability of regular officers; to fix the compensation of any or all officers, agents or employees they may appoint, and are likewise authorized to pay themselves such compensation for their services as they may deem reasonable.

(b) The Trustees shall cause to be kept by a Secretary elected by them, a record of all meetings of the beneficiaries and of the Trustees, which record shall be similar in character and of the effect as that kept in case of corporations, and so far as strangers to this trust are concerned, shall be conclusive against the Trustees of the facts and doings therein stated.

(c) Any Trustee may acquire, own and dispose of beneficial interests in this trust to the same extent as if he were not a Trustee hereof.

(d) Any Trustee may be removed for just cause. The term "Just Cause" as used in this paragraph, shall mean any cause which is detrimental to the interest of the trust estate other than political, racial or religious. Any Trustee may file charges for just cause with the Board of Trustees against any member thereof, and the remaining members of said Board of Trustees shall constitute a Commission with the exclusive power and authority to investigate and determine said charges.

(e) In case of removal of any Trustee, a statement of the cause therefor shall be set forth in writing, which statement shall be in duplicate, and shall be signed by the members of the Commission. The copy of said statement shall be delivered personally to the Trustee so to be removed and the other copy of said statement shall be filed in the office of the Trustees with a notation thereon showing proof of service of a copy of said statement upon the said Trustee. Upon

filing of a copy of said statement, in the office of the Trustees, the removal shall immediately become effective.

(f) Whenever a Trustee who has been so removed, shall file with the Commission, within five days after his removal, a statement in writing alleging his removal was made for political, racial or religious causes, and that he believes that upon a hearing he will be able to establish such fact, it shall be the duty of the Commission to order a hearing. The time and place of such hearing shall be fixed by the Commission and due notice thereof given to said Trustee. Upon such hearing, the Commission shall determine and decide whether or not the removal was made for political, racial or religious causes, and the Commission shall have no jurisdiction or authority to review, consider or determine any other question.

(g) In case of death, resignation or removal of any Trustee, the remaining members of the Board of Trustees shall have the power and authority to elect Trustees to fill the unexpired term or vacancy thus created, and for that purpose, a majority of the remaining Trustees shall be sufficient to elect one or more Trustees as above stated, and such Trustees, as above elected, shall occupy the same relation to this Trust as if they were original parties to this instrument. In case of death, resignation or disqualification of the entire Board of Trustees, a new Board may be appointed for the unexpired term by a Court of Equity of competent jurisdiction.

(h) Neither the said certificate holders or any of them, or their property shall be liable for any indebtedness or liability created by, growing out of, or arising from the execution of the said trust estate, whether arising from contract or tort of the said Trustees, their

servants, agents or employees, in the administration of said estate. The Trustees, personally, nor either of them, nor their private property, whether real, personal or mixed, shall be in any manner, liable for any debt or liability incurred by said Trustees, or any of them, in the administration or management of the said estate, whether arising from contract or tort of the said Trustees or any of them, or their agents, servants, or employees; and neither said Trustees or either of them shall ever be held personally liable for any damage or injury to person or property caused by or arising from, incident to, or growing out of the execution of said trust; nor shall they be liable for the acts or omissions of each other. That the assets of the said trust estate only, shall be liable for any indebtedness, liability, wrong, injury or tort incurred, arising out of or growing out of, the administration of the said trust estate by the said Trustees or any of them or for any act or negligence or default of their servants, agents, or employees in the administration of said estate.

(i) The said Trustees shall use ordinary and reasonable diligence in the performance of this trust, but shall not be liable to the certificate holders or any of them, for any act, default, failure or negligence in or connected with the execution of the said trust, provided, the same shall not amount to and constitute fraud, embezzlement or wilful breach of trust, and they shall not be obliged to give bond to secure the due performance of this trust by them.

Seventh: That for the purpose of evidencing the respective and proportionate equitable interests of the said certificate holders in and to the said trust estate, the said Trustees are hereby authorized and directed to execute and deliver to each such beneficiary hereunder, a certificate signed by the officers designated for

that purpose, which shall evidence and set forth how many interests of the par value of ..... Dollars ($.....) each, the said beneficiary therein named is entitled to as a beneficiary of said trust estate.

(b) The said trust estate shall be divided into ..... (.....) Beneficial Interests, all of which Interests shall be of the expressed par value of.....Dollars ($.....) each, and the certificates issued by the Trustees to said beneficiaries shall be substantially in the following form, to-wit.:

Organized Under the Common Law.

Number Shares
.....Shares Par Value $.....

..... Company

General Offices .....

This Certifies, That ..... is the holder of ..... Shares in the Capital of the ..... Company, fully paid and non-assessable, subject to Declaration of Trust in favor of said Organization dated ....., 19...., and recorded in the Records of ..... County, ..., and transferable on the books this Organization in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, The said Organization has caused this Certificate to be signed by its duly authorized officers and its seal to be affixed hereto, this ..... day of ..... A. D., 19.....

.....Secretary. .....President.

Shares $..... each.

(c) By a unanimous vote of all the Trustees at any annual meeting, or special meeting called for that pur-

pose, the Trustees shall have the power to increase or to decrease the number of beneficial interests of the said trust estate to such an amount, from time to time, as they shall deem expedient, for the interest and advancement of the trust estate herein created, and such additional shares may be sold for cash, exchanged for property, the shares of other companies or corporations, or distributed as dividends, at the option of the Trustees.

(d) In case of the loss or destruction of any certificate of beneficial interests issued hereunder, by the Trustees, the Trustees may, under such terms as they may deem expedient, issue new certificates in place of the ones lost or destroyed.

(e) The Trustees may from time to time declare and pay such dividends as are earned by all outstanding beneficial interests, out of the net earnings from time to time received by them, as they may deem advisable; but the amount of such dividends and the payment of them, shall be wholly in the discretion of the Trustees, and the surplus profits or earnings shall not be maintained as separate fund, but shall be merged into the body of the trust property.

(f) Beneficial interests hereunder shall be transferable only on the books of the Trustees upon surrender of certificates therefor and presentation of a written transfer thereof. The acceptance of a certificate of beneficial interests by the original holder or transferee shall make the person named in said transfer of certificate a party to this instrument as if such party had, in person, joined in the execution thereof.

(g) The name in which a certificate of beneficial interests stands on the books of the Trustees, shall be considered by the Trustees conclusive evidence of ownership, and they shall not be required upon trans-

ferring such certificate, or paying dividends on such interests, or distributing assets upon the termination of the trust, or at any other time, to inquire in any way into the relations between assignor and assigns, pledgor or pledges, trustee and beneficiary, guardian and ward, or in any other similar relation, and shall have the right to conclusively presume without inquiry, that the holder of any such certificate as shown by their books is the real and true and unconditional owner thereof.

Eighth: Annual meetings for the election of Trustees and for the transaction of other business shall be held in the office of the Trustees on the ...., in ....., each year, commencing in 19.., of which meeting the secretary or acting secretary, shall give notice by mail to each Trustee at his registered address at least ten days before such meeting, but failure to give notice of such meeting shall not invalidate the proceedings of the meeting.

(b) The Trustees may call the certificate holders together at the annual meeting of said Trustees, upon ten days' notice given as aforesaid, at which meeting the Trustees may submit an annual, or such other reports as they may deem advisable, to said certificate holders for their information, and the certificate holders, at such annual meeting, may nominate from among themselves, candidates for the office of Trustees, presenting such nominations to the Board of Trustees, but the election of such nominees, by the Trustees, shall be wholly optional with said Trustees. The fiscal year shall end each year on December 31st.

Ninth: The death of a beneficiary or of a Trustee during the continuance of this trust shall not operate to determine the trust, nor shall it entitle the legal representative of the deceased certificate holder to an ac-

counting, or to take any action in the courts, or elsewhere, against the Trustees; but the executors, administrators or assigns of any deceased certificate holder shall succeed to the rights of said decedent under this trust, upon surrender for transfer, of the certificates for the interests held by him.

(b) It is expressly agreed that the said trust shall not be terminated or the administration thereof in any wise interfered with or suspended by the death of any such beneficiary, or his incapacity for any reason, or by his said interest or interests being by process of law subjected to the payment of debts, or in any way vested in any heir, assign, creditor, or purchaser, of the said beneficiary, or in any trustee, assignee or officer of any court, or by the same in any manner being divested out of the beneficiary and transferred or vested in any other person, administrator, executor, trustee, assignee, or personal representative. But any such person who may, in any such manner acquire or become vested with the ownership of such certificate, shall thereupon succeed to and become entitled to all the rights and equities of the beneficiary therein named, and the beneficial interests in the said trust estate, upon surrendering the original certificate to the said Trustee with such proof of ownership as may be reasonably required by them, and the issue in lieu thereof of a new certificate, and notwithstanding said change of ownership or interest in any such certificate, or death or insolvency of the original owner thereof, the said trust estate shall continue and remain in full force until terminated as herein provided.

(c) The ownership of interests hereunder shall not entitle the certificate holder to any title in or to the trust property whatsoever, or right to call for a partition or division of the same, or for an accounting, or

for any voice or control whatsoever of the trust property or of the management of said property or business connected therewith by the Trustees.

Tenth: The Trustees hereunder shall, in entering into contracts and in the execution of notes, bonds, or other written instruments obligatory upon the said estate, set forth in appropriate terms that the said instruments are not entered into by them nor binding upon them individually, but only as Trustees of this estate, and that contracts or obligations are to be satisfied or performed out of the assets of said trust estate only. But the failure or neglect of such Trustee or Trustees to so declare in any instrument, contract or obligation entered into for the purpose of carrying out the objects of said trust, shall not be construed to render said Trustees or any of them, individually liable thereon, but the same shall be obligations binding upon and performable only out of the assets of said trust estate.

(b) It is further expressly agreed that the said Trustees are fully authorized in their capacity as such and for and on behalf of said trust, to receive, collect, receipt and give full releases, acquittances and discharges for any sums of money which may be payable to them as said Trustees for the benefit of said trust, or for any property or any other thing of value which they may be entitled to receive on behalf of said trust.

Eleventh: This trust shall not continue in any event longer than for the term of twenty years, at which time the then Board of Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the certificate holders of the beneficial interests according to the number of interests held by them.

(b) For the purpose of winding up their affairs and liquidating the assets of the trust, the then Board of

Trustees shall continue in office until such duties have been performed.

In Witness Whereof, the said ....., ... and ....., Trustees, hereinbefore mentioned, have set their hands and seals in token of their acceptance of the trust herein specified, for themselves and their successors; and the said ....., Subscriber, has hereunto set his hand and seal in token of his assent to and approval of said terms of trust for himself and his assigns, the day and year first above written.

..... Trustee (Seal)
..... Trustee (Seal)
..... Trustee (Seal)
..... Subscriber (Seal)

State of .....
County of ..... } ss.

I, ..., a notary public in and for said county aforesaid, do hereby certify that ...., ..., and ....., personally known to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this .... day of ....., A. D. 19...

.....
Notary Public.

My commission expires .....