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## VOLUNTARY ASSOCIATIONS IN MASSACHUSETTS

By S. R. Wrightington, of the Massachusetts Bar.

The decision of the Supreme Court of the United States in the corporation tax cases has attracted attention to a form of business organization that in recent years has become highly developed in Massachusetts. *Eliot v. Freeman*, 220 U. S., 178, 187, held that the corporation tax applied only to organizations deriving from legislatures "some quality or benefit not existing at the common law" and that, therefore, a "real estate trust" was not included. This real estate trust was what is known in Massachusetts as a voluntary association. It is a combination of capital vested in trustees who issue transferable certificates for shares and execute a declaration of trust designed to provide for the shareholders all the immunities of corporate shareholding. A somewhat similar form of combination, though with less elaborate provisions for the protection of shareholders, was used by the original Sugar trust<sup>1</sup> and the original Standard Oil trust.<sup>2</sup> They were held to be illegal combinations under state laws and corporations composing them were dissolved. Apparently their scheme of organization has been little used since in States other than Massachusetts, except under statutes providing for the organization of joint stock companies which give them almost, if not quite, the status of corporations.<sup>3</sup>

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<sup>1</sup> *People v. North River Sugar Refining Company*, 121 N. Y., 582, 623.

<sup>2</sup> *State v. Standard Oil Company*, 49 Ohio St., 137, 176.

<sup>3</sup> It has been held in Massachusetts that "joint stock associations," so-called, organized under the laws of other States as something distinct from corporations may have so many of the elements of corporations that they will be deemed to be such in applying Massachusetts statutes regulating transaction of business by foreign corporations. "When by legislative authority or sanction an association is formed capable of acting independently of the rules and principles that govern a simple partnership, it is so far clothed with corporate powers that it may be treated for the purposes of taxation as an artificial body; and become subject as such to the jurisdiction of the government under which it undertakes to act in its associated capacity." *Oliver v. Liverpool & London Co.*, 100 Mass., 531, 540. As to the real effect of this case see *Liverpool Ins. Co. v. Mass.*, 10 Wall., 566, *Edwards v. Warren, etc., Works*, 168 Mass., 564, 567. See *Hibbs v. Brown*, 190 N. Y., 167. *Tide Water Co. v. State Board of Assessors*, 57 N. J. L., 516. By statute also certain ancient associations have been made technical corporations in Massachusetts. Rev. Laws, Ch. 34, Sec. 1.

Voluntary associations in Massachusetts have been in common use for many years, occasionally in ordinary business enterprises, but more frequently in dealing with valuable parcels of real estate. Massachusetts has perpetuated the old fear of mortmain by forbidding organization of corporations under general laws to deal in real estate. Hence all modern office buildings and hotels had to be financed by voluntary associations and investors became familiar with these securities. To avoid the strict limitations on capitalization of public service corporations, the same form was adopted to organize holding companies which now control nearly two-thirds of the street railway mileage, and one-half the gas produced in the State. Taxation of business corporations, especially the inquisitorial features of the Federal law, have led two large manufacturing establishments controlled in Boston to abandon the corporate form for the voluntary association. This illustrates one of the most interesting tendencies in the law, the reaction from corporation to partnership in industrial organizations, which keen observers have detected in smaller business enterprises. It may well be that the high development of the form of these "voluntary associations" or trusts will be given more sympathetic treatment by the courts than were the first attempts of the merchants to organize partnerships, that their evident intent will be made effectual and that the partnership will again take its place as an effective method of coöperative finance.

Common law associations with transferable shares take different forms due to two different sources of legal sanction, one the partnership, the other the trust. An early form, which is still found occasionally in coöperative stores, is a simple association with constitution and by-laws providing for transferable shares representing the fractional interests of the members, but usually not containing very elaborate provisions for protection of the members from individual liability for debts of the association.<sup>4</sup> When engaged primarily in commercial enterprise, they have always been held partnerships.<sup>5</sup> In all jurisdictions, however, are found numerous decisions holding that associations so organ-

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<sup>4</sup> *Tyrrell v. Washburn*, 6 Al., 466; *Ashley v. Dowling*, 203 Mass., 311, 317.

<sup>5</sup> It was held that the Sugar trust was a partnership and the corporation entering the partnership *ultra vires* was therefore dissolved. *People v. North River Co.*, 121 N. Y., 582, 623. The Court mentioned but did not decide the question in *State v. Standard Oil Co.*, 49 Ohio St., 137, 176.

ized but not primarily for business purposes, are not partnerships. With such social or semi-social bodies this article has no concern.

The more important form of business association, however, is created by a declaration of trust by two or more individual trustees reciting that they are to acquire certain property usually either real estate or corporate securities, and will hold it upon trusts somewhat as follows: To avoid the rule against perpetuities the trust is limited, if not sooner terminated, to twenty years after the death of the survivor of the trustees, and a number of other persons named, some of whom are usually children of prominent shareholders.<sup>6</sup> The management of the trust estate is vested usually in the trustees, but sometimes in a separate board of directors. It is usually provided that the trustees shall be self-perpetuating, but if they are also the managers, the shareholders frequently have power to elect or remove them. Subscribers to the trust fund receive transferable certificates for stock resembling as closely as possible corporate stock. There is provision for meetings and certain powers of the shareholders may be exercised by vote. The most interesting provisions, however, are those by which it is attempted to eliminate personal liability for debts of the concern. The following quotation is from the deed of a well known real estate trust operating a large office building in Boston:

"The shareholders hereunder shall not be liable for any assessment and the trustees shall have no power to bind the shareholders personally. In every written order, contract, or obligation, which the trustees shall authorize or enter into, it shall be their duty to stipulate or cause to be stipulated that neither the trustees nor shareholders shall be held to any personal liability under or by reason of such order, contract or obligation, and to refer or cause reference to be made to this agreement.

"Every act done, power exercised or obligation assumed by the trustees personally under the provisions of this instrument or in carrying out the trusts herein contained shall be held to be done, exercised or assumed, as the case may be, by them as trustees and not as individuals, and every person or corporation contracting with the trustees, as well as beneficiary hereunder, shall look only to the fund and property of the trust for payment under such contract or for the payment of any debt, mortgage, judgment or

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<sup>6</sup> It has been held by a majority of the Court that even without this limitation such a trust does not violate the rule against perpetuities. The report of this case contains the full text of a real estate trust deed, though not of the most improved type. *Howe v. Morse*, 174 Mass., 491.

decree, or the payment of any money that may otherwise become due or payable on account of the trusts herein provided for or any other obligation arising under this agreement in whole or in part; and neither the trustees nor the shareholders, present or future, shall be personally liable therefor.

"No bond or surety or sureties shall ever be required of any trustee acting hereunder, and each trustee shall be liable only for his own acts, and then only for willful breach of trust."

Though associations which are engaged in trade have been long held partnerships whether their property is vested in the association,<sup>7</sup> or in trustees for it,<sup>8</sup> it has been generally supposed till recently that real estate trusts engaged in renting offices or perhaps merely renting an entire building to a tenant would not be deemed partnerships.

The reasoning of a leading English case supports this view. An English statute required that "no company, association or partnership consisting of more than twenty persons shall be formed after the commencement of this act for the purpose of carrying on any other business (than banking) that has for its object the acquisition of gain by the company, association or partnership or by the individual members, unless it is registered." In the lower court Jessel M. R. held that a trust similar to our real estate trust formed to acquire investment securities was such an association.

"There are many things which in common colloquial English would not be called a business even when carried on by a single person which would be so called when carried on by a number of persons. This is a distinction not to be forgotten even if we were trying the question by the ordinary use of the English language. For instance, a man who is the owner of offices, that is, of a house divided into several floors and used for commercial purposes, would not be said to carry on a business because he let the offices as such: but suppose a company was formed for the purpose of buying a building or leasing a house to be divided into offices and to be let out, should not we say if that was the object of the company that the company was carrying on business for the purpose of letting offices or was an office letting company, trying it by the use of ordinary colloquial language.

"When you come to an association or company formed for a purpose you say at once that it is a business because there you have that from which you would infer continuity."

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<sup>7</sup> *Alvord v. Smith*, 5 Pick., 232, 235; *Taft v. Ward*, 106 Mass., 518.

<sup>8</sup> *Phillips v. Blatchford*, 137 Mass., 510.

In the Court of Appeals the decision was reversed. Lord Justice James said: "But I believe that according to the vernacular we use on these subjects the difference which the act intended to draw between a company or association and an ordinary partnership is this: An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company or association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and to-morrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and with the intention that, so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership. This object as regards liabilities could not in point of law be attained by any arrangement between the persons themselves, unless the persons contracting with them authorized the change by a novation, or unless by special provisions in Acts of Parliament sanction was given to such arrangements."

Lord Justice Brett said: "I confess I have some difficulty in seeing how there could be an association for the purpose of carrying on a business which could be neither a company nor a partnership, but I should hesitate to say that, by the ingenuity of men of business, there might not some day be formed a relation among twenty persons which, without being strictly either a company or a partnership, might yet be an association.

"Where it is a joint stock company, or a corporation, or quasi corporation, and the individuals are mere shareholders, then the gain which is acquired by the business is a gain by the company, and not a gain by the individual shareholders. But where it is an ordinary partnership, or where it is an association which, not being a joint stock company or corporation, is more like to a partnership, there the gain will not be by the whole body as distinct from the individuals, but by the individual partners.

"Let us now consider whether in the present case there were any persons associated for the purpose of carrying on any business such as is described in this clause. If there were such persons, they must have been either the trustees or the certificate holders. In my opinion neither the one nor the other were associated together for the purpose of carrying on such a business as is described in the act. I will take first the trustees themselves. The trustees were not, as I construe the deed, to enter upon a

series of acts which, if successful, would obtain a gain. They were joined together for the purpose of once for all investing certain money which was delivered into their hands, and not for the purpose of obtaining gain from a repetition of investments. In other words, they were not associated together for the purpose of speculating in shares. That was not their business. There was no reason why, when they had once made an investment, it should, under ordinary circumstances, ever be changed. Therefore it seems to me that the primary and substantial object of their associating together was not for the purpose of carrying on a business which, if successful, would result in the acquisition of gain.

"But supposing that this was such a business as is mentioned in the act, were the certificate holders the persons who were to carry it on? It seems to me that they certainly were not. I take it that the persons called trustees in the deed are clearly trustees as distinguished from agents and from directors. The distinction has been pointed out by my Lord, and I entirely agree with it. If, indeed, although they were called trustees, the duties which they had to perform were really those of directors, then, although they were called trustees, the legal effect of the deed would be that they would be directors, and if they are directors they are agents; but here it seems to me clear that according to the true construction of the deed they were not directors or agents, but trustees. If that be so, the certificate holders, even if they were associated at all, were not associated for carrying on the business. It was not their business. They could not have been made liable for any contract made by the trustees. It was of course urged that they would be liable as undisclosed principals. But that assumes that the persons who made the contracts upon which they are to be liable are their agents authorized to bind them by their contracts, which is obviously not true. Therefore, even if there be here a business within the meaning of the section, yet it is not carried on by the certificate holders, who are of a larger number than twenty, but by the trustees, who are not of the number of twenty or more; and therefore in either view the case is not within the statute."

Lord Justice Cotton said: "If it appeared that the real object of the deed was that the trustees should speculate in investments, even though confined to this particular class, the case would have stood in a very different position. In my opinion there is nothing of that sort. This is not a provision that they shall make a profit by selling and buying again securities of this class, whenever, in their opinion, the turn of the market makes it advisable so to do. The deed is in substance a trust deed, providing how they are to hold as trustees specified securities of a large amount with provisions enabling them in certain events to sell some of the securities, and enabling them when that is done, but only

under special circumstances, to reinvest, not to speculate. In my opinion that is not a deed providing for carrying on a business within the meaning of the act, it is a deed providing for the holding trust property, with such provisions only as are necessary to enable that to be conveniently done. I am of opinion, therefore, that there is no carrying on business within the meaning of the act."<sup>9</sup>

The Massachusetts Supreme Court has recently declined to follow this in deciding whether a real estate trust for the purpose of erecting a hotel and leasing it was taxable in Boston as a partnership or in the residences of the shareholders as beneficiaries of a trust. The court said: "There is no doubt that they are joint owners of property for whose benefit the business is being carried on, in which profits or loss will affect them all proportionally through the increase or diminution of the value of their respective interests in the trust. In the leading and substantial features that distinguish ordinary partnerships, this association is within the spirit and meaning of the law of partnership. The limitations upon the power and liability of individual members and the attempt to avail themselves of many of the privileges of stockholders in corporations relate more to details and to the machinery of management than to the substantive purpose of the enterprise."<sup>10</sup>

Shortly after the court also decided that it would be *ultra vires* for the New York, New Haven and Hartford Railroad Company to develop its vacant land in Park Square, Boston, by forming a real estate trust and taking shares in payment. It was argued that the objections to a corporation entering a partnership did not apply because by the deed of trust there was no personal liability of shareholders. The court ignored this argument and said "it will be virtually if not technically in partnership with them."<sup>11</sup>

It is still possible that if an entire building or piece of land were rented and the only function of the trustees was to collect rents and make certain repairs, it would be held a tenancy in common and not a partnership. In most cases, however, the powers conferred on the trustees in the deed of trust are much broader than

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<sup>9</sup> *Smith v. Anderson*, 15 L. R. Ch. Div. 247, 259, 273, 274, 280, 283.

<sup>10</sup> "The question arises from the fact that the petitioners are trustees of an association of shareholders in an enterprise for the purchase, improvement and management of real estate." *Williams v. Boston*, 208 Mass., 497, 500.

<sup>11</sup> *Williams v. Johnson*, 208 Mass., 544.

that, and would permit some kind of trade.<sup>12</sup> There is, of course, a well known distinction between ordinary partnerships and tenancies in common, though the distinction is frequently hard to apply.<sup>13</sup> The test is proprietorship of a commercial enterprise as distinguished from mere ownership of property for whose use or from whose use compensation is jointly derived. There seems no reason why a similar distinction should not be applied in dealing with the more complicated voluntary association.

It is also possible that the share holding trusts whose trustees are engaged in operating only so far as they elect directors of the corporations controlled by them will be held not partnerships. Since the broader questions of policy of the corporations are doubtless dictated by the trustees, it seems likely that they will be held partnerships.

It is also familiar law that partners may by agreement modify their common law obligation but that such modifications will not be binding on those who deal with the firm without notice thereof.<sup>14</sup>

Recording the deed of trust in the registry of deeds would be notice only to those dealing with the real estate. The statutory requirement for filing a copy of the deed of trust with the town clerk and commissioner of corporations is not thereby made notice to any one.<sup>15</sup> It has been said, in the case of what was really not a partnership but a social club, that the nature of the association may give notice of limitation of liability of members.<sup>16</sup> The time may come when the custom of limiting liability of members of these voluntary associations is so familiar that our courts can find constructive notice of it.

There is no decision in Massachusetts, however, that if partners agree that certain of their members shall not be liable to creditors in any form for the debts of the firm, the creditors even contracting with notice of that provision, would be prevented from joining such members as defendants.<sup>17</sup> Much less that a provision

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<sup>12</sup> *Hussey v. Arnold*, 185 Mass., 202.

<sup>13</sup> *French v. Styring*, 2 C. B. n. s., 357; *Goell v. Morse*, 126 Mass., 480.

<sup>14</sup> *Tyrell v. Washburn*, 6 Al., 466. See *Manning v. Gasharie*, 27 Ind., 399, 415; *Walburn v. Ingilby*, 1 My. & K., 61, 76.

<sup>15</sup> *Acts of 1909*, Ch. 441.

<sup>16</sup> *Volger v. Ray*, 131 Mass., 439.

<sup>17</sup> There was apparently no limitation on the liability of shareholders in *Bodwell v. Eastman*, 105 Mass., 525, 527, and the other cases of the same period relating to express companies. In *Cook v. Gray*, 133 Mass., 106,

that no member of the firm should be personally liable and that a creditor's only remedy would be to attach firm goods would be enforced by the court. The attitude of the court toward such provisions is suggested by the following from the opinion in *Hussey v. Arnold*: "We do not attempt to determine whether all the provisions of this agreement are enforceable in the courts or whether there are such considerations of public policy involved in an attempt of this kind to do business without legal liability of anybody for debts incurred by the trustees as merit consideration by the legislature."<sup>18</sup> In England we find a number of cases dealing with joint stock companies where limitations similar to those above quoted were construed. Although not the form now most common, they were held not to bind creditors in the absence of express contract.<sup>19</sup>

A contrary result was reached in the Federal Courts. Here the trustees did refer to the deed of trust in their contract though not expressly contracting against liability of shareholders. It was an action at law on a note of A, "trustee, as trustee under declaration of trust dated," etc. The Court held that this obligated the plaintiff "by its implied agreement in accepting the note to abide by the terms of the articles of association. Whether or not the plaintiff examined the articles of association or knew their contents is of no consequence because this express provision required it to do so or take the hazard of not doing it.

"Therefore the only question is whether or not this implied stipulation of the plaintiff limiting its remedy to the general assets of the association and the property specially pledged to it, is contrary to the rules of law. Of course a stipulation in an instrument which fundamentally violates its essential nature must sometimes be rejected by the courts. For instance, if any individual or partnership should stipulate in his or its pecuniary obligations

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109, some very simple articles of association were interpreted as not intended to limit liability of stockholders and they were allowed joined as defendants in contract at law. Under Massachusetts statutes it would not be necessary to join all members of associations even where non-joinder is pleaded in abatement. *Bank of Topeka v. Eaton*, 95 Fed., 355 (C. C.—Mass.—1899).

<sup>18</sup> *Hussey v. Arnold*, 185 Mass., 202, 204.

<sup>19</sup> *Greenwood's Case*, 3 De G. M. & G., 459, 476, 482. Restrictions on liability of partners bind only themselves as to their right to contribution. *Hawken v. Bourne*, 8 M. & W., 703; *Smith v. Hall Glass Co.*, 8 Com. B., 668, 11 Com. B., 897; *Hallett v. Dowdel*, 18 Q. B. 2, 43, 53.

that he or it should not be personally liable thereon, without at the same time mortgaging or pledging property or giving some other specific lien for security, it might be difficult for the law to regard the stipulation, because in that event as there would be no lien that the law could enforce, the holder of the obligation would be left without remedy unless he could proceed by judgment against the obligor; and the result, if sustained, would be an obligation which in law is no obligation. The present case, however, assimilates itself to the large class of cases where certain property being pledged in some form for the security of a debt, the parties have been at liberty to stipulate that the owner of the debt should look only to the property thus pledged. In the present case not only did the Bank of Topeka have specific assets given it for its security but the entire property of the association was held in trust and therefore subject to administration by the chancery courts, which could apply it equitably and proportionally to the discharge of obligations incurred by the trustee as contemplated by the express direction of the articles of association that the debtors of the trust should look for payment solely to its property."

Hence individual shareholders were held not liable.<sup>20</sup>

In another case in the Federal Court there is a dictum in favor of the enforceability of such provisions.<sup>21</sup>

It is evident, however, from the form of limitation now favored that reliance is not placed on the doctrine of notice alone. It is intended to incorporate the abandonment by the creditor of his common law rights in an express contract. The tendency of the decisions is to uphold this if sufficiently clear and this, it is submitted, is the correct principle. Of course, one contracting with trustees of such an association may expressly agree that he will not hold the trustees to personal liability. In that case he cannot

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<sup>20</sup> *Bank of Topeka v. Eaton*, 100 Fed., 8 (C. C.—Mass.—1900), affd. by C. C. A., 107 Fed., 1003; *Acc. Industrial Co. v. Texas*, 31 Tex. Civ. App., 375.

<sup>21</sup> A judgment was obtained against agents of an association personally for work done for this association. They were also shareholders. They contended they could not be held because of provisions in the articles of association that every person dealing with them "disavows having recourse on any pretence whatever to the person or separate property of any present or future member of the company." *Held*: At most only a contract not to enforce his judgment against them personally. If he attempted to break it, equity might grant an injunction. *Davis v. Beverly*, 2 Cranch. C. C., 35.

sue the trustees at all at law.<sup>22</sup> It has been hinted that the beneficiaries might be liable in equity as principals.<sup>23</sup> If the contract expressly provided, however, that no action could be brought against any one, but the only remedy of the contractor was to reach the trust fund, it is doubtful if such provision would be held binding.<sup>24</sup>

There is an early decision in Pennsylvania which accepted with reluctance the right to forestall individual liability by contract. Notes were issued by an unincorporated banking association containing the stipulation that they were payable "out of their joint funds, according to the articles of association," Gibson, J., said: "I see no reason to doubt, but they may limit their responsibility by an explicit stipulation *made with the party* with whom they contract and clearly understood by him at the time. But this is a stipulation so unreasonable on the part of the partnership and affording such facility for the commission of fraud, that unless it appears unequivocally plain from the terms of the contract, I will never suppose it to have been in the view of the parties." He therefore held the members liable.<sup>25</sup>

In a recent New York case of a statutory joint stock association the majority of the judges seem to have felt that such a provision was void as against public policy.<sup>26</sup>

<sup>22</sup> *Shoe & Leather Nat. Bank v. Dix*, 123 Mass., 148, 151.

<sup>23</sup> *Hussey v. Arnold*, 185 Mass., 202, 204. But see *Taylor v. Davis*, 110 U. S., 330.

<sup>24</sup> *Hibbs v. Brown*, 190 N. Y., 167, 186, 196.

<sup>25</sup> *Hess v. Werts*, 4 Serj. & R., 356, 361. "This company (insurance underwriters) or association was not incorporated and was in nowise exempted by law from partnership liability, except as it should by agreement with the insured actually and explicitly so exempt itself. This does not mean that seemingly constructive notice which is so contrived and intended as to be hidden in the letter and not to be perceived or suggested until searched out of its lurking place after a loss. It means a notice so plain and fair that the party to be charged with it either receives it or it is his own fault if he does not." *Imperial Shale Brick Co. v. Jewett*, 169 N. Y., 143, 150.

<sup>26</sup> A statutory joint stock company of New York, the Adams Express Company, issued bonds stipulating against personal liability of members and making them payable only out of the funds of the company. The issue was whether the provision limiting payment to the fund made them non-negotiable. *Held*: It did not. O'Brien on the ground that they were practically corporations by statute. Werner, Bartlett, and Cullen on the ground that the limitation of liability was against public policy and void. "Personal liability preserved by the legislature and recognized by the courts." O'Brien intimated that if it were an ordinary partnership he might agree on that. *Hibbs v. Brown*, 190 N. Y., 167.

The English courts, however, uphold such contracts.<sup>27</sup> They say that the individuals who sign the contract personally contract that the capital stock or funds of the company shall be applied to answer the claim on the contract and also that each shareholder may be sued and recovered against to the extent of his unpaid subscriptions.<sup>28</sup> They hold he is also liable if the fund to which liability is limited is non-existent by his own fault.<sup>29</sup>

A contract to pay out of specific funds does not create a charge on those funds,<sup>30</sup> but even before time of payment, the creditor may prevent the fund from being misapplied.<sup>31</sup> This does not amount, however, to an implied contract to continue to carry on the business.<sup>32</sup> It will be practically impossible to sue at law on such contracts, the remedy will be in equity.<sup>33</sup>

Complications may arise, moreover, as to the exact effect of transfer of shares in such an association on the liability of members. It has been held that a new shareholder is not personally liable for debts contracted before he became an owner.<sup>34</sup> In accordance with the law applicable to ordinary partnerships it has been held that a member who sells and transfers his share is liable for debts contracted while he was a member,<sup>35</sup> and for debts

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<sup>27</sup> A contract of insurance stipulated that "the said policy or anything therein contained shall in no case extend or be deemed or construed to extend to charge or render liable the respective proprietors of the said company or any of them" etc., "to any claim or demand whatsoever in respect of the said policy or of the assurance thereby made beyond the amount of their, his or her individual shares or share in the capital stock of the said company, but that the capital stock and funds of the said company shall alone be charged and liable to answer all claims and demands by virtue of the said assurance or incident thereto." Held: To preclude any action at law against an individual shareholder. *Halket v. Merchants, etc., Association*, 13 Q. B., 960; *Hallett v. Dowdell*, 18 Q. B. 2, 43, 54.

<sup>28</sup> *Hallet v. Dowdell*, 18 Q. B. 2, 43, 55.

<sup>29</sup> *McIntyre v. Belcher*, 14 C. B. n. s., 654.

<sup>30</sup> *Sovereign Life Assurance Co.* (1892), 3 Ch., 279; *Albert Life Assurance Co.*, 9 Eq., 706; *Industrial Co. v. Texas Association*, 31 Tex. Civ. App., 375, 380.

<sup>31</sup> *Kearns v. Leaf*, 1 Hem. & M., 681; *State Fire Ins. Co.*, 1 De G. J. & Sm., 634.

<sup>32</sup> *King v. Accumulative Co.*, 3 C. B. n. s., 151.

<sup>33</sup> *Hallet v. Dowdell*, 18 Q. B. 2. See *Grain's Case*, 1 Ch. D. 315, 322.

<sup>34</sup> *Shamburg v. Ruggles*, 83 Pa., 148; *Thomas v. Clark*, 18 C. B., 662; *M. W. Powell Co. v. Finn*, 198 Ill., 567.

<sup>35</sup> *Camden R. R. v. Guarantors of Penn.*, 59 N. J. L., 328.

incurred thereafter until notice.<sup>36</sup> In most cases, however, he would prove to have been a dormant partner, who is not bound to give notice to terminate his liability.<sup>37</sup>

Does death dissolve a voluntary association? Technically it may be a new association after the death of each member, but by joining the association there is an implied agreement to continue a member in each new association thus formed,<sup>38</sup> or, as has been said, less evidence of an intent to continue the business is required.<sup>39</sup> No distribution of the assets can be compelled, but the business continues as before.<sup>40</sup> Upon death of a member where it is provided that "the representative of the deceased shall succeed to the rights of the deceased in the certificate and the shares it represents, subject to the declaration of trust," there is imposed on the estate of the deceased the liability the deceased would have incurred toward debts regardless of whether the executor decides to become a member of the firm or not. In an ordinary partnership the estate would not become liable for future debts unless the executor decided to become personally a partner, even where the articles had stipulated that he should become a partner. But a majority of the court held that in a voluntary association there was by this provision an implied agreement of indemnity by each partner against the debts of the association as long as he held his shares, which agreement could be enforced against the estate of the deceased.<sup>41</sup>

Transfer of a share may be held technically to dissolve the association,<sup>42</sup> but subject to the implied agreement of the other members to continue as partners, so that the others who have not transferred their shares cannot escape liability on that ground. The Massachusetts Court has not expressly said whether there is a dissolution or not, but has said that transferability of shares is

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<sup>36</sup> *Tyrrell v. Washburn*, 6 Al., 466; *N. Y. Bank v. Crowell*, 177 Pa. St., 313; *Farnam v. Patch*, 60 N. H., 294, 326; *Grady v. Robinson*, 28 Ala., 289, 297.

<sup>37</sup> *Grosvenor v. Lloyd*, 1 Met., 19.

<sup>38</sup> *Tyrrell v. Washburn*, 6 Al., 466.

<sup>39</sup> *Machinists' Bank v. Dean*, 124 Mass., 81, 84.

<sup>40</sup> *Taber v. Breck*, 192 Mass., 355, 361.

<sup>41</sup> *Phillips v. Blatchford*, 137 Mass., 510, 514. Of course the executor does not become a member or personally liable until he consents. *Wells v. Murray*, 4 Ex., 843, 868.

<sup>42</sup> *Wadsworth v. Duncan*, 164 Ill., 360, 364. This case held that the new firm assumed the liabilities of the old, and that members of the new firm could not plead non-joinder of the retiring members.

legal.<sup>43</sup> A member who pays a debt of the association is entitled to contribution.<sup>44</sup>

But the danger to partners does not arise during comfortable business times. It comes with financial failures due usually to the carelessness or dishonesty of representatives. The distinguished gentlemen now acting as trustees doubtless may safely be trusted even to delegate wisely their authority necessarily involved in the management of these large interests. But can the shareholders be sure that their successors in the trust will be equally trustworthy? As yet these trusts are held by individuals and not by trust companies, just as the early railroad trust mortgages were held by individual financiers. It may be that this business will be transferred ultimately to the trust companies, although they are now hardly equipped to manage directly industrial enterprises. The risks to shareholders are even more obvious in the trusts whose assets consist of stocks and bonds of public service corporations on which other bonds are often issued. The assurance of a trust estate sufficient to meet obligations is less likely than in the case of real estate. This was the reason for the decision of the Massachusetts Supreme Court that shares in the Massachusetts Electric Companies, a voluntary association holding bonds and stocks of the street railways of Eastern Massachusetts outside of Boston was an improper investment for trustees.<sup>45</sup>

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<sup>43</sup> *Phillips v. Blatchford*, 137 Mass., 510; *Ashley v. Dowling*, 203 Mass., 311. Lord Eldon suggested that unless the contrary was provided in the articles, a retiring member would have to notify all other shareholders before a dissolution resulted. *Van Sandau v. Moors*, 1 Russ., 441, 463. But the ordinary provision for transfer of shares would doubtless have satisfied him. Lindley says transfer results in a new firm. *Lind. Part 7th Eng. Ed.*, p. 401. *Held*: No dissolution where articles of partnership permit transfer of shares, but rights of third parties not affected. *Merrick v. Brainerd*, 38 Barb., 574, 578. See *Troy Iron & Nail Factory v. Corning*, 45 Barb., 231, 243.

<sup>44</sup> *Phillips v. Blatchford*, 137 Mass., 510; *Taber v. Breck*, 192 Mass., 355, 361, 365; *Comm. v. Rosen*, 176 Mass., 129, 130.

<sup>45</sup> After the opinion in this case was handed down and printed in an unofficial publication called the *Banker & Tradesman*, of June 27, 1908, counsel called the attention of the court to an error in the proceedings below which it was claimed should have deprived the court of jurisdiction. The opinion was thereupon withdrawn and the case recommitted to the lower court, where it was immediately settled. The case was not decided on the ground that it was a partnership. Indeed, it may still be that the court will follow *Smith v. Anderson*, *supra*, as to these holding trusts.

The causes of the development of these associations are doubtless the desire to escape troublesome statutes regulating corporations which interfere with plans for combination and stock watering, the unpleasant certainty of taxation, and the publicity of returns. Is there any immunity from regulation in these associations which derive no franchise from the State?

It was originally supposed that *Eliot v. Freeman*<sup>46</sup> decided that real estate trusts could not constitutionally be taxed, but the court simply said that the statute as written did not include them. It is to be noted, however, that the justification of the constitutionality of the Federal Corporation Tax is put on the ground that it is a tax on a privilege conferred by the State or Federal government, and the real estate trusts are said to have no such privilege.

Except for the filing statute above noted, Massachusetts has not yet attempted to regulate these associations, though by order of the legislature the tax commissioner is now conducting an investigation with a view to such legislation.

There has been no decision of our State Court directly passing upon the right to regulate voluntary associations as distinguished from all other partnerships. It has been held that shares in voluntary associations cannot be taxed to the owner.<sup>47</sup> But that the association, like other partnerships, must be assessed in the town of its principal place of business.<sup>48</sup> The distinction made between shares in corporations and shares in associations was that whereas the former were property under Massachusetts decisions, the latter simply represented an undivided partnership interest in the net assets of the association which was otherwise taxed.<sup>49</sup>

It has been held that the corporate franchise tax, an excise on the corporation based on the excess in market value of its aggregate share capital over the assessed value of its tangible property otherwise taxed, cannot be extended to associations.<sup>50</sup> The reasons given were that the association did not ask any special privilege of the legislature and that its peculiar features were created by agreement of the members under their natural rights at common law. "We do not see how this peculiar feature

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<sup>46</sup> 220 U. S., 178, 187.

<sup>47</sup> *Hoadley v. County Commissioners*, 105 Mass., 519, 526.

<sup>48</sup> *Ricker v. American Loan & Trust Co.*, 140 Mass., 346, 349; *Williams v. Boston*, 208 Mass., 497.

<sup>49</sup> *Hoadley v. County Commissioners*, 105 Mass., 519, 526.

<sup>50</sup> *Gleason v. McKay*, 134 Mass., 419, 425.

(transferability of shares) can be called a commodity, subject to special excise, any more than the agreement of copartnership itself or any clause or part of it or any other agreement, right or mode of transacting any business can be called a commodity and so liable to taxation at the will of the legislature." The true meaning of this decision has been the subject of discussion in subsequent decisions.<sup>51</sup>

Not long since the legislature exercised its constitutional right and asked the opinion of the justices on the constitutionality of a stock transfer tax including a tax on shares in voluntary associations. The judges differed in opinion, a majority holding such a tax valid; three on the ground that an excise in this State can be levied on a privilege which is the exercise of a natural right. Four judges denied this, and three held that transferability of shares in a partnership is an immaterial distinction from other partnerships and cannot be a basis for classification, but one (now the Chief Justice) held that transferability of such shares was not a natural right because a business dependent on such elaborate provisions which require constant resort to the courts for their enforcement may be regulated by the legislature, but he did think that an excise on the existence of such an association or on the holding of property by it would be unconstitutional. It is not entirely clear whether or not the justices thought that doing business in the form of a partnership is taxable provided that the excise applies to all partnerships.<sup>52</sup>

*Boston, Mass.*

*S. R. Wrightington.*

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<sup>51</sup> See *Minot v. Winthrop*, 162 Mass., 113.

<sup>52</sup> *Opinion of the Justices*, 196 Mass., 601, 615, 620, 626.