[Florida Law Review](https://scholarship.law.ufl.edu/flr)

Volume 14 | Issue 1 Article 1

March 1961

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University of Florida Law Review

VOL. XIV SPRING 1961 No. 1

BUSINESS TRUSTS IN FLORIDA — LIABILITY OF SHAREHOLDERS

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In Massachusetts, where the business trust was born and raised, it is well settled that shareholders[1] will not incur personal liability for trust debts so long as there is a separation of management from beneficial ownership.[2] Can shareholders of Florida business trusts achieve a similar limitation of liability? Or did something happen to the business trust on its way from Boylston Street to Biscayne Boulevard?

The writer believes that it is more likely than not that the courts would find a similar limitation of liability available to shareholders of business trusts operating in Florida. But relevant Florida case law is almost non-existent. And chapter 609 of the Florida Statutes, the only directly pertinent legislation, is not explicit. What authority does exist is ambiguous and does not warrant strongly held convictions. Perhaps it warrants no conviction at all. This article will consider the available authorities, and the reader can decide for himself the correctness of the thesis set forth, somewhat hesitantly, above.

THE BACKGROUND

Regardless of its ultimate resolution, the question itself is not merely academic. The introduction into the Internal Revenue Code of the "real estate investment trust" concept[3] saw to that. It may not be saying too much to say that when Congress added sections 856, 857, and 858 to the code it brought about the renaissance of the business trust. In doing so, it inevitably focused attention on the congeries of unresolved questions about business trusts that exist in many jurisdictions.

Tax Savings Opportunities

Although the intricacies of the tax legislation are outside the scope of this article, a few general remarks about it would nevertheless

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1. In this article the term *shareholders* will be used exclusively to refer to owners of fractional beneficial interests in the property of business trusts, interests usually evidenced by transferable certificates. The term *stockholders* will be used exclusively with reference to legally incorporated entities.

2. The rule in Massachusetts is usually said to have been definitely formulated in Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N.E. 355 (1913).

3. INT. REV. CODE OF 1954, §§856-58 (Pub. L. No. 86-779, 86th Cong., 2d Sess.

seem to be in order. The new code provisions offer tax-minimizing opportunities to investor groups that make certain prescribed types of investments in real estate and real estate mortgages. In order to take advantage of these opportunities it is necessary for investors to organize themselves as "an unincorporated trust or an unincorporated association."[4] The trust or association must (1) be "managed by one or more trustees,"[5] (2) have its beneficial ownership evidenced "by transferable shares, or by transferable certificates of beneficial interest,"[6] (3) be taxable as a corporation except to the extent that it is not so taxable by reason of the new code provisions,[7] and (4) be owned beneficially by "100 or more persons."[8]

If an investor group meets these and other tests the entity's income, if a sufficient percentage is currently distributed to shareholders, will, generally speaking, be taxable only to shareholders and will not be taxed as it passes through the entity.[9]

It is conceivable that organizational forms other than the business trust (or "Massachusetts trust") would meet the code's requirements. None quite so well suited comes quickly to mind, however, and the traditional business trust must be regarded as the brightest prospect for investors seeking to qualify. Unhappily, the traditional business trust, at least in Florida, is for the most part devoid of tradition. An investor may be forced to conclude that risking the uncertainties that surround the business trust is risking too much, however glittering such a venture may appear from his tax lawyer's point of view.

Risk of Unlimited Liability

One minimal requirement on which the prudent investor will insist is the assurance that any loss he suffers will be limited to the amount he elects to invest. If one of the managing trustees can run down a person while driving an automobile on trust business, and thereby render each investor personally liable,[10] there will be precious few business trusts in Florida. Contractual obligations are more readily predictable if less dramatic. If, in addition, an investor can be subjected to personal liability by the act of a fellow investor, the problem is all the more acute. Either way it is serious.

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§10 (a), Sept. 14, 1960), effective for taxable years beginning after Dec. 31, 1960.

4. INT. REV. CODE OF 1954, §856 (a). H.R. 1806, 87th Cong., 1st Sess. (1961), introduced by Congressman Keogh on Jan. 4, 1961, and referred to the Committee on Ways and Means, would extend the code provisions to incorporated entities.

5. INT. REV. CODE OF 1954, §856 (a) (1).

6. INT. REV. CODE OF 1954, §856 (a) (2).

7. INT. REV. CODE OF 1954, §856 (a) (3).

8. INT. REV. CODE OF 1954, §856 (a) (5).

9. INT. REV. CODE OF 1954, §857.

10. *Cf.* Marchulonis v. Adams, 97 W. Va. 517, 125 S.E. 340 (1924).

The business trust, as a form of doing business, was invented by ingenious New England lawyers and was designed to avoid restrictions contained in early corporation statutes, primarily prohibitions on corporate ownership of real estate.[11] The device worked well enough in the jurisdictions of its origin. But it was not for export.

Transplanted, business trusts did not always flourish. On the arid plains of Texas[12] and Kansas[13] they withered and died. They were forcibly uprooted in Indiana[14] and Washington.[15] Most recently they were plowed under what must have been an inadequately irrigated patch of desert by the Supreme Court of Arizona.[16] Elsewhere they fared better, but their over-all history, outside Massachusetts, has been a checkered one.

Wherever the business trust has failed to become a popular vehicle for the conduct of business, one reason for its unpopularity has been the existence of a judge-made rule rendering shareholders vulnerable to unlimited liability for trust debts. Elsewhere, the fear that shareholders would or might be subject to such liability has undoubtedly been responsible in large part for the arrested development of the business trust. In the latter group of jurisdictions, which probably includes Florida, uncertainties persist in regard to shareholder liability and other matters,[17] because cases presenting the questions have not arisen.

The existence of these uncertainties, for the most part, has not made much difference. The advantages, if any, to be gained from doing business in the form of a trust became less and less obvious[18] in an era in which the increasingly flexible corporate form, with its crystal clear statutory limitation of stockholder liability, was universally available. Permitting the uncertainties to stay unresolved was a luxury that could be afforded. The uncertainties themselves

11. See generally Annot., 156 A.L.R. 22, 28-29 (1945).

12. Thompson v. Schmitt, 115 Tex. 53, 274 S.W. 554 (1925).

13. Weber Engine Co. v. Alter, 120 Kan. 557, 245 Pac. 143 (1926).

14. McClaren v. Dawes Elec. Sign & Mfg. Co., 86 Ind. App. 196, 156 N.E. 584 (1927).

15. State v. Hinkle, 126 Wash. 581, 219 Pac. 41 (1923).

16. Rubens v. Costello, 75 Ariz. 5, 251 P.2d 306 (1952).

17. Other obvious questions include the liability of trustees to third parties, the duties of trustees to shareholders, the location of the power to convey trust property, the power of the trustees to incorporate the entity, and the right of a shareholder to force a dissolution. For illustrations of the resolution of the two questions last mentioned, see, respectively, Hauser v. Catlett, 197 Okla. 668, 173 P.2d 728 (1946), and State Street Trust Co. v. Hall, 311 Mass. 299, 41 N.E.2d 30 (1942).

18. One of the last clear-cut *raisons d'etre* for the business trust disappeared with the decision of the United States Supreme Court in Morrissey v. Commissioner, 296 U.S. 344 (1935), holding Massachusetts trusts taxable as corporations and changing the earlier rule expressed in Crocker v. Malley, 249 U.S. 223 (1891).

probably furnished opportunity for a certain amount of harmless academic speculation for anyone with the time and interest. Everyone else could safely regard them as quaintly irrelevant and let it go at that — but no longer.

STATUTORY RECOGNITION IN FLORIDA

In Florida, one encounters business trusts somewhat more often — but not much more often — than one encounters dinosaurs.[19] That there should be a statute providing for the existence of business trusts therefore comes as something of a surprise. But, lo and behold, chapter 609 of the Florida Statutes does just that.

The statute is very brief. It has only six sections. It provides that persons organizing a business trust in Florida must file a copy of the declaration of trust with the secretary of state and must pay a filing fee of $150.[20] It also commands that shares cannot be sold publicly without the permission of the Florida securities commission.[21] It says little else. In particular, it maintains a discreet silence on the matter of shareholder liability.[22]

The statute nevertheless legitimatizes the business trust, with or without shareholder immunity, when it says:[23]

> "Two or more persons, whether residents of this state or not, may organize and associate themselves together for the purpose of transacting business in this state under what is commonly designated or known as a 'declaration of trust;' provided, however, no such association shall ever be permitted or authorized to transact a banking or security business, of any kind, in this state."

If the effect of the statute had not been rendered doubtful by the few Florida cases,[24] it might well be thought to warrant the conclusion that limitation of shareholder liability had been "intended" by the legislature and would be freely accorded by the courts as the occasion arose. It is submitted that the statute is more persuasively so construed despite the case law. Certainly it remains susceptible of such a construction.

19. One major exception is the Lawyers' Title Guaranty Fund, a trust organized under chapter 609 of the Florida Statutes.

20. FLA. STAT. §609.02 (1959).

21. FLA. STAT. §609.05 (1959).

22. The reported progress of the legislation through the two houses of the Florida legislature does not indicate that any particular consideration was given to the matter.

23. FLA. STAT. §609.01 (1959).

24. For a discussion of the relevant Florida cases see heading "The Florida Court and the Business Trust," *infra*.

Common Law Precedents

There is a familiar rule of statutory construction to the effect that when a statute deals with a subject concerning which there is in force an existing body of common law rules, but does not deal with the subject in so detailed a fashion that it can be said to have superseded the common law, it will be interpreted as having affirmed the common law.[25] This rule seems clearly applicable to chapter 609.

The act begins by authorizing the conduct of business under what is "commonly designated or known as a 'declaration of trust.'" It says not a word more in definition of the entity it authorizes. The remaining portions of the chapter consist exclusively of regulatory and prohibitory provisions in regard to isolated matters. Therefore, a court looking for a rule applicable to a chapter 609 trust must necessarily look beyond the statute. It must consult the common law.

One may well ask, however, what common law rules are relevant in settling the matter of shareholder liability. Are they the rules governing trust law generally? Or are they the rules governing business trusts more specifically and, therefore, a body of law sui generis although closely related to ordinary trust law? And, if the latter are the proper rules, what about the fact that there is a substantial, if unbalanced, "split of authority" on the question of shareholder liability?

It is submitted that the selection of one or the other of these groups of rules should make no difference. A holding of limited liability should follow under either.

If "ordinary" trust rules are selected, the matter is at an end. Beneficiaries of conventional trusts do not incur personal liability to trust creditors.[26]

The Massachusetts Rule

If business trust doctrine is looked to, the same result should follow. In 1923, when chapter 609 was enacted, the common law of business trusts *was* the law of business trusts as it had developed in Massachusetts. In Massachusetts, by 1923, it had been established that business trust shareholders could limit their liability.[27] The courts of all other jurisdictions in which the question had arisen prior to 1923, with one exception, had indicated that they would follow the Massa-

25. See Ellis v. Brown, 77 So. 2d 845, 847 (Fla. 1955); 3 SUTHERLAND, STATUTORY CONSTRUCTION §§5302, 5305 (3d ed. 1943).

26. See BOGERT, TRUSTS AND TRUSTEES §721 (2d ed. 1960); RESTATEMENT (SECOND), TRUSTS §§274-75 (1959).

27. Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N.E. 355 (1913); Mayo v. Moritz, 151 Mass. 481, 24 N.E. 1083 (1890).

chusetts rule.[28] Scattered decisions in other jurisdictions deferred,[29] as they still defer, to Bay State precedents. The common law of business trusts, therefore, even though it may be too newly developed to constitute a part of the common law statutorily adopted in Florida,[30] nevertheless seems to have been well enough, and uniformly enough, settled, by 1923, to bring into play the rule of construction set forth at the outset.

The one jurisdiction that by 1923 had set a course independent of Massachusetts was Texas. The Texas rule, however, was not formulated until 1921 and 1922.[31] It was formulated then only by what amounted to the overruling of an earlier case which had indicated that Texas would fall in line with the majority.[32] Furthermore, the rationale of the Texas cases, so far as they dealt with shareholder liability, was that, for the purpose of immunity at least, business trusts were not trusts at all but partnerships or joint-stock companies.[33]

Therefore, as of 1923, the common law rule fixing the liability of business trust shareholders, to the extent that it differed from the "ordinary" trust law rule, had developed with substantial uniformity. The split of authority on the question arrayed a substantial majority group of jurisdictions against a minority of one. The minority rule itself resulted from the belief of the Texas courts that business trusts were not trusts at all, at least for some purposes. Chapter 609, what ever else it says, does say that business trusts are in fact trusts. Having said that much, it would seem to have said enough to invoke application of the rule of construction referred to earlier. At least it would seem to have foreclosed resort to the only line of reasoning which, to that time, had been solely responsible for there being any split of authority at all.

Two arguments can be mustered, however, for construing chapter 609 as not authorizing shareholder immunity. How important is it that chapter 609 fails to sanction shareholder immunity, in so many

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28. Home Lumber Co. v. Hopkins, 107 Kan. 153, 190 Pac. 601 (1920) (*semble*); Crehan v. Megargel, 234 N.Y. 67, 136 N.E. 296 (1922); Wells-Stone Mercantile Co. v. Grover, 7 N.D. 460, 75 N.W. 911 (1898); Rhode Island Hospital Trust Co. v. Copeland, 39 R.I. 193, 98 Atl. 273 (1916); Connally v. W. H. Lyons & Co., 82 Tex. 664, 18 S.W. 799 (1891).

29. See Crehan v. Megargel, 234 N.Y. 67, 136 N.E. 296 (1922).

30. FLA. STAT. §2.01 (1959).

31. Nini v. Cravens & Cage Co., 253 S.W. 582 (Tex. Civ. App. 1922); Graham Hotel Corp. v. Leader, 241 S.W. 700 (Tex. Civ. App. 1922); McCamey v. Hollister Oil Co., 241 S.W. 689 (Tex. Civ. App. 1922), *aff'd*, 115 Tex. 49, 274 S.W. 562 (1925); Stroud Motor Mfg. Co. v. Gunzer, 240 S.W. 644 (Tex. Civ. App. 1922); Wells v. MacKay Telegraph-Cable Co., 239 S.W. 1001 (Tex. Civ. App. 1921).

32. Connally v. W. H. Lyons & Co., 82 Tex. 664, 18 S.W. 799 (1891).

33. For a discussion and criticism of the rationale of the Texas cases, see subheading "The Minority View," *infra*.

words, (1) when such a sanction has been given in the business trust statutes of other states, and (2) when the Florida legislature itself has expressly sanctioned investor immunity with respect to other business entities?

Comparative Legislation

In 1923 there appear to have been only two other jurisdictions in which statutes exclusively concerned with business trusts were in force. Under one of these statutes shareholder immunity was expressly authorized.[34] Under the other it was not.[35] In both jurisdictions immunity was, and still is, available. As an aid to the construction of chapter 609, therefore, comparative legislation is not particularly illuminating. If anything, it seems merely to reinforce the idea that the question of shareholder immunity, in Florida, is referable to common law precedents. This is so because the Oklahoma statute that expressly sanctions the immunity is, in general, more detailed than the Florida act. The absence of a specific immunity provision there would be more conspicuous than under chapter 609.

Looking at other Florida legislation, it is obvious that the legislature has specifically provided elsewhere for limited investor liability. It has done so in the case of business corporations,[36] limited agricultural associations,[37] agricultural cooperative associations,[38] and limited partnerships.[39] That it failed to do so in the recent revision of the act governing corporations not for profit[40] was possibly an oversight. Is it inferable, therefore, that because chapter 609 contains no such provision limited liability is not available?

Such an inference is, of course, possible. But it seems relevant to recall that trusts — business trusts like other trusts — are basically creatures of the common law. Apart from any statute, the term *trust* comes clothed with meaning. Its use directs attention to a whole collection of common law rights and duties peculiar to the institution. One such right is the beneficiary's non-liability for trust debts.

The same cannot be said of corporations, limited partnerships, and the like. These are the products of legislatures. The fact that the courts have been forced to develop little bodies of corporation "common law" to fill in legislative gaps does not militate against the proposition that the corporation is, first and foremost, statutory. It is un-

34. OKLA. STAT. ANN. tit. 60, §174 (1949).
35. MASS. ANN. LAWS ch. 182 (1955).
36. FLA. STAT. §608.44 (1959).
37. FLA. STAT. §604.12 (1959).
38. FLA. STAT. §618.15 (1959).
39. FLA. STAT. §620.07 (1959).
40. FLA. STAT. ch. 617 (1959).

usual legislative draftsmanship when a corporation code does not provide specifically for stockholder immunity. Today, with the corporate form so prevalent, such an immunity might be implied by the courts but it could not be counted on. In the case of the trust, even the business trust, such a provision is relatively unnecessary. The express authorizations for investor immunity elsewhere in the Florida statutes do not seem a satisfactory reason for denying immunity under chapter 609.

It would seem, therefore, that chapter 609 should be construed to authorize the application of at least the basic tangential rules of law governing business trusts that had evolved at common law elsewhere, primarily in Massachusetts. If the act had been so construed, limited liability would be a fixture of Florida's jurisprudence today. But it has not been so construed. In regard to business trusts organized under chapter 609 the question has never been dealt with at all, so far as reported decisions are concerned. That it has not arisen, ironically, is largely the result of dictum in one decision of the Florida Supreme Court.[41]

The Florida Court and the Business Trust

If shareholders of Florida business trusts should ultimately be denied the right to limit their liability, they would, in a sense, be the victims of scoundrels. In none of the three cases that have reached the Florida Supreme Court has the business trust been cast in a particularly favorable light, and in one of those cases[42] the business "trust" involved nothing less than outright fraud. The trust has always been a flexible legal institution, but never that flexible.

One case in particular has created most of the uncertainties that surround Florida business trusts. Although the more devastating aspects of the opinion in *Willey v. W. J. Hoggson Corp.*[43] consist only of dicta, it is nevertheless true that the case can be interpreted to stand for the proposition that it is not legally possible, in Florida, for investors to avoid full joint and several liability if they wish to use the business trust form.

The facts of the case are extremely difficult to glean from the reported opinion. Apparently it all began with a plan for the development and commercial exploitation of the Fountain of Youth. There was a falling out among the original promoters, and the success of the venture proved about as elusive as the fountain itself. The series of lawsuits that resulted, however, if they did not instill it, obviously

41. Willey v. W. J. Hoggson Corp., 90 Fla. 343, 106 So. 408 (1925).

42. Young v. Victory, 112 Fla. 66, 150 So. 624 (1933).

43. 90 Fla. 343, 106 So. 408 (1925).

required a certain amount of youthful stamina; and the parties to those lawsuits may therefore be described, with some precision, as having added their chapter to the local lore after all.

In an attempt to gain control of the project, one of the competing factions organized an entity called the "Fountain of Youth Company of St. Augustine."[44] The company purported to be a common law trust. Unquestionably it was meant to engage in business. Mostly its business seems to have been litigation. The suit in question was brought by the trust to undo the result of earlier litigation. Specifically, the plaintiffs sought a decree requiring one of the defendant corporations to register the transfer to the plaintiffs of some stock, an injunction against the issuance of certain bonds by another corporate defendant, an order setting aside an earlier judicial sale as fraudulent, and other equitable relief.

On appeal, however, the Supreme Court was not concerned with the merits of any of those issues. The trust, having failed in the trial court,[45] took the appeal. The appellees moved to quash. One ground asserted in support of the appellees' motion was that some of the trustees and some of the shareholders of the trust had not joined in the appeal. The Supreme Court agreed with the appellees and dismissed the appeal. In its opinion the Court indicated that the "trust" in question was enough like a partnership to render applicable the procedural rules concerning partnerships. Under these rules all the partners were indispensable parties to both the lawsuit and the appeal on the entity's behalf. Since some of the partners had not joined in the appeal, it was necessarily dismissed.

Dictum Casts Long Shadow

If that had been the end of the matter, the opinion would not present too formidable an obstacle to shareholder immunity. The Court, however, took the opportunity to comment more broadly on the use of the common law trust as a vehicle for doing business. In the course of Mr. Justice Ellis's opinion the following appears:[46]

> "[The] so-called trust, in which the trustees are pretended to be vested with the power of acquiring and selling property and reinvesting the proceeds of the sale thereof for the com-

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44. Prior to commencement of the lawsuit the entity's name was changed to "Ponce de Leon Beach Associates."

45. The procedure in the trial court was somewhat unusual in that the trial court's order dismissing the complaint was entered several days prior to the motion in regard to which it should have been responsive. See 90 Fla. at 344, 106 So. at 408.

46. *Id.* at 353, 106 So. at 411.

mon advantage and profit of trustees and subscribers, is nothing but a veiled and futile effort to avoid the liabilities of a copartnership and acquire the privileges and immunities of a corporation without complying with the corporation laws of the state. Such an association is nothing more than a copartnership or joint stock company, in which the members are jointly and severally liable."

In view of this statement it is not surprising that serious doubt exists as to the immunity of Florida business trust shareholders from general liability. The *Willey* case casts a long shadow. There are nevertheless a number of reasons for supposing that in a showdown, in a case involving a business trust properly organized under chapter 609, the Florida courts will not follow the path marked out by the quoted dictum.

In the first place, the Court's exposition on shareholder liability, however unqualified, is nonetheless only dictum. Shareholder liability was not in issue and would not have been in issue even if the merits of the case had been reached. The doctrine of stare decisis does not oblige the courts to follow dicta.[47]

In the second place, any court that is so inclined can distinguish the *Willey* case, if for no other reason, simply because the trust involved was not organized under and did not comply with chapter 609. The timing of this case, however, causes this argument to cut both ways. On balance, assuming that the dictum must be followed at all, it is submitted that the better argument requires that its application be limited to business trusts that do not comply with the statute.

The Fountain of Youth Company of St. Augustine, the trust in the *Willey* case, was organized in April of 1923. This was several months before the effective date[48] of what is now chapter 609. So far as the Court's opinion discloses, no attempt was made later to qualify that trust under the statute. The statute does not provide specifically for compliance with its provisions by business trusts already in existence on its effective date, but compliance presumably would have been possible. Consequently, if it is assumed that shareholder immunity for Florida business trusts became available for the first time with the enactment of the Florida statute,[49] and is limited to business trusts that comply with the statute, the trust in the *Willey* case, since it did not comply, was an ineffective device for effecting such

47. 14 AM. JUR., *Courts* §83 at 295-96 (1938); 21 C.J.S., *Courts* §190 at 311-12 (1940).

48. The effective date was July 1, 1923. Fla. Laws 1923, ch. 9125, §5.

49. No such assumption seems warranted, although Fla. Stat. §§609.03-.04 could be taken as indicating that the legislature in 1923 assumed that none were in operation when the act was passed.

immunity. If so, the Court's dictum is an accurate statement of the law of shareholder liability, but only with respect to non-chapter 609 trusts. This line of reasoning tends to find support in an unreported 1956 opinion of the attorney general.[50] This opinion does not deal with the question of shareholder liability but does deal with business trusts organized under chapter 609. It considers what are described as the only two decisions relating to chapter 609. The *Willey* case is conspicuously missing from that abbreviated roster.

On the other hand, the *Willey* opinion was not handed down until 1925, well after the effective date of the Florida act. Since the Court, in mentioning shareholder liability at all, had already gone well beyond the issues directly before it, its failure to go one step further and indicate whether its opinion applied also to statutory business trusts is suspicious. Coming when it did, silence on this point gives the opinion a provocative aspect it might not otherwise have had.

But if *Willey,* like the Mona Lisa, has the capacity through its silence to make one wonder, it is no match for da Vinci in over-all artistry. This suggests a third reason for supposing that its dictum may not be the law of Florida.

The opinion of the Supreme Court in *Willey v. W. J. Hoggson Corp.* appears to lay down rules generally applicable to Florida business trusts, at least to some Florida business trusts. It is the writer's belief that these dicta should be entitled to even less weight than is normally accorded dicta. The reason for this belief is that the Court does not appear to have given due consideration to those factors a thorough analysis of which would seem prerequisite to formulation of the rules announced in the dicta. Inasmuch as the case did not involve shareholder liability, the Court was obviously under no obligation to consider all the factors relevant to the question. The point is that the Court's opinion, since it gives no indication that those factors were considered, is more readily disregarded as authority on the matter of shareholder liability than it would be if those factors had been considered.

Relevant Foreign Precedents

That most courts have deferred to Massachusetts precedents on business trust questions has already been mentioned. Even courts choosing not to follow those precedents have generally felt obliged to say so.[51] The Florida Court in the *Willey* case, however, did not

50. OPS. ATT'Y GEN. FLA. 056-159 (May 23, 1956).

51. See McClaren v. Dawes Elec. Sign & Mfg. Co., 86 Ind. App. 196, 200, 156 N.E. 584, 585 (1927); Wells v. MacKay Telegraph-Cable Co., 239 S.W. 1001, 1007 (Tex. Civ. App. 1921).

advert to the Massachusetts business trust cases or, for that matter, to cases from any other jurisdiction.[52] The only cases referred to, in fact, were Florida cases dealing with the proposition that all partners are necessary parties to a suit on behalf of the partnership. Granting the arguable relevance of such an analogy to the matter of shareholder liability, and further granting that shareholders have been subjected to liability on the basis of a partnership analogy in a minority of jurisdictions, such an analogy has never, as an original question, been adopted casually.

The Florida courts are bound neither to follow nor to cite case law from Massachusetts or any other jurisdiction. They have customarily done so, however, when foreign precedents seemed relevant to a question presented for the first time in Florida. The failure to do so in the *Willey* opinion, it is submitted, should not be taken as an indication that Massachusetts precedent is not relevant in Florida. It seems preferable to conclude that the Court's dictum should be taken as something less than the final statement of the Florida rule. If the dictum *was* intended as the last word on the subject, the Court's formulation of the rule, since it failed to take into consideration what has been thought relevant everywhere else, was about as persuasive as would be the original formulation of a rule concerning product liability without at least some discussion of *MacPherson v. Buick Motor Co.*[53] So casual a treatment is not to be presumed.

Effect of Shareholder Control

Finally, there is abundant reason to believe that the trust in the *Willey* case would have been regarded as a partnership even in the "majority" jurisdictions, where shareholder immunity is normally accorded — even in Massachusetts. Wherever immunity has been granted to business trust shareholders it appears to have been conditioned always on their inability to exercise any substantial degree of control over the managing trustees. The shareholders of a business trust that fails to meet the requirements of the "control test"[54] are vulnerable to general liability for entity debts.

Although the facts in the *Willey* case, as reported, are not entirely

52. It is not even clear that the Court regarded the entity before it as a "business trust." It traced the origin of similar trusts to a statute of Charles II (the Statute of Uses). The historical discussion may have some relevance, but no other opinion dealing with the matter of shareholder liability has so indicated. See 90 Fla. at 354, 106 So. at 412.

53. 217 N.Y. 382, 111 N.E. 1050 (1916).

54. See a discussion of this doctrine under heading "Policy Considerations," *infra*.

free from doubt,[55] they do suggest that the shareholding beneficiaries exerted considerable influence over the trustees. The original trustees resigned[56] shortly after formation of the entity, and the successor trustees seem to have been substantially if not completely identical with the beneficiary group. In any event, if the trustees were subject to shareholder domination, the shareholders would have been liable as general partners under the most conventional business trust doctrine. If so, the *Willey* case need not be regarded as an adverse precedent. On the contrary, it can be regarded as fully in accord with cases elsewhere.

Although numerous reasons suggest confinement of the *Willey* decision to its facts, the legacy of the case has nevertheless been *doubt.* Two leading treatises, relying on the decision, have classed Florida with the minority jurisdictions that do not allow business trust shareholders to limit their liability.[57] A United States district court in Massachusetts, on the other hand, seems to have regarded the decision as at least consistent with the majority rule.[58] No less a jurist than Judge Augustus Hand, in a case governed by Florida law and which might have been decided on business trust principles, acceded to the doubts and decided the case before him on another issue.[59] Perhaps it is significant, and encouraging, that the *Willey* case has never been cited in a reported Florida decision for any proposition of law relating to business trusts.

Subsequent Cases Not Determinative

The doubts created by the *Willey* case have not been resolved by subsequent decisions. There appear to be only two others that have anything at all to do with Florida business trusts, and neither of them contains so much as a word about shareholder liability.

In *Walker v. Close*[60] it was held that, since the wife of a business trust shareholder was not entitled to dower in her husband's shares, the trustee could convey good title without her joinder. The same decision strongly implies, for that matter, that the trustee could convey title to trust property without the joinder of the shareholders, a position that would be taken in the "majority" jurisdictions. The case suggests that Florida business trusts, by 1929, may have gained

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55. The text of the declaration of trust, for instance, is not set forth in the report.

56. See 90 Fla. at 353, 106 So. at 411.

57. 2 Bogert, Trusts and Trustees §295 (1953); 16 Fletcher, Cyclopedia of Corporations §8261 (perm. ed. rep. vol. 1942).

58. Gutelius v. Stanbon, 39 F.2d 621 (D. Mass. 1930).

59. Brown v. Smith, 73 F.2d 524 (2d Cir. 1934).

60. 98 Fla. 1103, 125 So. 521 (1929).

in stature since the low-water mark reached four years earlier in *Willey*.

In *Young v. Victory*[61] the trust was formed under what is now chapter 609. It had been organized to promote a fraudulent scheme and had been dissolved, and a receiver appointed, in an earlier proceeding. The case concerned a mortgage foreclosure proceeding against a former shareholder on a personal obligation, and there is no indication of whether the trust's creditors sought to hold its shareholders liable for trust debts. The shareholders appear to have been the prime victims of the fraud.

In *Gutelius v. Stanbon*[62] a United States district court in Massachusetts, purportedly applying Florida law, held that the *trustees* were not personally liable for notes which they had signed on behalf of the trust. The decision, however, was based strictly on a construction of the Negotiable Instruments Law and not on business trust principles. When it came to the defendants' liability, in their capacity as shareholders, the court apparently held[63] that Massachusetts law applied. The declaration of trust had been filed with an appropriate public official in Massachusetts and had not been filed in Florida.

These cases constitute the only authorities. None deals expressly with the immunity of shareholders from general liability, although the *Willey* case strongly indicates that the shareholders of at least some, if not all, business trusts will incur liability as though they were general partners. Until the ominous shadow it casts is dispelled in some manner, it will doubtless impede the development of Florida business trusts, regardless of tax advantages.

Policy Considerations

If there is a relevant policy consideration involved in resolving the question of shareholder liability, the consideration is not whether limitation of liability, in and of itself, is good or bad. There is nothing inherently reprehensible about the fact that persons risking capital in a business venture prefer not to expose themselves to general liability for the venture's debts. Nor is there anything reprehensible in their seeking a legally effective means to accomplish partial immunity. If that were the relevant policy question, then it was settled long ago with the coming of the corporation.

But policy is involved. It is submitted that the relevant policy question is only another facet of the recurring legal problem of

61. 112 Fla. 66, 150 So. 624 (1933).

62. 39 F.2d 621 (D. Mass. 1930).

63. See *id.* at 624.

having to enumerate those instances in which it is fair to impose liability on one person as a result of the conduct of another.

Traditional Agency Principles

Generally speaking, liability does not attach to one person as a consequence of another's conduct unless the former has a legally sufficient degree of control over the latter's conduct. The control may be actual, potential, or only apparent. Frequently, control does not exist in fact, or is not exercised when it actually exists, but the law usually regards these circumstances as irrelevant.

This, of course, is only a statement of one of the more fundamental principles of agency law.[64] Note, however, that as a matter of original jurisprudence it is not an inevitable position. A premise might have been accepted requiring the imposition of personal liability on one person for the acts of another if the former stood to gain or profit, directly or indirectly, from the latter's conduct, regardless of control. Such a premise, though plausible, is not prevalent in our law. In order for liability to follow from the act of another, it is ordinarily necessary that there be an agency relationship, and the existence of the relationship does not depend on the principal's anticipating gain. The most lucrative financial transaction imaginable is not enough to transform an "independent contractor" into an "agent." Control is necessary for "agency," and the absence of a legally sufficient degree of control undoubtedly underlies the rule to the effect that one cannot ordinarily be rendered liable by the acts of another with whom he merely contracts.

The rule imposing general liability on one partner for the acts of his copartners, for instance, is usually explained as resulting from a mutual agency,[65] although in most instances it would be susceptible of explanation on the theory that each partner, having joined the venture with the hope of profit, should be prepared for liability in the event of failure. But the "profit" explanation is not often found; the more familiar rationale is "agency," with all its implications of a legally sufficient degree of control to warrant responsibility.[66]

Relating the foregoing to the liability of business trust shareholders, it seems a reasonable starting point to ask why beneficiaries of "conventional" trusts are not held liable for debts incurred by the trustee, a well-established rule of law that has been alluded to previously. It is submitted that the reason for the rule, which is seldom examined in depth, is that the typical beneficiary does not

64. RESTATEMENT (SECOND), AGENCY §14 (1958), particularly comment *c.*

65. See, *e.g.*, Proctor v. Hearne, 100 Fla. 1180, 1187, 131 So. 173, 177 (1930).

66. See Farmers & Merchants Nat'l Bank v. Anderson, 216 Iowa 988, 250 N.W. 214 (1933).

have what it thought to be a legally sufficient degree of control to make the imposition of personal liability for the trustee's acts seem fair. One leading writer says merely that the trustee is not the beneficiary's "agent"[67] and for that reason cannot render him personally liable. This reduces the policy consideration to conventional legal terminology but nevertheless reflects the policy rather well.[68] Therefore, is it not reasonable to say that if the shareholders of a business trust have as little control over the business trust as do more conventional beneficiaries over more conventional trusts, the two groups should enjoy a similar immunity from liability to third parties? That seems reasonable to the writer.

Characterization Substituted for Analysis

Unfortunately, most courts seem to have regarded the problem more as a matter of proper labels than as one of broad policy considerations. This phenomenon is readily observable and is, indeed, lamentable.[69] Labeling has occurred in both majority and minority jurisdictions. The majority courts tend first to characterize the business trust as a bona fide trust and then proceed to apply traditional trust doctrines, including the rule immunizing beneficiaries from liability for trust debts. The minority courts, on the other hand, do not seem to regard the question as one of trust law at all, but rather as one of deciding how many and what kinds of business entities will be permitted to operate in the jurisdiction with investor immunity as an attribute. Therefore, in the minority jurisdictions, it is customary first to equate the business trust with a partnership,[70] a joint-stock company,[71] or a defectively organized corporation.[72] After that characterization has been made, a holding of general liability follows easily. These labels are convenient ways of stating results. They are not reasons for results.

It is nevertheless believed that the majority jurisdictions have the better of the policy argument. The majority rule is in accord with the premise that legal responsibility for the acts of another should follow primarily, if not entirely, as a consequence of control. The

67. BOGERT, TRUSTS AND TRUSTEES §721 at 509 (2d ed. 1960).

68. See also to the same effect RESTATEMENT (SECOND), TRUSTS §8, comments *b, c* (1959), which indicate the relationship between control and liability.

69. See Comment, 37 YALE L.J. 1103, 1119-21 (1928).

70. See Texas cases cited note 31 *supra*. See also McClaren v. Dawes Elec. Sign & Mfg. Co., 86 Ind. App. 196, 156 N.E. 584 (1927).

71. See note 70 *supra*. Most minority courts do not draw too fine a distinction between partnerships and joint-stock companies when making the equation.

72. See Rubens v. Costello, 75 Ariz. 5, 251 P.2d 306 (1952); Weber v. Alter Engine Co., 120 Kan. 557, 245 Pac. 143 (1926); State v. Hinkle, 126 Wash. 581, 219 Pac. 41 (1923).

minority rule is not in accord with that premise. Furthermore, statements of the minority rule are not usually accompanied by full enough analyses of the competing policy considerations to make their adherence to a different premise seem convincing.

At this point it would be well to examine more closely the contrasting positions of the majority and minority jurisdictions and to analyze the reasons, real and asserted, for those positions.

The Majority Position

In Massachusetts, and in most other jurisdictions where the question has arisen, it has been held that business trust shareholders are not liable for trust debts.[73] There is, however, a condition precedent to shareholder immunity, wherever immunity is recognized, that the shareholders neither have nor exercise any substantial control over the business of the trust.[74] Management must be left strictly to the trustees. In other words, business trust shareholders, since they claim the status of beneficiaries and thereby purport not to have a sufficient degree of responsibility to warrant their subjection to liability for trust debts, must play their roles with some consistency.

This requirement that shareholders forego control is usually, and appropriately, called the "control test."[75] There is little to be gained from a detailed consideration of the doctrine. The degree of control sufficient to warrant imposition of general liability varies from state to state.[76] Suffice it to say, in general, that business trust shareholders can exercise somewhat less control over their trust, and retain immunity from general liability, than can stockholders over their

73. Betts v. Hackathorn, 159 Ark. 621, 252 S.W. 602 (1923); Goldwater v. Oltman, 210 Cal. 408, 292 Pac. 624 (1930); Schumann-Heink v. Folsom, 328 Ill. 321, 159 N.E. 250 (1927); Farmers & Merchants Nat'l Bank v. Anderson, 216 Iowa 988, 250 N.W. 214 (1933); Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N.E. 355 (1913); Darling v. Buddy, 318 Mo. 784, 1 S.W.2d 163 (1927); Crehan v. Megargel, 234 N.Y. 67, 136 N.E. 296 (1922); Roberts v. Aberdeen-Southern Pines Syndicate, 198 N.C. 381, 151 S.E. 865 (1930) (at least when creditor knows of trust); Wells-Stone Mercantile Co. v. Grover, 7 N.D. 460, 75 N.W. 911 (1898); Pennsylvania Co. v. Wallace, 346 Pa. 532, 31 A.2d 71 (1943) (*semble*); Rhode Island Hospital Trust Co. v. Copeland, 39 R.I. 193, 98 Atl. 273 (1916).

74. Engineering Serv. Corp. v. Longridge Inv. Co., 153 Cal. App. 2d 404, 314 P.2d 563 (1957); Brown v. Bedell, 263 N.Y. 177, 188 N.E. 641 (1934); Marchulonis v. Adams, 97 W. Va. 517, 125 S.E. 340 (1924). See also Schumann-Heink v. Folsom, *supra* note 73; Darling v. Buddy, *supra* note 73.

75. A broad and inexact analogy can be drawn to the doctrine of "piercing the corporate veil" when stockholders fail to show proper deference to the corporate form.

76. See generally 2 BOGERT, TRUSTS AND TRUSTEES §297 (1953); Annot., 156 A.L.R. 22, 104-09, 112-113 (1945); 9 AM. JUR., *Business Trusts* §36 (Supp. 1960); Comment, 37 YALE L.J. 1103 (1928).

corporation. If trust shareholders, for instance, can remove trustees at will without cause, or must authorize a proposed sale of trust assets in order for the sale to be valid, they will probably not be regarded as trust beneficiaries for purposes of determining their liability to third parties — not even in Massachusetts.[77]

The control test seems to be in force in every majority jurisdiction. It has even carried over into the law of one of the few jurisdictions that has a statute governing business trusts in some detail. In Oklahoma the business trust statute expressly sanctions shareholder immunity, apparently without qualification.[78] The Supreme Court of Oklahoma has nevertheless read the control test into the statute as a condition precedent to enjoyment of the statutory immunity.[79]

The position of the majority jurisdictions might therefore be summarized as follows:

> Business trusts have enough of the characteristics of more conventional trusts to allow the application of conventional trust rules unless there is some good reason not to apply them. One such rule excuses beneficiaries from liability for trust debts. That particular rule arises from a determination, made a long time ago, that beneficiaries of conventional trusts are not sufficiently responsible for the conduct of the trustee to warrant subjecting them to personal liability. They are not in a position to control the trustee, and the imposition of personal liability is therefore unfair. That rule itself, arguably, may be unwise as an original proposition. But it is settled, and it is fundamental, and it is necessary to start somewhere. Consequently, business trust shareholders, so long as they have as little to say about what the trustees do as do the beneficiaries of more typical trusts, will enjoy a similar immunity. It is necessary to recognize, however, that investors who join together in a business venture will sometimes be reluctant to forego the right of direction over their investments, and will sometimes have a far more responsible role in the conduct of the trust's business than do more "typical" beneficiaries. There will be a point, therefore, in regard to business trusts, where shareholders do possess a legally sufficient degree of control to warrant the imposition of personal liability. When that point is reached, liability will be imposed. If there is no counter-

77. Horgan v. Morgan, 233 Mass. 381, 124 N.E. 32 (1919); Frost v. Thompson, 219 Mass. 360, 106 N.E. 1009 (1914).

78. OKLA. STAT. ANN. tit. 60, §174 (1949). The text of the provision is set out in note 100 *infra*.

79. Liquid Carbonic Co. v. Sullivan, 103 Okla. 78, 229 Pac. 561 (1924). See also Hauser v. Catlett, 197 Okla. 668, 173 P.2d 728 (1946).

part of this "control test" in conventional trust doctrine, it is because none is needed.

It is obvious that difficulties will be encountered in applying the majority rule, with its built-in control test. The rule nevertheless exhibits a proper regard for settled trust doctrine and also recognizes the rights of third parties who deal with business trusts. The main practical objection to the doctrine is that it takes too long, on a case-by-case basis, to resolve the uncertainties as to what will constitute enough control to cause shareholders to become personally liable. That is, as a guide for future conduct, the majority rule is a somewhat uncertain one.

The Minority Position

The courts in the minority jurisdictions have felt concern over the possibility that an uncontrolled proliferation of business entities, each having investor immunity as an attribute, might develop and become unmanageable unless the process were forestalled at the outset. Any such argument seems to presuppose that immunity from liability for the acts of others is exceptional in the "business context." It is submitted that this is not so, and that whether one becomes liable through the acts of another does not normally depend on the business or non-business milieu in which those acts occur. What the minority courts have actually said is a little different. In general, they have followed one or the other of two lines of reasoning.

Under one line of reasoning the court first notes that the jurisdiction's legislature, here and there, has provided specific sanction for investor immunity in the business context. It next concludes that these statutorily sanctioned exceptions are the exclusive exceptions. This line of reasoning is typified by the Texas courts, and is reflected in the following passage from one of the leading cases:[80]

> "The statutes relating to corporations and limited partnerships are the only statutes in this state which provide for and allow a limitation of the individual liability of the members of any association of persons formed to transact business for profit for the debts legally incurred by the association. Under the rule, 'Expressio unius est exclusio alterius,' the statutes relating to limited partnerships imply a denial of the right of members of a partnership to limit their liability, under the common law, in any other manner since 'that which is implied in a statute is as much a part of it as what is expressed.'

80. McCamey v. Hollister Oil Co., 241 S.W. 689, 699 (Tex. Civ. App. 1922), *aff'd*, 115 Tex. 49, 274 S.W. 562 (1925).

... And the statutes referred to upon the subjects of Corporations, Limited Partnerships, and Unincorporated Joint-Stock Companies or Associations, all considered together reflect the public policy of this state and indicate a legislative intention to include unincorporated joint-stock companies of every character which are organized for profit within the class of those mentioned in the statutes."

To the extent that this argument relies on the *expressio unius* doctrine it is obviously not well founded. The court is on fairly solid ground when it cites that rule for the principle that a partnership cannot limit the liability of any of its members unless it complies with the limited partnership act. But it is a long and unexplained leap ahead to reach the conclusion that the *expressio unius* doctrine necessitates equating the business trust with a partnership or a joint-stock company or anything else. The *expressio unius* doctrine is not usually used to reach an inductive conclusion following the comprehensive scanning of a group of statutes, but rather to construe one statute in which, for some purpose or another, one or more specifics are enumerated, presumably to the exclusion of others.[81]

It is interesting to observe that in the end the court does not really rely on the *expressio unius* doctrine at all but, instead, follows what is described as the jurisdiction's policy in regard to limitation of liability in the business context. Is that policy properly derived from a reading of the jurisdiction's statutes governing partnerships, corporations, and the like? One commentator has subjected the reasoning of the Texas courts to stinging criticism,[82] and the writer is inclined to agree that the criticism was properly bestowed.

The court's reasoning seems wrong because, however it is stated, it attributes to the legislature an intention to prescribe a rule of trust law that probably was not intended by the legislature.[83] The rule thus implicitly attributed to the legislature may be stated in one of several ways.

First, it may be described as a definitional rule, or at least partially definitional, in the sense that it would limit the concept of the word *trust* in terms of purpose. Hence, the minority rule appears to say: If an entity otherwise a trust engages in the active conduct of a business and does not confine itself to the more passive pursuits of the typical trust, it is not a trust at all but something else. That may be all right as an original proposition, but it flies in the face of the usual notion that a trust can be utilized in furtherance of any lawful

81. 2 SUTHERLAND, STATUTORY CONSTRUCTION §§4915-17 (3d ed. 1943).

82. Hildebrand, *Massachusetts Trust — A Sequel*, 4 TEXAS L. REV. 57, 63 (1925).

83. *Id.* at 60-64, 65, 68, where the legislative background in Texas is discussed at length and the reliance of the Texas courts thereon is shown to be unwarranted.

purpose.[84] The last principle was relied on by the Supreme Court of California in a leading case upholding the ability of business trust shareholders to limit their liability to third parties.[85]

Alternatively, the Texas rule may be described as a rule that leaves the definition of the term *trust* intact but that changes the law fixing the liability of beneficiaries of those trusts that engage in business. (Or that have transferable shares? Or that have more beneficiaries than usual? Or that happen to have been set up by businessmen?) That might be a wise rule, but it is simply not inferable from the legislation that the Texas court considered.

Although the exposition of the reason for the Texas rule does not seem convincing, it has nevertheless been found persuasive by the courts of that state. It has apparently been influential in the evolution of a rule exposing shareholders to general liability in other minority jurisdictions.[86]

To the extent that the Texas rule is properly described as definitional it is paralleled by the reasoning adopted in another group of minority jurisdictions. The situation in Washington was[87] typical. That state's constitution contains a broad definition of the term *Corporation*:[88]

> "The term corporations, as used in this article, shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons."

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84. RESTATEMENT (SECOND), TRUSTS §59 (1959).

85. Goldwater v. Oltman, 210 Cal. 408, 292 Pac. 624 (1930).

86. McClaren v. Dawes Elec. Sign & Mfg. Co., 86 Ind. App. 196, 156 N.E. 584 (1927); Ing v. Liberty Nat'l Bank, 216 Ky. 467, 287 S.W. 960 (1926) (*semble*); Standard Drilling Co. v. Slate, 203 Ky. 599, 262 S.W. 969 (1924) (*semble*). The apparently harsh Texas rule has itself been qualified to some extent. It seems now to have been established in Texas that by a contractual provision a third party can effectively waive his right to hold shareholders personally liable. Marion Mach. Foundry & Supply Co. v. R. T. Harris Interests, 26 S.W.2d 449 (Tex. Civ. App. 1930); Shelton v. Montoya Oil & Gas Co., 292 S.W. 165 (Tex. Comm'n App. 1927); Dayle L. Smith Oil Co. v. Continental Supply Co., 268 S.W. 489 (Tex. Civ. App. 1924). It also seems established in Texas that it is only the managing trustees whose acts can render shareholders liable, thus ameliorating somewhat the "partnership" rule, which would enable any shareholder to render all other shareholders liable. See Campsey v. Jack County Oil & Gas Ass'n, 328 S.W.2d 912, 915 (Tex. Civ. App. 1959). These rules only make the situation in Texas somewhat less serious. They do not solve the problem. A large area of shareholder vulnerability remains.

87. The law of Washington has been changed by statute, the relevant section of which is set out in note 99 *infra*.

88. WASH. CONST. art. XII, §5.

The Supreme Court of Washington first encountered the business trust in a case that did not involve shareholder liability but which did involve the statute regulating the sale of securities.[89] The court first looked at the written declaration of trust and then looked at the quoted provision from the Washington Constitution. It decided that since this trust had some of the "privileges" of corporations, including the privilege of shareholder immunity, its validity depended upon compliance with corporate regulations. The court was not deterred by the fact that immunity from liability also is a "privilege" enjoyed by beneficiaries of most trusts. It is somewhat ironic that as a consequence of the court's decision the entity involved in this case was probably shorn of the very characteristics on which the court had relied in reaching its decision. The court did not say so in so many words, but the decision suggests such a result.[90]

It is submitted that the Supreme Court of Washington attributed to the constitutional draftsmen an intent to change a rule of trust law, just as the Texas courts attributed a similar intent to the legislature of that state.

As of 1928 there appear to have been seventeen jurisdictions having constitutional definitions of "corporation" like the one in Washington.[91] There may be more or less at the present time, but it is a provision that, in any event, is frequently encountered. In at least two jurisdictions with such provisions in force the courts seem to have adopted a result similar to the one reached in Washington. This has been true in Kansas[92] and, more recently, in Arizona.[93] The courts of other states with such constitutional provisions have not found them relevant in determining the rights and liabilities of business trust shareholders.[94] The latter courts, it is believed, have reached the correct result. Regardless of the proper interpretation of such provisions, the Florida Constitution does not contain the words necessary to produce a Washington-Kansas-Arizona type result.

Although the reasons asserted for the results in the minority jurisdictions are not particularly convincing, at least two policy arguments can nevertheless be mustered in support of those results. These do not seem persuasive either.

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89. State v. Hinkle, 126 Wash. 581, 219 Pac. 41 (1923).

90. See Comment, 37 YALE L.J. 1103, 1118 (1928), in which such a possibility is discussed.

91. See Comment, 37 YALE L.J. 1103, 1117, n.63 (1928).

92. Weber v. Alter Engine Co., 120 Kan. 557, 245 Pac. 143 (1926).

93. See Rubens v. Costello, 75 Ariz. 5, 251 P.2d 306 (1952) (shareholder liability not involved).

94. See State v. Cosgrove, 36 Idaho 278, 210 Pac. 393 (1922) (not involving shareholder liability); Spottswood v. Morris, 12 Idaho 360, 85 Pac. 1094 (1906) (not involving shareholder liability); Pennsylvania Co. v. Wallace, 346 Pa. 532, 31 A.2d 71 (1943) (by implication).

First, it can be argued that business trust shareholders make their investments with profit in mind. It is only fair that those who embark on a venture with the hope of making money should be responsible for the venture's debts if it fails, regardless of whether they are in a position to exercise control over those who manage the venture. As an original jurisprudential question this is not an indefensible position. But is it an original question? Does such a position not seem strangely out of tune with the notion, discussed earlier, that it is undesirable to impose liability on one person for the acts of another unless the first has a legally sufficient degree of control over the latter? Outside the law of agency — where such liability seems to be imposed as a corollary of the fact of control — such a position is foreign to our law.

Furthermore, it is logically impossible to keep this argument from spilling over the sides of its original context. For instance, if the argument is sound, it should be equally sound with respect to any trust, not just business trusts.[95] The beneficiary of any trust tends to profit from his trust and should be equally liable for its debts if the aspect of control is irrelevant. But the minority courts do not pretend to go so far as to change the rule with respect to beneficiaries of conventional trusts. Nor, however, do they set out to demonstrate in what respect business trusts are meaningfully different from more conventional trusts. Is it because business trusts, unlike more conventional trusts, are generally engaged in "active" commercial endeavors? If so, this does not seem a valid distinction. The sole proprietor of a hardware business can bequeath the business to his son in trust for his widow, and she will not become liable for the debts of the business. Or does the distinguishing feature lie in the fact that the beneficial interests in a business trust are usually represented by transferable certificates, whereas the beneficial interests in a more conventional trust are not? This is not a valid reason for imposing liability in the one instance and not in the other. The beneficiary of a more conventional trust, in the absence of effective spendthrift provisions, also can transfer his beneficial interest.[96] That such transfers can be accomplished more easily in the case of the business trust should not make any difference.

A better policy explanation for the result in the minority jurisdictions might be given along the following lines:

> It is true that liability for the acts of others is not to be imposed in the absence of a legally sufficient degree of control. In the case of conventional trusts it is well settled that beneficiaries do not have a sufficient degree of control to warrant the impo-

95. In Hildebrand, *supra* note 82, at 57, such a possibility is discussed.
96. RESTATEMENT (SECOND), TRUSTS §§132-63 (1959).

> sition of liability. That can be accepted. In the case of trusts that engage in business, however, it very frequently, if not always, is true that the shareholders do in fact exercise enough control to warrant the imposition of personal liability. That is only being realistic. Even the majority courts have had to deal with this phenomenon. They have resolved it by the formulation of a control test, which is philosophically sound but too difficult and uncertain of application to be a useful rule of law in a business context. All in all, it is better to be sure. Rather than deciding the matter of limited liability on a case-to-case basis, and keeping all concerned guessing up to the last minute, it is preferable, as a matter of policy, not to allow limited liability to the shareholders of any "business trusts."

The foregoing position is not absurd, but it seems extremely arbitrary. Arbitrary rules of law tend to run into situations that demand the formulation of exceptions. With enough exceptions the rule tends to lose the very clarity that was its chief original virtue.

Furthermore, formulation of the shareholder liability rule on the basis of such a policy reason necessarily assumes that trusts can be classified into "business trusts" and "conventional trusts." This is not a particularly easy distinction to draw, and the necessity of the distinction tends to suggest that the certainty of such a rule is more apparent than real. The classification problem could, of course, be resolved, for instance, by limiting the "business trust" liability rule to those trusts whose beneficial interests are represented by transferable certificates. That is clear enough. But it tends to make the rule more arbitrary and artificial than ever, assuming that it was designed, in the first place, to isolate the trusts in which too much control is likely from those in which it is unlikely. Assignability of beneficial interests has no relevance to the question of control, and the rule, if it were so limited, would be some distance away from the realities that it was originally intended to approximate.

The majority rule, permitting limitation of liability unless the shareholders are in a position to exercise "too much" control, better reflects the fundamental precepts of our jurisprudence than does the minority rule.

Conclusion

It is not an inaccurate generalization to state that not one jurisdiction that has recognized the trust as a legitimate form of business entity distinct from the corporation, the partnership, and the joint-stock company has not also accorded immunity from personal liability to the shareholders. The immunity has consistently been tempered by application of the control test, but that is a reasonable limitation.

Although the majority rule is not usually so explained, it is nevertheless believed to reflect a rule of policy that is both wise and in accord with broader principles of jurisprudence. Such a policy determination is, of course, within the province of the judiciary. Courts make rules of policy all the time. But policy-making is also for the legislature. It is believed that the Florida legislature, having said that business can be transacted in the form of a common law trust, has made a policy determination to the effect that conventional trust doctrine applies to business trusts except when there is a very good reason to formulate new rules. If the legislature has expressed that policy only by pinning the tag "trust" to the entity, it has nevertheless done as much as the majority jurisdiction courts have done when such a policy determination has been arrived at by the judiciary. The tag should be regarded as an adequate indication of Florida's policy determination, and shareholder immunity should follow.

Jurisprudence and statutory construction arguments aside, however, there is uncertainty as to "the Florida rule" on shareholder liability — too much uncertainty perhaps to warrant a substantial investment by a normally prudent person. The existence of this doubt is particularly unfortunate in view of the advent of the real estate investment trust concept for federal income tax purposes.

The new code provisions lend an aspect of urgency to the matter. For even if the Florida courts ultimately reach a position in accord with the weight of authority, they will not do so overnight. The evolution of common law doctrine takes time. It takes time because it takes cases. And the process of evolution itself is bound to be impeded as a result of the negative portents of *Willey v. W. J. Hoggson Corp.* Until the implications of that opinion are dispelled, many prudent investors will be deterred from organizing business trusts. Consequently there will not be many cases, and a sophisticated body of case law doctrine will never have a fair chance to evolve. It is a vicious circle.

Legislation therefore seems in order. If the legislature should be inclined to take up the question, it will have available for consideration at least a few samples. Two states already have in force statutes containing express sanctions for shareholder immunity. In at least one other state legislation is pending.[97]

Two basic statutory approaches to the matter are evident. In Washington, the Massachusetts Trust Act of 1959[98] conceives of the business trust as being more like a corporation than any other entity. It sanctions immunity for business trust shareholders according to

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97. See note 101 *infra.*

98. WASH. REV. CODE §§23.90.010-.900 (1959).

the same rules that apply to corporate stockholders.[99] Under the Oklahoma statute,[100] and under the currently available draft of the legislation pending in New York,[101] the question of shareholder liability is regarded as sui generis. Strangely enough, or perhaps not so strangely, there seems to be no legislation analogizing the problem of shareholder immunity with the doctrine that beneficiaries of conventional trusts are not liable to third parties.

Any of the stated approaches would probably serve as a satisfactory starting point. Of the two approaches that seem to have found statutory expression, the one treating shareholder immunity as more or less sui generis is perhaps better suited to Florida's needs, although the embodiment of that approach in the proposed New York act seems too peculiarly geared to that state's local statutory background to be a very useful sample. The Oklahoma law seems better.

The Washington act, on the other hand, although it may be more easily applied because of its tie-in with familiar corporation law, may go too far in that direction. There may be disadvantages in legislation which in one breath purports to provide for a new form of business entity and in the next to say that the new entity is just about like one already in existence. One potential disadvantage that comes quickly to mind is the possibility that Washington business trusts could be regarded by the Treasury Department as *incorporated* entities and therefore not qualified for real estate investment trust tax treatment. That would be quite a blow, but it seems a possibility.

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99. WASH. REV. CODE §23.90.040(4) (1959) reads as follows: "Any Massachusetts trust shall be subject to such applicable provisions of law, now or hereafter enacted, with respect to domestic and foreign corporations, respectively, as relate to the issuance of securities, filing of required statements or reports, service of process, general grants of power to act, right to sue and be sued, *limitation of individual liability of shareholders,* rights to acquire, mortgage, sell, lease, operate and otherwise to deal in real and personal property, and other applicable rights and duties existing under the common law and statutes of this state in a manner similar to those applicable to domestic and foreign corporations." (Emphasis added.)

100. OKLA. STAT. ANN. tit. 60, §174 (1949), reads as follows: "Liability to third persons for any act, omission, or obligation of a trustee or trustees of an express trust when acting in such capacity, shall extend to the whole of the trust estate held by such trustee or trustees, or so much thereof as may be necessary to discharge such liability, but no personal liability shall attach to the trustee or the beneficiaries of such trust for any such act, omission or liability."

101. The proposed New York legislation would add a new article 2A to the General Associations Law. Section 11-a(4) of the draft presently available reads as follows: "The holders of beneficial interests evidenced by certificates or shares of a real estate investment trust shall not be personally liable for debts or obligations of the trust. The liability of the trustees of a real estate investment trust to creditors and other persons having claims against the trust shall be to the same extent as the liability of directors of a stock corporation."

In any event, legislation does seem desirable. Unless the crucial matter of shareholder immunity is favorably resolved, investors in Florida real estate will, for practical purposes, be denied a tax-saving opportunity available to investors elsewhere. It is unnecessary to list the natural attractions of Florida real estate for investment and other purposes. Those attractions are evident. The legislature should not allow them to become relatively less attractive over so small a matter as a legal uncertainty that is susceptible of clarification without harm to anyone.